IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 28(1) of Land Acquisition Act (Chapter 460).

CA No. CA/LAND/Acq/03/2011

Land Acquisition Board of Review App No.
BR/100/2007/GM

N.S.D. Gunawardena,
No.33 Layards Road,
Colombo 04.
APPELLANT-APPELLANT

-Vs-

Divisional Secretary,
Divisional Secretariat,
Katana.
RESPONDENT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. &
E.A.G.R. Amarasekara, J.

COUNSEL : Geoffrey Alagaratnam, PC with Nimal Jayawardena for the Appellant-Appellant

Neil Unamboowe, PC (ASG) with Chaya Sri Nammuni, SC for the Respondent-Respondent

Written Submissions on: 01.08.2018

Decided on : 10.08.2018

A.H.M.D. Nawaz, J.

This is an appeal from a decision of the Land Acquisition Board of Review dated the 2nd November, 2010, awarding compensation to the Appellant-Appellant in respect of a land which is more fully depicted as Lots 7 (b), 7 (c) and 7 (d) in a document marked and produced as A1 at the proceedings before the Board of Review.

The Appellant-Appellant (hereinafter sometimes referred to as "the Appellant") who claimed title for the land acquired was awarded a total compensation of Rs. 4,45,000/- by the acquiring officer (the Respondent-Respondent) under Section 17 of the Land Acquisition Act, No. 09 of 1950 as amended. Subsequent to an appeal to the Land Acquisition Board of Review, the compensation was enhanced to Rs. 511,750/- by an order dated 02.11.2010. It would appear that the Board of Review accepted a state valuation of Rs. 445,500/- which was adopted as the market value for the acquired land. Having regard to the injurious effect (infelicitously called injurious affection) to the land, the Board of Review allowed a 15 per cent claim on the compensation of Rs. 445,500/- and it was in those circumstances that the award became a sum of Rs. 511,750/-. But the original claim tendered to the Acquiring Officer was a sum of Rupees Four Million Five Hundred and Fifty-Four Thousand Five Hundred (Rs. 4,554,500/-).

Being aggrieved by this order of only Rupees Four Lakhs and Forty-Five Thousand Five Hundred Rupees (Rs. 445,500/), the Appellant preferred an appeal to this Court seeking thatthe total compensation be increased to Rupees Four Million Five Hundred and Fifty-Four Thousand Five Hundred (Rs.4,554,500/-) the original claim preferred by Appellant before the Acquiring Officer.

The Appellant also seeks to set aside the order made by the Board of Review on 02.11.2010 by the Land Acquisition Board Review No. BR/100/2007.

The Appellant tendered a claim to the Respondent-Acquiring Officer seeking compensation for the aforesaid land in the following manner,

Lot 7(b) - 0.2186 Hectares or A0-R2-P6.39 - Rs. 4,321, 500/-

Lot 7(c) - 0.0064 Hectares or A0-R0-P2.52 - Rs. 126, 500/-

Lot 7(d) - 0.0054 Hectares or A0-R0-P2.13 - Rs. 106, 500/-

Thus it was a total claim of a sum of Rs. 4,554,500/- (Rupees Four Million Five Hundred and Fifty-Four Thousand Five Hundred). The Respondent-Acquiring Officer by his order dated 28th January 2007 awarded only a sum of Rs. 445,000/- as compensation. I must say a few words about this award. This award was made under Section 17 of the Land Acquisition Act which imposes certain requirements on the part of the acquiring officer when it comes to apportioning compensation.

Section 17 (1) sets out the following:-

> *"The acquiring officerwho holds an inquiry under section 9, shall, as soon as may be after his decisions under section 10 have become final as provided in that section or after the final determination of any reference made under that section and subject to the other provisions of this section, make an award under his hand determining-*
>
> *(a) the persons were entitled to compensation in respect of the land or servitude which is to be acquired:*
>
> *(b) the nature of the interests of those persons in the land which is to be acquired or over which the servitude is to be acquired:*
>
> *(c) the total amount of the claims for compensation for the acquisition of the land or servitude;*
>
> *(d) the amount of the compensation which in his opinion should, in accordance with the provisions of Part VI of this Act, be allowed for such acquisition; and*
>
> *(e) the apportionment of the compensation among those persons.*
>
> *Such acquiring officer shall give written notice of the award to the persons who are entitled to compensation according to the award."*

It is quite apparent from a reading of the above section more particularly (d) that the Acquiring Officer must form an opinion as to the quantum of compensation and that would connote that his decision making process as to how he arrived at the quantum to be apportioned, must be manifest upon his decision. Such a statutory duty as enjoined by

Section 17 presupposes reasons to be set out in his award but sadly enough the award made in this case under Section 17 of the Land Acquisition Actbares nothing on its face as to reasons. In fact in ***Padfield v. Minister for Agriculture, Fisheries and Food*** (1968) AC 997 (HL)-a seminal case on giving reasons Lord Upjohn observed: "if he does not give any reason for his decision, it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that *he had no good reason of reaching that conclusion....*". In the same breath Lord Pearce too echoed the same notion: "If he gives no reason whatever for taking a contrary course, the court may infer that he had no good reason.....". *Padfield* was in fact an action for a declaration rather than an application for a prerogative order. So the award dated 20th January 2007 has to be struck down for paucity of reasons. In this award which is on a printed form nothing is set out as to how the compensation to be awarded was computed at Rs.445,000/-. The basis on which the Acquiring Officer came to a finding of Rs. 445,000/- is lacking in the award and I must hasten to add that the Acquiring Officer cannot be said to have made a legally admissible award in terms of Section 17 (1) of the Land Acquisition Act as amended.

The Appellant did prefer an appeal in terms of Section 22 (1) of the Land Acquisition Act which couches the right of appeal as follows:-

> *"A person to whom compensation is allowed by an award under Section 17 and who has notified his claim for compensation to the acquiring officer within the time allowed for by this Act, may appeal to the board against that award on the ground that the amount of the compensation allowed to him is insufficient".*

At the hearing before the Board of Review both the Appellant and Respondent summoned their valuers to testify as to the valuation of the acquired land. Both the private valuer on behalf of the Appellant and the state valuer on behalf of the Respondent-Acquiring Officer testified as to the basis on which they both put forward their valuation for compensation to be awarded. Section 45 of the Land Acquisition Act which sets out the mode of assessing the market value of the land is as follows:-

"For the purposes of this Act, the market value of the land in respect of which a notice under section 7 has been published shall, subject, as hereinafter provided, be the amount which the land might be expected to have realised if sold by a willing seller in the open market as a separate entity ***on the date of publication of that notice*** *in the Gazette."*

Sections 45, 46, 46A, 47 and 48 contain elaborate provisions as to the assessment of compensation and several other considerations that have to be taken in arriving at the quantum of compensation. In fact in ***Government Agent, North Western Province v. Fernando*** 51 N.L.R 121, it was stated that in deciding the market value, the evidence of recent sales in the vicinity is an important test, provided that such sales were of properly and similarly situated and are shown to have been by a willing seller to a willing buyer.

In order to prove actual, fair and just compensation sale deeds of adjacent land or near about adjacent land are produced to indicate the trend of the value of land within the near vicinity of the acquired land. In awarding compensation compulsorily acquired, the both the Acquiring Officer and the Board of Review should first of all, estimate the value of the land, and with the value as a basis, take into account any other special factors, and calculate the proper compensation to be paid. If the value of the land can be directly estimated by the value of the property in the neighbourhood, then this should be the best method of the land acquired, provided that there has been a sale of the land act, or about the time when the acquisition was notified.

The Acquiring Officer and the Board of Review are required to enquire about the same transaction of lands in the locality.

The Appellant did produce before the Board, as the proceedings disclose, two agreements to sell dated 13th October 2000 and 30th October 2000 respectively in regard to the sale of two lands in the vicinity. But the Board of Review appears to have excluded from consideration these two sale agreements as the dates of the two agreements in relation to the two lands in the vicinity are one year after the Section 7 notice in respect of the acquired land was published on 20.08.1999. In fact the Board of Review made short shrift of the two agreements in this tenor:-

"The Private valuer sales and the sale agreements offered appeared for the period after the relevant date which disqualifies its consideration."

I am afraid I cannot but disagree with this proposition. In this case the notice in pursuance of Section 7 of the Land Acquisition Act had been published in the gazette on 20.08.1999-an admitted fact by the parties. The tenor of the reasoning of the Board of Review appears to be that since the sale agreements in relation to lands in the vicinity took place in October 2000, they did occur not "on the date of the publication of the notice in the gazette" but a little more than 01 year thereafter. Therefore the price reflected or agreed upon in the deeds bearing Nos. 10352 and 10353 cannot be thought or considered to be the price that would have realized if the land had been sold in the open market on 20.08.1999, that being as stated above, the date on which the notice had been published in the gazette under Section 7 of the Land Acquisition Act. This is, in my view, too restrictive an interpretation which is myopic in the extreme. The quality of a decision would for certain be immeasurably impoverished, if a decision maker were to make a fetish of the many rules that we encounter in statutes. The pith and substance of such a narrow view, if upheld, would be to altogether exclude the valuation given in the two deeds from consideration for no other reason that the deeds had not been executed on 20.08.1999 which was the date on which the notice of the intended acquisition was published in the gazette.

The word "date" in the phrase that occurs in Section 45 (1) of the Land Acquisition Act to wit: *"the amount which the land might be expected to have realised if sold by a willing seller in the open market...on the date of publication of that notice in the Gazette...."* does not mean, in the context, the exact day of the month or the year indicated by a number. The signification of the word "date" employed in the phrase "on the date of publication of that notice in the gazette" has to be ascertained or clarified with reference to words that come before and after it because they provide the background or the circumstances in which the term "date" is used in Section 45 of the Land Acquisition Act. In Section 45(1) of the Land Acquisition Act the word "date" in the phrase abovementioned means not an exact or specific date of the sale but the period to which something belongs or something

happens which something, in this case, is the agreement to sell evidenced by the deeds as had happened or taken place. For instance, a person will want to know the fate of a particular ancient ruins or one can say that experts or archaeologists have been trying to date the fossil or the remains or traces of a prehistoric animal or plant or a structure. We can say that a custom or a practice or a right dates from a prehistoric date. In all these contexts contemplated above the word "date" does not signify the exact day of the month or the year expressed by a number, by the period of time associated with the happening or occurrence of a certain event or thing.

Further no objection was taken *though* when the two sale agreements and the deeds of sale were marked on behalf of the Appellant.

I would highlight the fact that the price reflected in the deeds demonstrates much greater evidentiary value in determining the value of the land proposed to be acquired and the Board misdirected itself in having excluded this evidence. It is not beyond one's comprehension that the price of lands was fluid and changed between the date of publication of Section 7 notice in the gazette the date of such publication being 20.08.1999 and the year 2000 (that being the year in which the two deeds of agreements to sell, which are substantially if not wholly relied upon by the Appellant to support the estimate of the valuation of the land acquired by the State) and it is a matter of common knowledge that during that intervening period spanning nearly 1 year or more the land prices had virtually increased immeasurably if not by leaps and bounds, and that phenomenon continues. It is axiomatic that the current trend of land prices is upwards. But, under Section 45 of the Land Acquisition Act the relevant question is: what was value of the land acquired at the date that the notice of acquisition was published in the gazette. In other words, it is open to this tribunal or any court to take judicial notice of that fact that prices of lands had not remained at the same level in the middle of the year 1999 or on 20.08.1999 to be exact, (when notice of intended acquisition was published in the gazette) as they were in the year 2000 when the agreements to sell evidenced by deeds took place because it is a fact too demonstrably notorious to be capable of serious dispute or debate.

No hard and fast rules can be enunciated as to the how close the proximity or nearness should be in these matters and the decision with regard to that matter must be dictated by pragmatism treating things in a practical way by adopting a down-to-earth approach which accords with commonsense.

So I hold that the Board misdirected itself on excluding the evidence with regard to the agreements to sell and sales that took place and this misdirection amounts to misdirection on law.

Another matter that I would like to advert to flows from the observation of the Board of Review namely "*[...] the land in question is within 100 meters from the lagoon and herein the National Environment Act No. 47 of 1980 imposes conditions that no development activity will be permitted. This therefore stultifies any commercial development of that land and the progress of same is contained*".

The Respondent too has submitted that the National Environment Act No. 47 of 1980 has imposed conditions to prevent any development activity within 100m from the high flood level contour. Even the state valuer who was summoned by the Respondent to give evidence before the Board of Review has put forward as the basis of her valuation the fact that no development activity would be allowed within 100m from the high flood level contour of or within a public lake as defined in the Crown Lands Ordinance. The Board too appears to have adopted this basis and hence the observation ... "*no development activity will be permitted. This therefore stultifies any commercial development of that land and the progress of same is contained.*" But the regulation that was produced as R5 to drive home this theory of no development refers to Section 23Z of the National Environment Act No. 47 of 1980 which goes as follows:-

> "*The Minister shall by order published in the Gazette determine the projects and undertakings (hereinafter referred to as "prescribed projects") in respect of which approval would be necessary under the provisions of this part of this Act.*"

Further, in describing what "*prescribed projects*" are, the Gazette bearing No. 859/14 and dated 23.02.1995 amending the Gazette No. 777/22 dated 24.06.1993 states that:-

"...within 100 meters from the high flood level contour of, or within, a public lake as defined in the Crown Lands Ordinance (Chapter 454) including those declared under Section 71 of the said Ordinance."

Upon a perusal of Section 23Z of the National Environment Act No. 47 of 1980 it is crystal clear that with the express approval of the competent authority a development activity can be undertaken. There is no absolute prohibition of a development activity as the Board of Review has so mistakenly ruled above. Therefore it was incorrect for the Board of Review to have held that: *"such regulations have "[stultified] any commercial development of [the land in question] and the progress of same is contained"*. This is another misdirection which has misled the Board into reducing the quantum of compensation for the Appellant.

Moreover I must observe that the Board of Review displays overzealous deference to state valuation when it held:-

"The state valuation in further perspective is subjected to much discussion at committee stages with experienced personnel of the Department with all its procedures, and taken into account any condition imposed by the relevant legislation currently available."

This is reflective of a clear surrender and an abdication of the power of independent analysis of the criteria that have to be borne in mind by the Board and the automatic adoption of state valuation cannot be decisive of the market value of the land. By making the above observations on the primacy of state valuer's opinion over that of any other private valuer, the Board of Review was displaying a partial preference for the expertise of the state valuer's opinion vis-à-vis the contrary evidence of a private valuer's valuation the Appellant had led and in ***Weatherall v. Harrison*** (1976) QB 773 DC Lord Widgrey C.J stated that a member of a tribunal of fact may not make use of his personal knowledge of facts in issue if this amounts to giving evidence in contradiction of that adduced. The Divisional Court stressed that while lay justices could use their knowledge to evaluate evidence they must not use that knowledge in contradiction of, or substitution for, the evidence actually given.

In other words it is not so notorious a fact that a state valuation ranks high above that of a private valuer and on the question of the source of knowledge on the primacy of a state valuer's valuation there is no evidence available on record. It is contrary for a tribunal indulging headlong into an independent and objective assessment of compensation for a land wrested from its owner and vested in the state to embrace only one view of an expert based on its own notion of competence of that expert, sans any tittle of evidence to support and substantiate that notion.

In the end I take the view that by committing the above errors of fact and law, the Land Acquisition Board of Review has not considered relevant and admissible evidence and its order dated 02.11.2010 has to be necessarily set aside and since no evaluation of evidence has taken place I proceed to set aside the order dated 02.11.2010 and remit the case back to the Board of Review so that it could take into account the evidence omitted and make a fresh determination as to compensation. In the discharge of this direction the Board of Review can take all steps that are necessary to achieve a fair and just result for both parties.

JUDGE OF THE COURT OF APPEAL

E.A.G.R. Amarasekara, J.
I agree

JUDGE OF THE COURT OF APPEAL