Judgment Sheet

IN THE HIGH COURT OF SINDH HYDERABAD CIRCUIT.

Ist Appeal No.139 of 2003.

R.A. No.47 of 2007.

Appellant:	Through Mr. M. Arshad S. Pathan, Advocate.
Respondent:	Through Mr. Jhamat Jethanand, Advocate.
Date of Hearing:	09.10.2017.
Date of Judgment:	13.11.2017.

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J.- These two cases i.e. Ist Appeal No.139 of 2003 and Revision Application No.47 of 2007 pertains to a common property. In first appeal No.139 of 2003 the appellant [WAPDA & others] have challenged the order of the Referee Court in pursuance of acquisition proceedings whereby the valuation of the property was enhanced from Rs.01/- per sq. ft. to Rs.05/- per sq. ft.

2. Brief background of case is that respondent filed objection/application before the Collector and Land Acquisition Officer L.B.O.D. WAPDA in respect of Land in Survey No.319 Deh Seri Taluka & District Hyderabad. The Reference under section 18 of the Land Acquisition Act 1894, against the Award Order No.129 of 1982 was then sent to the District Judge Hyderabad, which was referred to the III-Additional District Judge Hyderabad, for consideration. In the earlier round vide Judgment dated 28th February 1984 in consideration of objections the land acquisition suit was decreed by fixing Rs.05/- per sq. foot along with 06 % interest and 15% compulsory charges under section 23(2) of the Land Acquisition Act.

3. Being aggrieved of such fixation the respondent filed an appeal No.17 of 1984 and Appeal No.22 of 1984, whereby the Judgment and Decree was set-aside and the matter was remanded to the appellate court for reexamining the evidence after allowing parties to lead evidence on the issues of additional compensation under section 28-A of the Land Acquisition Act vide order dated 09.05.2000. The land of the respondent in Survey No.319 measures 1-00 acre 00-32 ghuntas situated in Deh Seri Taluka & District Hyderabad, which claimed to have been acquired for construction of WAPDA Colony under section 4 of the Land Acquisition Act.

4. On consideration of the pleadings the court framed following issues:-

1. Whether the suit is not maintainable?
2. Whether the plaintiffs were running stone crasher plant on the suit land and suffered damages to the extent of Rs.4000/- per month due to illegal acts of the defendant from September 1981?If so, its effect?
3. Whether this court has no jurisdiction.
4. Whether compensation of land awarded to the plaintiffs is adequate and proper?
5. Whether plaintiffs are entitled for compensation of Rs.3,75,300/- for machinery made useless by forcible possession of land?
6. Whether plaintiffs are entitled to recover Rs.1,39,000/- as compensation for boundary wall demolished by WAPDA after September 1983?
7. What should the decree be?

5. Parties were directed to adduce evidence. Apart from earlier record the parties produced certain documents including the title documents of certain land to establish the value of the land in question.

6. Mr. Muhammad Arshad S. Pathan, learned counsel for the appellant submit that there is no iota of evidence with reference to issue No.4 that the compensation was required to be enhanced from Rs.01/- per sq. ft. to Rs.05/- per sq. ft. He submitted that the land is situated beyond the Municipal limit of Hyderabad and, as such, all sale deeds in respect of

the land is not available for consideration as they are within Municipal limit and cannot form basis to consider the value of the land in question. He submits that the Referee Judge has stated that the burden was upon the respondent but they have miserably failed to discharge it. Based on the consideration of these extraneous documents it is contended by the learned counsel that the amount of compensation was enhanced from Rs.01/- to Rs.05/- per sq. ft. along with 06% interest and 15% compulsory charges. He submits that despite the fact that the value claimed was Rs.30/- per sq. ft. there are no basis to reach to such conclusion at Rs.5/- as there is no evidence of the relevant time when the Notification under section 4 was issued and that there was no potential value since the land was barren and was never a commercial property as alleged.

7. On the other hand Mr. Jhamat Jethanand learned counsel appearing for the respondent has not only supported the Judgment but attempted to argue that he is still entitled to raise and object that part of the Judgment which doesn't find favour with the respondents and in view of Order XLI Rule 22 he can still agitate such grounds against the findings which were not assailed by the respondents. He submits that there is enough evidence on record in the shape of sale deed as Ex.16 to 20 and Ex.52/A to N to show that the compensation of even Rs.05/- is not adequate and in view of the Judgment reported in 2003 SCMR page 74, irrespective of any appeal whether preferred or not, could raised such grounds in an appeal filed by the appellant or in respect of a Judgment which is not challenged by respondents.

8. Mr. Jhamat learned counsel submit that the definition of market value includes the potential value of the property and the language used in section 23 of the Land Acquisition Act to define market value of the property at the time when the Notification was issued includes the potential value and is an built entity. Learned counsel has further argued that the Award was passed after so many years and this should have been taken into consideration as the escalation in the value during the

period in between Notification under section 4 and the Award cannot be ignored. All exhibits as 16 to 20 and Ex.52/A to N the minimum value is more than Rs.200,000/- per acre which is far more than the value determined by the Referee Judge. Mr. Jhamat also submit that the arguments of the appellant's counsel is not appealable to mind regarding the barren land as the land was acquired for residential colony of the employees of WAPDA, therefore, these arguments are contrary to their own acts that the land was not feasible for any residential scheme.

9. In the connected revision application Mr. Jhamat learned counsel submit that at the relevant time when the suit was filed there were no proceedings to the knowledge of respondents as to the acquisition of land were pending and hence only a suit for injunction and damages was filed. However, after filing of written statement, an application for amendment in the pleadings was filed and a declaration was sought to the extent that all acts and proceedings of the appellant/WAPDA are illegal and unlawful. However, the trial court dismissed the application. Since there was no appeal available against that order as agreed, they intended to challenge it along with the Judgment in case it would have been required. Counsel submits that neither the Judge while deciding the suit nor the Referee Court has decided the issue of compensation regarding losses suffered by the respondent on account of dismantling the wall, plant and machinery affixed and other monthly income which they were fetching and hence this Court may give its Judgment on the basis of pleadings. He, however, concedes that neither any evidence was recorded nor any issue was framed by the trial court in the suit preferred by them.

10. We have heard the learned counsel and perused the material available on record.

11. At the very outset we have enquired from Mr. Jhamat as to whether he has preferred any appeal in respect of the findings of the Referee Judge to which he replied in negative. The judgment impugned in this appeal is dated 20.03.2002 passed in L.A. Suit No.37 of 1982, whereby

the suit is decreed at the rate of Rs.5/- per sq. ft. with 6% per annum interest and compulsory charges under section 23(2) of the Land Acquisition Act as 15% and his entitlement to additional compensation under section 28-A as 15 % solatium per annum from the date of Notification and the decree was ordered to be executed after six (06) months. It is one of the arguments of Mr. Jhamat that despite the fact that they have not preferred any appeal, they may agitate and raise all such points which in the impugned judgment have gone against the respondents. To this proposition Mr. Jhamat has relied upon the case of ***ABDUL HAQ v. SHAUKAT ALI and 2 others*** reported in 2003 SCMR 74. Learned counsel Mr. Jhamat has relied upon para-8 of the Judgment which is reproduced as under:-

> "8. *We have heard the learned Counsel for the parties at length. Under Order XLI, Rule 22, C.P.C. a respondent who does not file an appeal or cross-objection against a part of a decree can nevertheless support the decree on any of the grounds decided against him by the Courts below. In an appropriate case, an Appellate Court may allow a party, on consideration of justice, to support judgment and decree under appeal on a ground which has been found against him in that judgment and decree. In taking this view, we find support from the case of Syed Ziaul Hasan alias Thah Peer v. The State (1998 SCMR 1582) in which the cases of Kanwal Nain and Muhammad Afzal Khan (supra) were considered. The Supreme Court of India also took a similar view in the cases of Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji and others (AIR 1965 SC 669) and Tepfulo Nakhro Angami v. Shrimati Ravoluei alias Rani M. Shazia (AIR 1972 SC 43). The decree by the First Appellate Court was in favour of the predecessor-in-interest of the appellants. In the peculiar facts and circumstances of the case, it was not obligatory for him to file an appeal or cross-objections before the High Court. He could defend the decree of the First Appellate Court on all the grounds available to him.* "

12. We have perused the provisions of Order XLI Rule 22 CPC. It requires the respondents, who may not have preferred an appeal against any part of the Judgment, to have preferred and filed atleast cross appeal or objection to the appeal filed by appellant against decree which he could have taken by way of appeal. Admittedly neither any appeal is preferred nor cross objection or cross appeal were preferred within the time frame as required under law, therefore, this contention of Mr. Jhamat requires no consideration in view of the Judgment referred above. Similarly the facts of the case of ***SUBA v. ABDUL AZIZ*** reported in 2008 SCMR 332 lay emphasis on Order XLI Rule 22 & 23 CPC.

13. In order to resolve the controversies raised by the respective counsels it is necessary to peruse the objections taken by the land owners/respondents which is available at Ex.14. The objections started from the point that the award was not accepted by the respondents and a request for referring the matter was made to the Referee Judge on the grounds mentioned therein which are as under:-

(i) that the demand of compensation was not in accordance with law i.e. the compensation as requested at the rate of Rs.30/- was not considered

(ii) the compensation of machinery as claimed in the objection was not considered,

(iii) the compensation for the boundary wall, rooms and construction were not considered,

(iv) that the claim of running the business of stone crushing whereby they were fetching approximately Rs.4000/- per month was not considered as the possession was taken forcibly, and;

(v) that instead of 15% compensation for a compulsory acquisition and interest at the rate of 13% per annum were requested.

14. There are no questions regarding the Notifications under section 4 or any other Notification i.e. relied upon by the applicant. This point

therefore, that only photo copies were produced by the applicant doesn't require any interference since it is not the case of the respondents that the Notifications under section 4/6 etc were not issued or the original gazettes were not produced.

15. On the other hand applicant's case revolves around the fact that the documents produced to establish the value of the property neither pertains to the period when the notification was issued nor it relates to the same area or vicinity. Learned counsel has relied upon the provisions of Section 4 of the Land Acquisition Act which require the Land Acquisition Officer to consider the value of the property at the time when the Notification was issued.

16. In this regard we may point out that the Land Acquisition Officer in respect of the land acquired prior to present land, fixed Rs.2 to 3 per sq. ft. The subject property was acquired for the residential colony of WAPDA employees therefore, the arguments are not convincing that it was a barren land and should not have fetched more than 2 to 3 rupees. Had it not been feasible it would not have been acquired for residential colony. This itself shows that the property was fit enough for residential accommodation of the WAPDA employees thus have the potential of raising residential scheme thereon. The potential value of the land can be determined on the basis of its future prospects which is inbuilt definition of the market value. In the case of ***PROVINCE OF PUNJAB v. BEGUM AZIZA*** reported in 2014 SCMR 75 the Honourable Supreme Court held as under:-

> *"6. - - - - - - - - - - - - - -While assessing the compensation, the Collector has not only to consider the market value of the land in question but its potential value. The market value is normally taken up as one existing on the date of notification under section 4(1) of the Land Acquisition Act under the principle of willing buyer and willing seller while the potential value was the value to which similar lands could be put to any use in future. Thus in determining the quantum of compensation the exercise may not be restricted to the time of the aforesaid notification but its future value may be taken into account. In Abdul Rauf Khan v. Land Acquisition*

Collector/D.C (1991SCMR 2164) this court while dilating upon the question of rate of compensation laid down following principles germane to section 23 of the Land Acquisition Act which may be kept in view. Those are as follows:--

> *"(i) That any entry in the Revenue Record as to the nature of the land may not be conclusive, for example, land may be shown in Girdawari as Maira, but because of the existence of a well near the land, makes it capable of becoming Chahi land;*
>
> *(ii) That while determining the potentials of the land, the use of which the land is capable of being put, ought to be considered;*
>
> *(iii) That the market value of the land is normally to be taken as existing on the date of publication of the notification under section 4(I) of the Act but for determining the same, the prices on which similar land situated in the vicinity was sold during the preceding 12 months and not 6-7 years may be considered including other factors like potential value etc."*

17. The Notification under section 4 was issued on 03.04.1975 and under section 9 on 07.06. 1978. Whereas Award was passed on 12.08.1982. Ex.16 dated 28.04.1981, Ex.17 dated 11.04.1983, Ex.18 dated 23.06.1983, Ex.19 dated 03.11.1983. These are all sale deed of land showing value of land in the near vicinity but were of the period beyond Award hence the extended value up to 200,000 per acre was not considered. However, Ex. 20 is a brochure/application of a builder and is not reliable otherwise. Perusal of these Exs.16 to 19 show that the value was fixed after considering the requirement of law. However, applicants have not made out any case that the value of Rs.5 per sq. foot is on higher side.

18. We have considered the compulsory acquisition charges under section 23(2) of the Land Acquisition Act. A bare perusal of section 23(2) provides as under:-

> "23. Matters to be considered in determining compensation. (1) - - -
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> (2) In addition to the market value of the land as above provided, the Court shall award a sum of fifteen per centum on such market value, in consideration of the compulsory nature of the acquisition, if the acquisition has been made for a public purpose

and a sum of twenty-five per centum on such market-value if the acquisition has been made for a company."

19. No doubt this acquisition of land is for WAPDA employees, a legal entity for which the compulsory charges for such acquisition were to be considered at the rate of 25 per centum. However, the respondents have not preferred any appeal or cross appeal to reconsider such charges and have conceded to the observation.

20. The next point for consideration was a claim of damages in respect of the business, boundary wall, plant and machinery regarding which details have been provided in the objection application Ex.14. In this regard the issues were framed by the Land Acquisition Officer / Referee Court in Suit No.37 of 1982, which are issues No.2, 5 and 6. I am inclined to consider the claim under above heads for the reasons that respondents have also filed a suit for such claim regarding which connected revision is pending. However, the evidence of respondents is absolutely silent as to (i) maintaining accounts of monthly or yearly profit, (ii) as to the expenditure of the boundary wall and the (iii) value of the plant and machinery. No doubt in the objections to Award he has given the tentative value of all such claims however, that claim may be justified only by producing the relevant documents, accounts and details of expenditure along with receipts which he has failed. In the absence of such evidence when the Referee Judge and/or Senior Civil Judge and appellate court could not have granted such claim on the mere wishes and whims how then under revisional jurisdiction this Court could consider when there is no departure from consideration any part of evidence. Similarly in the case of Issues No.5 & 6, the respondents have failed to adduce evidence as to such claim.

21. In the suit, respondent/plaintiff claimed that initially when they had no knowledge about section 4 of Land Acquisition Act, 1894 they filed simple suit for injunction and damages of Rs.99400/-. However, subsequently when they came to know about issuance of Notification, they

filed an application under Order VII rule 17 CPC for amendment and has proposed certain amendments in the pleadings. The application was dismissed on 8.2.1983 on the ground that it is a separate cause of action and the plaintiff/respondent may preferred a fresh suit.

22. Order II rule 1 CPC provide that every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them failing whereof the left over claim shall be deemed to be relinquished under Order II Rule 2 CPC. Order II Rule 3 provides joinder of causes of action. It provides that a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

23. In the instant case, in the wisdom of the Senior Civil Judge did not fixed it convincing that these separate causes of action can be joined/merged against the same defendants in terms of Order II Rule 3 CPC. However, the crucial aspect in the matter is that the respondent has not filed any appeal as he was of the view that the order under Order VII Rule 17 CPC does not provide any room of appeal.

24. No doubt that they could have challenged the order concerning dismissal of the application under Order VII Rule 17 at the time of filing an appeal against final judgment and decree but the memo of appeal against the Judgment & Decree which was finally passed against the respondent shows otherwise. He may have taken a ground as to the dismissal of application under Order VII Rule 17 as ground No.(b) but in the main prayer clause respondent has not cared to challenge the order dated 8.2.1983 dismissing the application under Order VII Rule 17. It could only lead to a conclusion that substantially he has challenged the Judgment and Decree dated 28.2.1987 and 22.3.1987 respectively and has conceded to the order passed on application under Order VII Rule 17.

25. Hence in view of above discussion and in the absence of a challenge as to the issuance of Notification under Section 4 and by perusing the objections to the Award which was referred to the Referee Judge and in the absence of any evidence to substantiate their claim of losses/damages it appears that the Judgment of the Appellate Court in Civil Appeal No.82 of 1999 requires no interference. Beside the appeal 82 of 1999 preferred by the respondent was barred by time. Respondent has not adduced any evidence as to the quantum of damages sustained by the respondent. There is nothing which requires this court to interfere with concurrent findings of two courts below under section 115 CPC.

Resultantly, both the revision application and Ist Appeal are dismissed.

Judge

A.