

HEWAGE
v
WEERASENA AND OTHERS

COURT OF APPEAL
UDALAGAMA, J.
WIJAYARATNE, J.
C:A.NO. 03/2001
LAND ACQUISITION BOARD OF
REVIEW CL 1257
FEBRUARY 26, 27, 2003
MARCH 13, 24, 2003
APRIL 4, 2003

Land Acquisition Act – section 28(1) – section 48(e), Section 48(g) – Compensation awarded – Appeal on a question of law only – Evidence Ordinance Section 3 – Fact?

Held :

1. The ambit of the appeal under section 28(1), is confined to the review of a decision of the Board of Review on a question of law only.
 2. What is outside the jurisdiction of the Board of Review and what was not contested in the proceedings before the Board of Review cannot form the subject of an appeal.
- No questions of law arise for determination.

APPEAL from the decision of the Land Acquisition Board of Review.

Case referred to:

1. *Perera (GA, NWP) v Fernando* 51 NLR 121
- A. Gnanathasan* D.S.G. for respondent – appellant.
Shibly Aziz, P.C., with *Luxman de Alwis* for the appellant - respondent.

Cur.adv.vult

October 27, 2003

WIJAYARATNE, J.

This is an appeal from the decision of the Land Acquisition Board of Review dated 20.12.2000 awarding compensation in a

sum of Rupees thirteen million seven hundred and twenty four thousand and seventeen and cents sixty one (Rs. 13,724,017.61) in respect of lot 2 in PP7450 in extent 180.58 perches.

The appeal is preferred by the respondent-appellant under and in terms of section 28(1) of the Land Acquisition Act, which gives the right of appeal to a party dissatisfied with the decision of the Board of Review to appeal to this Court on a question of law.

The respondent – appellant in his petition of appeal dated 08.01.2001 presented nine questions stating in paragraph 5 thereof that the questions of law are fit and proper questions of law to be determined by this court under section 28(1) of the Land Acquisitions Act. The nine questions so presented are as follows :

- a. Is the acquired land within the retention area coming under the Colombo Flood Protection and Control Project as at the relevant date.
- b. Even if it is otherwise has the valuer got to disregard any planning restrictions imposed by Planning Authorities by the very fact that lands are identified as Low Lying and come within the area declared under Section 2 of the Colombo District (Low Lying Areas) Reclamation and Development Board Act No. 15 of 1968.
- c. Has the publication of the Notice under section 2 of the Colombo District (Low Lying Area) Reclamation and Development Board Act No. 15 of 1968 inhibited the public from buying or otherwise developing the lands described therein, thereby affecting the value of the land acquired. Further has the publication of press notices by Ministry of Housing and Construction and other agencies concerned with Greater Colombo Flood Protection Project inhibited the public from the buying or otherwise developing.... In whatsoever manner.
- d. Is the method adopted by the respondent-appellant's Valuer in assessing the depth of filling of the acquired land reliable and accurate.
- e. Is the method adopted by the respondent - appellant's Valuer in assessing the value of the land on a national development

scheme based on development projects of similar nature in the area correct and accurate in arriving at the market value of the subject property. 40

- f. Has the Board of Review erred in law considering past awards in determining the value of the land acquired ignoring comparable sales.
- g. Whether section 48(e) of the Land Acquisition Act requires to take into account any decrease in value due to the reason of the use to it will be put after its acquisition.
- h. Whether section 48(g) of the Land Acquisition Act requires the valuer to disregard only any increases due to circumstances envisaged therein or does it require total disregardment of the purpose for which the land is acquired. 50
- i. Finally if the land is situated outside the retention area, whether the acquisition is valid.

The petitioner prayed that appeal be allowed, set aside the Decision of the Board of Review, affirm the award of compensation made by the respondent-appellant in a sum of Rs. 1,589,179.09 and for costs.

At the argument stage, whilst arguing merits and demerits of the decision and the findings of the Board, the appellant-respondent urged that appeal be dismissed as the questions presented for decision by this court are not pure questions of law but questions of fact only. Accordingly this court would deal with each and every question first having determined whether the same is a question of law or a question of fact or a question of mixed fact and law. 60

"fact" according to section 3 of the Evidence Ordinance, means and includes,

(a) "anything, state of things or relation of things capable of being perceived by the senses;"

(b) any mental condition of which any person is conscious.

This court would first apply these provisions in determining whether each of such questions is a question of fact only or a question of law. 70

Q1 : Is the acquired land within the retention area coming under the Colombo Flood Protection and Control Project as at the relevant date.

The Board has considered the documents A30, A31A, A39 the evidence of Mr. Guruge who testified on behalf of the respondent before the Board of Review. The evidence supported the proposition that the land in suit is outside the retention area marked in plan PP7450.

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However, this question relates to the existence of lot 2 in relation to the Retention area marked in PP7450 and it is a pure question of "fact" in terms of the definition of the term "fact".

Thus, it is not a question that this court would have to determine in terms of section 28(1) of the Land Acquisition Act.

Q2 : Even if it is otherwise has the valuer got to disregard any planning restrictions imposed by Planning Authorities by the very fact that lands are identified as Low lying and are coming within the area declared under Section 2 of the Colombo District (Low Lying Area) Reclamation and Development Board Act No. 15 of 1968.

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Section 2 of the Colombo District (Low Lying Area) Reclamation and Development Board Act No. 15 of 1968 empowers the minister to declare a particular area to be a "Reclamation and Development area" for the purpose of the act.

In terms of subsection 3 of section 2 states that upon publication of an order declaring a Reclamation and Development area, the duty of the Corporation is to reclaim and develop such area.

The ambit of the provision is that the corporation should develop such land and not to restrict development of such area. The powers of the corporation stipulated in section 9(d) as amended,

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" to enter into any contract with any person for the execution of any Land Development Project and schemes..."

Thus it is clear that what the relevant law envisaged is the Development and Co-operation in development of such lands by the Corporation and not the restriction of development of such lands. However, the respondent-appellant did not refer this Court to

any provisions of law empowering the corporation to restrict development of such lands. There is thus no legal basis upon which empowering the imposition of planning restrictions on the basis of a declaration of Reclamation and Development area. 110

Question however is whether a valuer got to disregard any planning restriction imposed by the planning authorities. In the first place when the restrictions are not lawful any valuer acting in terms of law cannot regard any restriction which has no sanctity of law.

Yet if there is proof that it is a factor that has affected the market value of the land, a valuer is obliged to consider the same with due regard.

This is a mixed question of law and fact, the Board of Review has considered on the evidence before it and with due regard to sale of land in the vicinity. We are unable to agree that a question of law arises for determination, as it is not established that the Board of review has erred in law on whether such should or should not be considered. 120

Q3 : Has the publication of the Notice under Section 2 of the Colombo District (Low Lying Area) Reclamation and Development Board Act No. 15 of 1968 inhibited the public from buying or otherwise developing the lands described therein, thereby affecting the value of the land acquired. Further has the publication of press notices by Ministry of Housing and Construction and other agencies concerned with Greater Colombo Flood Protection Project inhibited the public from the buying or otherwise developing.... In whatsoever manner 130

"Inhibition" is a state or condition of mind of a person in relation to existence of facts (things). Whether the publication for notice under section 2 had the effect of changing the State or condition of mind of a would be purchaser of land is a pure question of fact dependent on evidence of such state of things. Specially when the purchasers are described as members of the public. The existence of such an inhibited frame of mind is a question of fact and whether the existence of such fact affected the value is again a question of fact. 140

The witnesses, mainly the valuers have testified on this area and the Board of Review has considered the same. There is no question of law that this court has to determine on the question of inhibition and/or its effect.

Q4 : Is the method adopted by the respondent-appellant's Valuer in assessing the depth of filling of the acquired land reliable and accurate.

The reliability and accuracy of a method is again a state of things in relation to an existing set of facts.

The Board of Review has considered the evidence of the valuer describing the methods he adopted in assessing the depth of the filling. The valuer who testified on behalf of the respondent too has agreed to the existence of documentary evidence that permitted such assessment. This is a pure question of fact the Board of Review had in fact considered and there is no question of law presented for determination by this court.

Q5 : Is the method adopted by the respondent-appellant's Valuer in assessing the value of the land on a national development scheme based on development projects of similar nature in the area correct and accurate in arriving at the market value of the subject property.

Development projects of similar nature in the area in the assessment of a notional development is a factor that need to be considered by a valuer. The market value of land is essentially a relative factor and it is both reasonable and practical to consider values in relation to similar land.

In the case of *Perera (G.A.NWP) v Fernando*,⁽¹⁾ it was held,

- i. "In deciding upon the market value, of property compulsorily acquired, evidence of relevant sales in the vicinity is an important factor provided that such sales were of property similarly situated and are shown to have been by a willing seller to a willing buyer"
- ii. "Market value of property is the price which a willing vendor might be expected to obtain in the open market from a willing

purchaser and the price will be estimated having in view the future potentialities of the property"

Accordingly the method adopted by respondents-appellant's valuer in assessing the value of the land was not found to be correct and accurate by the Board of Review on the strength of evidence before it. 180

Q6 : Has the Board of Review erred in law considering past awards in determining the value of the land acquired ignoring comparable sales.

There is nothing on record in proceedings before the Board of Review that the Board had ignored comparable sales. The Board has definitely compared the sales referred to in evidence and for reasons given had considered them as being not comparable. Past awards are presumed to be made according to law and it is the duty of the Board to consider lawful award relevant to the matters in issue. The Board has not erred in law in considering the past awards lawfully made presumably on rational basis. 190

Q7 : Whether Section 48(e) of the Land Acquisition Act requires to take in to account any decrease in value due to the reason of the use to it will be put after its acquisition.

The purport of provision of sub section C of section 48 is to exclude any "increase" likely to occur after acquisition" and only provide that such increase "shall not be taken into "consideration". Even on a plain reading of the section it is clear that the provisions " do not require to take into account any decrease in value.....". 200

Section 48 deals with "matters that shall not be taken into consideration and hence there is no question of what it requires to take into account does not arise to be determined."

Q8 : Whether section 48(g) of the Land Acquisition Act requires the valuer to disregard only any increases due to circumstances envisaged therein or does it require total disregardment of the purpose for which the land is acquired. 210

Provisions of Section 48(g) deals with "special suitability or adaptability of the land in its application under statutory powers for which there is no market..." The section certainly requires that the purpose for which the land is acquired became the determining factor than in the application of the purpose under statutory powers. Whether there is increase or decrease, what is to be not taken into account is "the purpose of application under statutory powers... which has no market" only.

Q9 : Finally if the land is situated outside the retention area, whether the acquisition is valid. 22SS

Validity of the acquisition is not a matter that has arisen for consideration by the Board of Review. Nor does the provisions of the Land Acquisition Act empowers the Board of Review to, consider the question of validity of an acquisition of land.

The ambit of an appeal under section 28(1) of the Land Acquisition Act is confined to the review of a decision of the Board of Review on a question of law only. What is outside the jurisdiction of the Board of Review and what was not contested in the proceedings before the Board of Review cannot in terms of provisions of section 28(1) form the subject of an appeal. 230E

The question of validity of the acquisition is one outside the scope of such an appeal as it cannot be a part of the decision of the Board of Review.

This is not a question that this court would consider in an appeal under section 28(1) of the act.

In all the circumstances, we see no reason to interfere with the findings of the Board of Review. In the result the appeal is dismissed with costs fix at Rs. 2,500/-.

UDALAGAMA, J.

I agree.

Appeal dismissed.