

MADRAS RECORD OFFICE.

Government of Madras.

Revenue DEPARTMENT.

G.O. No. 3095

Press
~~Mis~~

35-37

Dated 2nd December 1869

Not to be folded or roughly handled

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

Read the following:—

No. 35. Proceedings of the Board of Revenue, dated 29th October 1869,
No. 8,061.

Read the following letter from J. FRASER, Esq., Collector of the Godavery District, to the Acting Secretary to the Board of Revenue, dated Cocanada, 16th October 1869, No. 250.

I HAVE the honour to inform you that an Original Suit, No. 11 of 1869, has been filed against me in the Civil Court at Rajahmundry in my dual capacity of Collector of the Godavery District and President of the Municipal Commission of Cocanada by Mr. Leonce Gandolphe, a Merchant in Cocanada.

2. This Suit has arisen out of the taking by Government, for a public purpose, and at my recommendation, of some land, the property of Mr. Gandolphe. The accompanying copies of correspondence will explain the facts of the case, which are as follow:—

I. An application* was made in writing by the Municipal Commissioners to Mr. Gandolphe on the 11th December 1866, asking him to let the Commis-

* *Vide Document A.*
sioners have land of his sufficient for the erection of two latrines, and the terms on which he would let them have the land.

II. On 13th December Mr. Gandolphe sent a reply,† apparently agreeing to give ground measuring 529 feet by 275 feet on certain terms, for which see his letter.

† *Vide Document B.*
III. On 20th December 1866 a second offer‡ was made to Mr. Gandolphe of payment at 100 Rupees per acre for the ground required, and stating that, if this was not accepted, Government would be applied to for sanction to take it under Act VI. of 1857.

‡ *Vide Document C.*
IV. To this Mr. Gandolphe replied§ on 21st December, declining to abide by his first agreement, and requiring that a much larger space than was first mentioned should be taken at his own price by the Municipal Commissioners.

§ *Vide Document D.*
3. The matter was here allowed to rest till 1868, when on 7th March a fresh application|| was made to Mr. Gandolphe by the Commissioners, to allow them to rent the land required for latrines. To this Mr. Gandolphe gave a direct refusal on 10th March. Mr. Gandolphe was again applied to,¶ on 23rd March, for the same land, for the same purpose, to which he returned another refusal.**

** *Vide Document G.*
4. On this last decided refusal it was agreed,†† at a Municipal Meeting on 6th January 1869, that I should apply to Government for obtaining the ground for a public purpose, viz., the erection of latrines, under the provisions of Act VI. of 1857, and on the same day the application‡‡ was made and an order of

†† *Vide Document II.*

‡‡ *Vide Document I.*

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

Government passed on it on 16th idem, No. 65. The inquiry, ordered by Government in their Order referred to above, having been made, Government, on 12th April 1869, in their Order No. 477,*

* *Vide Document J.*

directed that the land required should be taken for public purposes under Act VI. of 1857, and appointed myself and the Executive Engineer to carry this order into execution under the provisions of the above Act.

5. Proclamation was made and Notice affixed on the land and served† on

† *Vide Document K.*

Mr. Gandolphe in accordance with the provisions of Section 4 of the Act; and on the 15th May the Executive Engineer, Mr. G. S. Sage, and myself met, inspected the land, agreed on what quantity was to be taken, which was more than was at first intended, (and this was solely for Mr. Gandolphe's convenience as we believed and intended,) and met Mr. Gandolphe at my office on the same day, when an offer of what we considered sufficient compensation was verbally made to Mr. Gandolphe under Section 5, which he at once refused as insufficient, and the matter was at once

‡ *Vide Document L.*

referred to arbitration under Section 6, and the land taken possession‡ of under Section 8.

6. After this strict attention was paid to the provisions of Sections 10 and 12, and the Arbitrators proceeded on 26th May to meet and make the necessary inquiry previous to delivering their award, which was delivered to me in writing on the afternoon of 9th June. It was signed by the majority under the provisions of Section 20 of the Act, and I beg to enclose copy of it, marked M.

7. I send copy of Mr. Gandolphe's plaint as received from the Civil Court, and of the reply I propose to file to it, and request permission for the defence of the Suit at the Government cost.

8. The agreement referred to by Mr. Gandolphe, as made by me on 15th May, to purchase 70,000 square-yards more than was taken, exists only in his own imagination.

9. The date for filing the Answer is 16th December 1869.

10. As Municipal President, I propose to make a separate defence at the Municipal cost.

ENCLOSURE No. 1.

Original Suit No. 11 of 1869.

To the Honourable the Civil Court of Rajahmundry.

Plaint presented by LEONCE GANDOLPHE, Esq., Merchant, residing at Cocanada, against JAMES FRASER, Esq., Collector of the Godavery District and President of the Municipal Commission of Cocanada, under Section 32, Act VI. of 1857.

THE defendant having, under Act VI. of 1867, taken possession on behalf of Government of 56,482-80 square-yards of ground belonging to the plaintiff for public purposes, to wit, for constructing latrines by the Municipality of Cocanada, offered the plaintiff the sum of 3,200 rupees as the price thereof; and as the plaintiff declined to receive the same in consequence of the insufficiency of price, as well as in consequence of the defendant not having taken the whole of the ground pointed out by the plaintiff to the defendant, as the quantity of land to be taken by Government, (namely, 200 yards of breadth from the latrines' spot,) with a view to keep the nuisance as far as

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

possible distant from the rest of plaintiff's ground, the matter was referred to arbitration, and the Arbitrators, on the 9th June 1869, awarded to plaintiff the sum abovementioned, namely, 3,200 rupees.

2. The plaintiff prays that the said award may be set aside on the ground that the arbitration has been unlawfully constituted: in that the Deputy-Collector, Kadumbary Jagannadham Garoo, ought not, with reference to the Minutes of Consultation, dated 21st December 1852, to have been appointed an Arbitrator by the defendant, his immediate superior, in a matter wherein Government are concerned; and further, ought not to have been appointed on the arbitration in a matter wherein the Municipality of Cocanada is concerned, he being himself a Municipal Commissioner.

3. The majority of the Arbitrators have further been guilty of misconduct: in that their award is perverse; facts have been mis-stated; the ground has been under-valued; they have brought a nuisance to the immediate border of plaintiff's land, and thereby depreciated its value; and they have omitted to take into consideration the fact that the defendant had originally (on the 15th May) agreed to take and pay for, at a fair valuation, additional ground, measuring about 70,000 square-yards, as the boundary between the land occupied by the defendant and the remaining portion of the plaintiff's land.

4. The plaintiff also prays that the defendant may be ordered specifically to perform his original agreement, and be compelled to purchase from the plaintiff the said additional quantity of 70,000 square-yards, valued at the rate of 6 annas 9 pies per square-yard at 29,531 rupees 4 annas, in accordance with the price paid by the plaintiff for the piece of waste land acquired by him in public auction, on the 15th March last, from Government, situated in the neighbourhood, and being originally a part of the plaintiff's (seller's) Inam.

5. The plaintiff likewise prays that the defendant may be ordered to pay his costs, and that he may be discharged from liability to pay 105 rupees, the half of the cost of arbitration demanded from him, and that such further and other relief may be granted as to the Court may seem fit.

6. The plaintiff also prays that the defendant may be ordered to construct the latrines at a sufficient distance from the roads entering into the plaintiff's ground, so that it may not be a nuisance to himself and others to whom he may allow to occupy his ground.

7. This part of his claim he values at 500 rupees. Plan showing the particulars of the plaintiff's ground is herewith produced.

(Signed) L. GANDOLPHE.

31st August 1869.

ENCLOSURE No. 2.

To the Civil Court of Rajahmundry.

Original Suit No. 11 of 1869, Civil Court's file.

Plaintiff:—LEONCE GANDOLPHE, Esq., Merchant, residing at Cocanada.

versus

Defendant:—JAMES FRASER, Esq., Collector of the Godavery District.

The written statement of the defendant.

THIS suit has been brought under Section 32, Act VI. of 1857, which Section declares that "the provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house or other building or manufactory, if the owner desire that the whole of such house, building, or manufactory, shall be taken."

The property taken by Government in this Suit is not a part of any house, building, or manufactory. There are no such erections on any part of Mr. Gandolphe's land, part of which was taken; therefore the defendant contends that, on this ground, there is no cause of action, and that this Suit should be dismissed with costs, and the defendant prays that it be so.

2. The defendant maintains that, in his capacity of Collector, he had nothing whatever to do with the award of the Arbitrators, which is complained of, beyond the making the appointment of one Arbitrator, which appointment he maintains to be perfectly legal and proper, and he puts plaintiff to the proof of the contrary.

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

On this ground, therefore, defendant contends that the Suit as against the Collector of the Godavery District should be dismissed with costs, and he prays that it be so.

3. Defendant further maintains that any Suit brought under Act VI. of 1857 should be brought solely against the Arbitrators, as the terms of Section 31 show. This has not been done, nor have they at all been included in it as defendants; therefore, on this ground, defendant maintains that this Suit as against himself should be dismissed with costs, and he prays that it be so.

4. Section 31 of Act VI. of 1857 declares that "no award of Arbitrators, made in accordance with the provisions of this Act, shall be liable to be reversed or altered, except by the decision of a Civil Court, on the ground of corruption or misconduct of the Arbitrators."

Corruption is not charged against the Arbitrators by plaintiff.

The misconduct referred to is, from the use in the Section of the words "made in accordance with the provisions of this Act," evidently "not strictly conforming to the provisions of the Act in making the award."

The plaintiff contends that the arbitration was illegally constituted, because Kadumbary Jagannadham Garoo, Treasury Deputy-Collector, and also a Municipal Commissioner, was appointed by the defendant as Arbitrator on his behalf.

The defendant contends that there is nothing whatever in the provisions of Act VI. of 1857 to prevent such an appointment. The appointment would have been illegal only if, under Section 11, K. Jagannadham had been appointed "single Arbitrator," which he was not, but he was appointed under Section 10, Clause 1, of the same Act. Moreover, Minutes of Consultation, quoted by plaintiff, of 21st December 1852 can have no reference to an Act passed in 1857.

Minutes of Consultation of Government are, moreover, of no legal value, as an exposition of a point of law. Of the expediency of the appointment complained of, the defendant maintains that he was sole judge, and that therefore the appointment was perfectly legal and proper.

The plaintiff further maintains that the arbitrators misconducted themselves: "in that their award is perverse; facts have been mis-stated; the ground has been under-valued; they have brought a nuisance to the immediate border of plaintiff's land, and thereby depreciated its value; and they have omitted to take into consideration the fact that the defendant had originally (on the 15th May) agreed to take and pay for, at a fair valuation, additional ground measuring about 70,000 square-yards as the boundary between the land occupied by the defendant and the remaining portion of the plaintiff's land."

To this the defendant replies that the agreement said to have been made between himself and plaintiff on 15th May has no existence, save in the plaintiff's own imagination, and he puts plaintiff to the proof thereof.

And granting, for the sake of argument only, that the other instances of misconduct do actually exist (which defendant denies), he maintains that the Arbitrators are, under Sections 18 and 19 of the Act, the sole judges of these matters, and that, as regards them, the decision given under Section 20 is final.

The defendant therefore maintains that, independently of his other objections to this Suit, he has clearly shown that, under Section 31, there has been no "corruption" or "misconduct of the Arbitrators" such as is contemplated in that Section; that therefore there are no grounds for the interference of the Civil Court; and he prays that this Suit as regards himself may be dismissed with costs.

(Signed) J. FRASER,
Collector.

ENCLOSURE No. 3.—A to M—Correspondence.

SUBMITTED for the orders of Government.

2. The Board recommend that the defence of the Suit as against Mr. Fraser, in his capacity of Collector, be sanctioned, and the filing of the Answer proposed by him authorized.

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

No. 36. Proceedings of the Board of Revenue, dated 25th November 1869,
No. 8,683.

Read the following letter from J. FRASER, Esq., Collector of the Godavery District, to the Acting Secretary to the Board of Revenue, dated Cocanada, 15th November 1869, No. 301.

I HAVE the honour to acknowledge receipt of Board's Proceedings, number No. 8,061 of 29th October 1869, and date as per margin, recommending for sanction the defence, at the public cost, of a Suit brought against me in my capacity of Collector of the Godavery District, by Mr. Leonce Gandolphe, a Merchant of Cocanada.

2. I am also, in my capacity of "Municipal President," drawing up an answer to the Plaintiff, and to enable me to do so satisfactorily, I have obtained, at the cost of the Municipality, an opinion from the Advocate-General on the case. I beg to enclose copy of this opinion, of the statement which I made to the Advocate-General in asking for it, and an amended answer which I send for the Board's approval. It is founded on Mr. Norton's remarks, which were received by me subsequent to the despatch of the answer already approved. I beg leave to substitute the amended one.

ENCLOSURE No. 1.

From J. FRASER, Esq., President, Municipal Commission, Cocanada, to J. B. NORTON, Esq., Advocate-General, dated Cocanada, 15th October 1869, No. 28.

I HAVE the honour to request your professional opinion on the following points in a Suit now brought against me as President of the Municipal Commission of Cocanada. I send copies of the Plaintiff and Arbitrators' award, that you may have a thorough knowledge of the case:—

1. The Suit is laid under Section 32 of Act VI. of 1857. The property taken is not a part of any house or other building or manufactory. There are no such erections on the plaintiff's ground, part of which was taken. Apparently, the only Section under which a suit can be brought is Section 31. Is not this error fatal to the plaintiff's case?

2. Do not the terms of Section 31 require that a Suit should be brought against the Arbitrators solely? And is not the failure to include them solely or at all in the plaintiff's case?

3. Does not the "misconduct," referred to in Section 31 as a ground of action, mean only the Arbitrators not "acting in accordance with the provisions of this Act?" And are not the Arbitrators by the provisions of the Act, (vide Sections 18, 19, 20,) the sole judges of what the plaintiff chooses to call misconduct?

4. Under Section 31 has the Civil Court power to do anything else or more than refer the matter to other Arbitrators if it sees reason to reverse the award of the first? I may here say that the agreement referred to by plaintiff, as made on 15th May between him and myself, exists only in plaintiff's imagination.

5. I enclose also Money Order for the amount of your fee (with postage) Rupees 87-12-0, as mentioned in your letter to my address of 2nd instant.

ENCLOSURE No. 2.

In Original Suit No. 11 of 1869.

Rajahmundry Civil Court.

I HAVE carefully perused the case and papers submitted for my opinion.

I do not think that the plaintiff's having stated that he brings his Suit under Section 32 of Act VI. of 1857, is fatal. It is clearly a mistake. No Suit can be brought under that Section. Its

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

effect is this: if an action was brought by an individual against the Collector for wrongfully taking possession of a part of a building, etc., against the owner's will, it could not be pleaded as a defence that it was done by virtue of this Act. In the present Suit, I learn that there was no building on the land, and the plaint itself shows that land only is the subject matter of the dispute.

If the plaint contained nothing more, it would be sufficient to show that there was no building on the land to prove that Section 32 had nothing to do with the matter.

But this is very far from being the whole of the complaint, and I think that the words "under Section 32 of Act VI. of 1857" are mere surplusage, and might be altogether struck out of the plaint.

The real nature of the Suit is to set aside the award and to compel the Collector to build the latrines at a certain distance from plaintiff's other property on the land which may eventually be taken up.

The plaintiff bases his claim to have the award set aside on two grounds: first, that the Arbitrators were improperly constituted; second, that the majority of them have been guilty of misconduct. As to the first ground, he says that K. Jagannadha ought not to have been appointed, because he is a Municipal Commissioner, and a servant of the Collector; and that certain Proceedings of Government (with which I am not furnished) prohibit the appointment of such a person as Arbitrator.

The only provision in the Act against the appointment of a Government Officer is in Section 11, and when the claimant has not attended to appoint his own Arbitrator.

But as I gather from the papers, in the present case, each party nominated his own Arbitrator under Section 10, and the third was appointed under Section 12.

It is not open now to the plaintiff to question the proper constitution of the Arbitrators. If he had any objection to the Arbitrator named by the Collector as Municipal Commissioner, his proper time was at the nomination. No doubt, if he had then objected, his objection would have received due consideration; but even then he could not have prevented the appointment, had the Collector persevered in it. The appointment of the third Arbitrator is, no doubt, intended to neutralize the effect of the parties nominating advocates rather than judges respectively.

It is open to the plaintiff to seek to set aside the award on the ground of "misconduct" by which is meant any such misconduct as is sufficient to set aside an award made between individuals under ordinary circumstances, and not under this Act. The law on this point is clear: corruption, partiality, refusal to receive legitimate evidence, and the like, are such grounds; and it is manifest that it is for the Court, and not the Arbitrators themselves, to decide in each particular case, whether there has been such misconduct on the part of the Arbitrators.

The grounds alleged here are, (1), "perverseness" of award; (2), mis-statement of facts; (3), under-valuation of ground; (4), bringing a nuisance to plaintiff's ground; (5), omission to consider an agreement of 15th May.

Of these, the second and fifth alone fall under the head of misconduct. As to the fifth, the answer is that no such agreement ever existed. As to the second, I presume it will be easy to show that the facts are truly stated. It must be a wilful mis-statement on the part of the Arbitrators to set aside the award.

I think that the Suit should have been brought against the Arbitrators only, and that the only Decree which the Court can make is to sustain or set aside the award. I think that the plaintiff is premature in asking for a perpetual injunction in point of fact against the President to prohibit his making the latrines in a certain place. I presume that the work will not be commenced pending this Suit, and that all this should be pointed out, and the Court requested to dismiss the suit as against the President with costs. At the same time, I am not prepared to say that if collusion were charged between the Arbitrators and the President that he would not be a proper party to a Suit to set aside the award.

I observe that the award is signed by only two of the three Arbitrators. Mr. Duminy I presume to have been the Arbitrator appointed by the plaintiff, and Mr. Simpson the one nominated by

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

the other two. Generally speaking an award must be signed by all the Arbitrators, but Section 20 makes an award by the majority binding.

NELLORE,
28th October 1869.

(Signed) J. B. NORTON,
Advocate-General.

Nellore Court House.
28th

DEAR SIR,—REFERRING to my opinion sent you this morning, I beg to say that on second thoughts I am of opinion that you are properly made a party. I think that in Suits to set aside awards, the parties who appoint the Arbitrators as well as the Arbitrators themselves are necessary and not only proper parties. I have no books of reference here to see who are the proper parties to a Suit to set aside an award. But I am pretty sure this is the correct view. Should I see occasion to alter it when I get to Madras and my books, I will write again. I have no doubt you will be entitled to your costs when the Suit is dismissed. But you should not make any application to be struck out of the Suit now.

I remain, etc.,
(Signed) J. B. NORTON,
Advocate-General.

(True Copy.)

(Signed) J. FRASER,
Collector.

ENCLOSURE No. 3.

To the Civil Court of Rajahmundry.
Original Suit No. 11 of 1869, Civil Court's file.

Plaintiff,

versus

Defendant.

Leonce Gandolphe, Esq., Merchant, residing
at Cocanada.

James Fraser, Esq., Collector of the Godavery District.

The written statement of the defendant.

In this Suit the defendant maintains that, in his capacity of Collector, he had nothing whatever to do with the award of the Arbitrators, which is complained of, beyond the making of the appointment of one Arbitrator, which appointment, being under the provisions of Section 10 of the Act VI. of 1857, he maintains to be perfectly legal and proper, and he puts plaintiff to the proof of the contrary. The Minutes of Consultation quoted by plaintiff of 21st December 1852 can have no reference to an Act passed in 1857. Moreover, Minutes of Consultation of Government are of no legal value as an exposition of a point of law. On these grounds, therefore, defendant contends that the Suit against him as "the Collector of the Godavery District" should be dismissed with costs, and he prays that it be so.

2. Defendant further maintains that any Suit brought under Act VI. of 1857, to set aside an award by Arbitrators, must of necessity also include these Arbitrators as defendants. This has not been done in the present Suit, and this omission defendant maintains to be fatal to it; and on this ground he prays that, as regards himself as Collector, the Suit be dismissed with costs.

3. The plaintiff bases his claim to have the award of the Arbitrators set aside on two grounds:—

- 1st.—That the arbitrators were improperly constituted.
- 2nd.—That the majority of them have been guilty of misconduct as follows:—
 1. In that their award is perverse.
 2. Facts have been mis-stated by them.
 3. They have under-valued the ground.
 4. They have brought a nuisance to the immediate border of plaintiff's land.
 5. They have omitted to consider an agreement of 15th May.

*Proceedings of the Madras Government, Revenue Department,
2nd December 1869.*

4. Defendant has already in 1st paragraph of his answer, replied to the first ground of objection.

5. In regard to the second, he maintains that even supposing all the instances of so-called misconduct to exist (which he denies) the second and fifth instances alone are such as can be legally or properly called misconduct.

6. In regard to the former of these instances, defendant denies that any facts brought before the Arbitrators have been wilfully or otherwise mis-stated by the majority of them in their award, and puts plaintiff to the proof of the same. In regard to the latter, defendant denies "in toto" the existence of any such agreement as plaintiff refers to, and puts him to the proof of its having ever been made or entered into by defendant.

7. The defendant, therefore, maintains that, independently of his first two objections to this Suit, he has clearly shown that there has been no "misconduct of the Arbitrators" such as is contemplated in Section 31, Act VI. of 1857. No corruption has been laid to their charge. Therefore there are no grounds for the interference of the Civil Court, and he prays that this Suit as regards himself as Collector of the Godavery District may be dismissed with costs.

(Signed) J. FRASER,
Collector.

SUBMITTED to Government in continuation of Board's Proceedings of the 29th October 1869, No. 8,061, with a recommendation that the proposed alteration be adopted.

No. 37.

ORDER THEREON, 2nd December 1869, No. 3,095.

Miscellaneous.

THE Government sanction the defence of the Suit at the public expense in the first instance, but will determine, when a copy of the Judgment and Decree is submitted, whether the costs, if any be adjudged against the Collector, shall be borne by that officer or by the Government.

2. The amended Answer, submitted with the second Proceedings above recorded, is approved.

(True Extract.)

(Signed) R. A. DALYELL,
Acting Secretary to Government.

To the Board of Revenue.

Exd. F. R. Bantleman.

Original

2-3095. P.D.

Pro. of the Madras Govt
Under date the 2nd Decemr/69

Read the following
Proc. of the Bd. of Rev.

Recommendation for
sanction defence of suit No.
11 of 69, filed in Rajahmundry
Dist. Court against Collector
to authorize filing of proposed
answer. *But for order an amended
answer to be filed* W.D.

A.C. 29th Oct/69
No. 8004.
25 Nov/69 1868

W.A.

judgment and

The Govt. sanction
tion the defence of
the suit at the pub-
lic expense in the
first instance, but
will determine when
a copy of the Decree
is submitted whether
the costs, if any be
adjudged against
the collector, shall
be borne by that
officer

Govt. of 1869 Minutes

REVENUE.

70.

THE BOARD OF REVENUE.

Dated December, 2nd.

Recd.

Encl.

G. O., 2nd December 1869, No. 3,095.

DECEMBER.
Nos. 35-37.

Suit No. 11 of 1869 against the Collector
of Godavery.—Its defence at the public cost, sanc-
tioned. Amended answer submitted by the Board
of Revenue, approved.

1
Officer, or by the
Government.

2 The amended answer submitted with
the second Proceeding
above recorded is
approved.

14. To the Court with an order Dec 2^d 1884 Dec 4th 84

21
3

Sp. H. B. Hall