Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Civil Appeal No.D-16 of 2014

Present:

Mr. Muhammad IqbalKalhoro, J.
Mr. Arbab Ali Hakro, J.

Appellant	:	M/s United Energy Pakistan Beta GmbH, through its Manager Through Mr. Dildar Ali Khan, Advocate
Respondent No.1	:	Ghulam Muhammad, through Mr. Tariq G. Hanif Mangi, Advocate
Respondent No.2	:	Additional Commissioner-I Khairpur, through Mr. Ahmed Ali Shahani, Assistant Advocate General, Sindh
Date of hearing	:	07.12.2023, 31.01.2024
Date of Decision	:	13.03.2024

J U D G M E N T

ARBAB ALI HAKRO, J.-Through this First Appeal under Section 54 of Sindh Land Acquisition Act, 1894 (**"the Act of 1894"**) read with Section 96 C.P.C., the appellant (**"Acquiring Agency")** have impugned judgment and Decree dated 17.5.2014, passed by I-Additional District Judge, Khairpur (**'Referee Judge**'), in Land Acquisition Reference No.01 of 2009, whereby the said suit of the respondent No.1 has been decreed, re-determining the rate of compensation at Rs.200,000/- from Rs.156,250/- per acre from the date of taking over the possession of land so also awarding Rs.700,000/- as damages of Masjid.

2. The brief facts of the case are that the land bearing Survey Nos. 686(4-17), 687(4-15), and 688(3-05), measuring 11-37 Acres,

situated in Deh Lemon Rajper Taluka Nara District Khairpur (**'subject land'**), were acquired by the Acquiring Agency for the purpose of extending the Buffer Zone around the C.P.P. of the Sawan Gas field. The subject land was owned by respondent No.1 (**"land owner"**). Respondent No.2, after fulfilling the requirements, passed the Award under Section 11 of the Act of 1894 on November 27, 2008. The land owner disagreed with the Award and submitted an application/reference to the Land Acquisition Officer, stating that he is ready to receive the compensation shown in the Award under protest and that the compensation awarded is insufficient. He prayed to make a reference under Section 18 of the Act of 1894 to the Court. The land owner specifically mentioned the details of compensation for the pumping machine and tube-well valued at Rs.1,200,000/-; compensation for seven houses built on the land at Rs.5,500,000/-; the Masjid at Rs.700,000/-; damage to wheat and cotton crops over the last four years at the rate of nine lacs Rs.4,500,000/-; and compensation for the subject land at the rate of Rs.500,000/- per acre.

3. The Land Acquisition Officer forwarded the reference to the District Judge, Khairpur, who subsequently transferred it to the I-Additional District Judge Khairpur for a trial. Upon receipt of the notice, the acquiring agency filed a written reply/objections. They stated that the landowner, who was a Government servant serving as Daroga in the Irrigation Department, obtained the subject land from the Barrage authorities by misrepresenting the facts. Therefore, he could not legally be granted state land on Harap condition. It was asserted that the grant of the land to the owner was outside the company's project. Therefore, he applied to the District Officer (Rev.) Khairpur for correcting the site plan/sketch of the subject land. However, his request was turned down by the District Officer (Rev.). He then filed an appeal before the E.D.O Khairpur, which was also dismissed. The acquiring agency also submitted that the subject land of the landowner was initially acquired for the company. But when it was brought to the notice of the acquiring agency

that the subject land was outside the project, a corrigendum was published in the official gazette. The land acquisition officer passed the award, keeping in mind the prevailing market value/rate of the land in the area and Mukhtiarkar's report (Rev.). Taluka Nara. The Land Acquisition Officer even visited the land and took photographs of the subject land, which clearly showed that the land was heavily sandy, dune-like, and was obtained by the land owner for the purpose of walar. At no time was the subject land brought under cultivation. The acquiring agency denied that the landowner ever installed any tube well/pumping machine or constructed any houses and a Masjid on the subject land. It was finally prayed that the reference is not maintainable and is liable to be dismissed.

4. On the pleadings of the parties, the Referee Judge framed the following issues: -

i. *Whether S. No.s.686, 687 and 788 area 11-37 Acres situated in Deh Leemon Rajpar was obtained by the applicant from the Barrage Department on misleading facts*?

ii. *Whether the possession of suit land remained with the respondent w.e.f 11.8.2005 without any compensation*?

iii. *Whether the disputed land is lying barren and no cultivation was raised by the applicant*?

iv. *Whether the applicant raised construction over the suit land as claimed by him*?

v. *What is the rate per acre of the land in Deh Leemon Rajpar Taluka Nara*?

vi. *Whether the land acquisition reference is not maintainable in law*?

vii. *Whether the applicant is entitled for compensation of pumping machine, tube-well, seven houses built over the land and Masjid, damage and deprivation of crops for five years at the rate of Rs.900,000/- for two crops per year and actual compensation at the rate of Rs.500,000/- per acre?*

viii. *What should the order be?*

5. In order to prove the case, the land owner examined his Attorney at Exh.13, who produced his Special Power of Attorney at Exh.13/ and Khan Muhammad (Tapedar) was examined as a Court witness at Exh.14, who produced relevant entries pertaining to subject land and closed the side.

6. In rebuttal, the Land Acquisition Officer/Assistant Commissioner examined at Exh.17. He produced a Valuation Certificate issued by Mukhtiarkar at Exh.17/A; DW-2 Attaullah Qazi (Land Acquisition Assistant of acquiring agency) at Exh.18 and closed the side as Exh.16.

7. After hearing both parties, the Referee Judge passed the impugned Judgment and Decree, whereby enhanced the rate of compensation and also awarded damages of Masjid to the land owner. Hence, this appeal.

8. At the very outset, learned counsel representing the appellant contended that the Referee Court has failed to appreciate the basic principles governing the assessment of the amount of compensation and, as such, failed to determine the reasonable compensation for the acquired land and has merely passed the impugned Judgment; besides appellant was a government employee and alleged grant is illegal. Counsel urged that no evidence was brought on record regarding the existence of a masjid over the suit land irrespective of the findings of issues no 3 and 4 against the appellant, and it attained finality; lastly, he argued that the market value of acquired land had been legally evaluated an award in accordance with law and referee judge committed illegality by not considering the evidence on record. In support of his contentions, learned counsel has relied on the case law reported as 2013 SCMR 737, 2022 SCMR 918, PLD 2010 SC 604, PLD 2023 SC 470.

9. Conversely, learned counsel representing the land owner contended that the appeal is time-barred as the same is filed without

affixation of requisite court fees; the referee Court legally and lawfully enhanced the compensation rate after considering the factors defined in section 23 of the Act of 1894. At the end of his arguments, he relied on the case law reported as 1997 SCMR 919, 2014 CLC 160, 1983 CLC 1502, 2009 CLC 262.

10. Learned A.A.G. contends that the Award has been finalized, and the respondent received the compensation amount; he supported the arguments of the appellant's learned counsel.

11. We have heard the arguments advanced by learned counsel representing the parties and, with their assistance, minutely perused the material available on record, including the case law they relied upon at the bar.

12. Before delving into the merits of the case, it is essential to note that the instant first appeal appears to be time-barred. This is because the Court Fee was paid approximately nine years after filing of this first appeal. When objection was raised on October 26, 2023, the counsel for the appellant voluntarily presented the Court Fee. Consequently, he was directed to satisfy the Court regarding the timeliness of the appeal, as per the following order:-

> *"Learned Counsel for appellant through statement has paid the requisite Court fee. However, he is put on notice to satisfy on this point as the appeal filed in 2014 and he has submitted the requisite fee today after 09 years. In the circumstances, the question is whether the appeal could be treated to have been filed within time without submission of requisite fee."*

13. The learned counsel for the appellant has argued that the delay in filing the court fee should not be considered as a limitation bar. It is noteworthy that while hearing an appeal under Section 54 of the Act of 1894, this Court is vested with all the powers and jurisdiction conferred on the appellate Court under Section 107 and Order XLI of the Code. The procedure for filing an appeal before an appellate court is governed by Order XLI of the Code. Rule 1 of Order

XLI prescribes the form of appeal and the relevant documents to be attached. Rule 3 of Order XLI of the Code empowers the appellate Court to reject an appeal before it is admitted for hearing or to return it for amendment. However, if a memorandum of appeal is found to be completed in all respects, it must be admitted in accordance with Rule 9 of the same Order. The rule reads as follows: -

> *"9. - (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.*
> *2) Such book shall be called the Register of Appeals."*

14. If the appeal was not dismissed in terms of Rule 11 of Order XLI of the Code, then the Court has to fix a date for hearing in terms of Rule 12, which reads as follows:–

> *"12.---(1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal."*
>
> *(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent and the time necessary for the service of the notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day."*

15. In the case at hand, it is noteworthy that the office did not raise any objection at the time of the presentation of the appeal concerning the non-payment of the court fee. The appeal was admitted, and a notice was issued to the other side. When the other party appeared, they did not raise any objection regarding the non-affixation of the court fee stamp. In fact, the appellant himself submitted the requisite court fee without any directionfrom the Court or any objection from the other side. This act clearly reflects the appellant's good faith, and it cannot be said that any malafide or contumacious behaviour was involved or the intention was to disregard fiat of law for depositing the court fee.It is an established principle of law that no one can be punished for any act of the Court. If the appellant has not acted with malafide intentions while filing the

appeal, then after the admission of the appeal, it cannot be dismissed on account of non-affixation of the court fee or the point of limitation.

16. The other proposition of law is that this Court has to apply the provision of Order VII, Rule 11 of the Code, in the context of an appeal. This rule allows the Court to direct the appellant to supply any deficiency in the court fee within a prescribed period. The issue is whether this Court is obligated to apply this provision and allow the appellant an opportunity to rectify the deficiency in the court fee or whether it has the authority to reject the appeal at any stage without providing such an opportunity. The answer to this question lies in the interpretation of the law and the principles of natural justice. On one hand, the Court must ensure that the legal process is not abused and that all necessary fees are paid. On the other hand, the Court also has a responsibility to ensure that justice is done and that parties are not unduly penalized for minor procedural oversights that can be rectified. Therefore, while the appellate Court has the authority to reject an appeal for non-payment of the court fee, it must also consider the circumstances of each case, including the conduct of the appellant and the nature of the deficiency. Suppose the appellant has acted in good faith, and the deficiency is minor,it can be rectified. In that case, the Court may apply Order VII, Rule 11 of the Code and allow the appellant to rectify the deficiency rather than rejecting the appeal outright.

17. In a recent judgment by the Supreme Court of Pakistan, in the case of Meeru Khan vs Mst. Naheed Aziz Siddiqui & others (PLD 2023 SC 912) has elaborately discussed the powers of the Court under Section 149 of the Code, Sections 4 and 6 of the Court Fees Act, 1870, the collective effect of Order VII Rule 11 and Section 149 of the Code and the distinction between Sections 148 & 149 of the Code. Therefore, it would be conducive to reproduce the relevant findings hereunder: -

"7. It goes without saying that when time is allowed or extended by the Court for the payment of the requisite court fee, such order cannot be recalled unless it formally reviewed. The policy of the law with the gateway of a beneficial provision is not intended to penalize or victimize the litigant on account of a deficiency in court fees. By no stretch of imagination have the laws vis-à-vis court fees and valuation of suits been envisioned to make available an apparatus to the parties under litigation to circumvent the decisiveness of the lis on merits or to elongate the life of the lis by raising objections as to court fees and valuation of the suit; therefore it is also an obligation of the Court simultaneously that, while admitting or registering the plaint or appeal, it should check whether the requisite court fee has been paid or not and, in case of deficiency or filing application under Section 149 CPC, pass necessary orders for compliance without keeping the application pending for an unlimited period of time. In the case in hand, the application under Section 149 CPC remained pending unnecessarily, without any order, until 02.10.2019 when the Court granted 15 days' time for payment of the court fee and, on 04.10.2019, the court fee was paid, which fact is also reflected from the impugned order, hence there was no lawful justification for considering the appeal barred by time and this finding of the High Court is erroneous. After making up the deficiency of court fee within the time allowed by the Court, the second appeal should have been heard on merits rather than technicalities. In the case of Mst. Zainab and another v. Naeem Ahmad and another (1987 SCMR 1883), this Court observed that the petitioners had initially failed to pay the proper amount of court fees as they were misled by the erroneous entry in the decree sheet. The Court held that in any case they were entitled to an opportunity for making up the deficiency as laid down in Siddique Khan v. Abdul Shakoor Khan (PLD 1984 SC 289) and as they had made up the deficiency within the time granted to them, the Court erred in law in making an order which had the effect of dismissing their appeal. Whereas in the case of Siddique Khan and 2 others v. Abdul Shakur Khan and another (PLD 1984 SC 289), this Court while relying on different dictums held that (a) It would indeed be anomalous if limitation is not saved in cases where the law requires the Court to allow the plaintiff to correct the valuation of the relief claimed in the suit which must necessarily entail making up any deficiency in the stamp paper affixed on the plaint; (b) Time should automatically be enlarged in cases in which the Court has the discretion to grant time to pay the whole or part of the court fee prescribed; and (c) Consequently, where the plaintiff is required to correct the valuation of the relief claimed in the suit, he shall further be required to supply the requisite stamp paper and on compliance it shall have the same force and

effect as if such fee had been paid in the first instance. In the foregoing background, it was further held with regard to the interpretation of Order VII, Rule 11 (b) and (c), C.P.C. that it was obligatory to allow time for making up the deficiency in court fees before rejecting the plaint and, regarding refusal of discretion under Section 149, C.P.C., this could only be on grounds of contumacious and positive mala fide conduct. In the case of Muhammad Mahibullah and another v. Seth Chaman Lal thr. L.R.s. and others (1994 SCMR 222), it was held that when the learned Additional District Judge came to hold that the memorandum of appeal had not been sufficiently stamped, instead of outright dismissing the memorandum of appeal, an opportunity should have been given and the appellant should have been called upon to make good the deficiency. Under the provisions of Order VII, C.P.C. which applies to suits, when the plaint does not bear the appropriate court fees this is the requirement of the law. Further, Section 107(2), C.P.C. provides that the Appellate Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by the C.P.C. on Courts of original jurisdiction in respect of suits instituted therein. While in the case of Assistant Commissioner and Land Acquisition Collector, Badin v. Haji Abdul Shakoor and others (1997 SCMR 919), this Court held that if an appellant files an appeal with the deficit court fee, the Appellate Court under Section 149, C.P.C. can extend the time and, if time is so extended, the question of limitation will not arise, but if the Appellate Court finds that the appellant is guilty of contumacy or he acts in a positive mala fide manner with regard to the deficient court fee, it may decline to exercise discretion on that ground in favour of the appellant. In the case of Ch. Nazir Ahmed v. Abdul Karim and another (PLD 1990 SC 42), this Court held that the Court is bound to ascertain the deficiency in the court fee affixed on the plaint and then give time to the plaintiff to make up the deficiency and, if the plaintiff complies with the order within the time granted, the defect in the plaint is deemed to have been removed from the date it had been originally filed in Court. 8. The function of the Court is to do substantial justice between the parties after providing an ample opportunity of hearing which is one of the most significant components and elements of a fair trial. The procedure is mere machinery and its object is to facilitate, not obstruct, the administration of justice. The C.P.C. should, therefore, be considered liberally and should not be allowed to undermine substantial justice. A statute or any enacting provision therein must be so construed as to make it effective and operative. The distinction between substantive law and the law of procedure is a very fine one, but for the purposes of jurisprudence a distinction is made particularly from the point of view of administration of justice. This Court

> *in the case of Imtiaz Ahmad v. Ghulam Ali and others (PLD 1963 SC 382) held that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his."*

18. Now reverting to the merits of the case, under the Act of 1894, the offer made by the Collector or Land Acquisition Officer is considered final unless the claimant-land owner can provide substantial evidence before the District Judge that the offer was insufficient. This implies that the burden of proof, as stipulated under Section 23 of the Act, rests on the shoulders of the landowners who are seeking a higher compensation than what has been awarded by the Land Acquisition Officer/Collector. If a landowner is dissatisfied with the Award and opts to refer the case to the relevant Court, it signifies that he has willingly assumed the burden of proof. He is then obligated to demonstrate that the compensation recorded in the Award was inadequate. This process requires the landowner to present compelling evidence to substantiate his claim for a higher compensation. The Act of 1894, therefore, places a significant responsibility on the landowner to justify his claim for a higher compensation amount. Failure to provide such evidence may result in the original offer/award passed by the Collector/Land Acquisition Officer being upheld. However, it's important to note that the government, or any other department or local authority for whose benefit the land is being acquired, also has the right to produce evidence. This ensures that the compensation paid to the claimants is fair and just. Therefore, while the burden of proof primarily rests with the landowner, the government and other relevant authorities also

play a crucial role in determining fair compensation.

19. In the present case, the landowner claimed compensation for the pumping machine, tube well, seven houses, and a Masjid built on the subject land and damages to the wheat and cotton crops. The Referee Judge framed issue No.3, questioning whether the subject land was barren and whether the landowner had not cultivated it. The Referee Judge gave his findings on this issue against the landowner. It would be appropriate to reproduce the findings of the Referee Judge on the above issue below: -

> *"The attorney of the applicant in his evidence has deposed that they have cultivated the land prior to 2005 on water of tube-well and after 2005 they have stopped the cultivation of land because the same was remained with the possession of company. The attorney of the applicant has failed to produce any receipt regarding cultivation of any crops in the land in question. The attorney of the applicant in his cross-examination has admitted such fact that he has not produced land revenue receipts in his examination in chief. He in his cross-examination has admitted that the Mukhtiarkar has issued report that land was remained uncultivated since 15 years. The certified true copy of field book for the year 2002-03 to 2005 produced by the respondents shows that the land in question was lying vacant and no any crop of any kind was mentioned in it. It means that the claim of applicant in respect of crops in the land in question prior to 2005 is false and fabricated. The issue No.3 is answered accordingly."*

20. The above adverse findings of the Referee Judge have not been challenged by the landowner. In the context of jurisprudence, the fact that the landowner has not challenged the findings of the Referee Judge, which are adverse to him, carries significant legal implications. The principle of 'admission by silence' comes into play here. This principle posits that if a party does not challenge or contest the findings that are unfavourable to them, it is deemed to be an admission of the truth that there was no cultivation over the subject land. It was lying barren at the time of acquisition. In this case, the landowner's failure to challenge the Referee Judge's findings effectively constitutes an admission of those findings. This

tacit acceptance could influence the outcome of the case, as it suggests that the landowner acknowledges the legitimacy of the findings against him.

21. Likewise, the Referee Judge framed issue No.4 whether the applicant raised construction over the subject land. The findings of the Referee Judge on this point are also against the landowner. However, the trial Court summarily held that with respect to the Masjid, the landowner's claim is proved by evidence and photographs. Surprisingly, no such photograph was produced as evidence, nor was any independent witness examined by the landowner to show the existence of a Masjid over the subject land. Moreover, A Masjid has great importance in Islam. It is the house of Allah Almighty and it does not belong to any particular person, sect, etc. Allah Almighty is remembered there day and night. The blessings of Allah Almighty are showered there. All Muslims can gather to offer prayers irrespective of their caste, creed or sects etc. Masjid cannot be used for profitable or commercial purposes. The landowner has not produced documentary proof to show that any Masjid was registered with the concerned department, and a committee to run the affairs of the Masjid was registered and existing at that time.Therefore, such findings of the Referee Judge are not warranted under the law.

22. In the present case, the landowner verbally claimed compensation for his land at the rate of Rs.500,000/- per acre. However, he did not provide any documentary evidence to support his claim regarding the prevailing market rate in the locality during the acquisition proceedings, nor did he produce any documentary evidence before the Referee Judge. Verbal assertions carry no weight in the eyes of the law. On the other hand, the Land Acquisition Officer, upon self-examination, produced a certificate/letter from the concerned Mukhtiarkar, indicating the market value of the land in the vicinity to be between Rs.100,000 to Rs.125,000/- per acre. The

Referee Judge enhanced and fixed the compensation rate at Rs.200,000/- per acre, asserting that the appellant had acquired and taken over the possession of the subject land in 2005, which benefited them. The Referee Judge enhanced the compensation rate without documentary evidence and misread the Award. In the Award, the compensation rate for the subject land was fixed at Rs.156,250/- per acre, and compensation for other damages was set at Rs.31,250/- per acre. In our view, this is justified and correct. In the case of **Abdul Sattar v. Land Acquisition Collector Highways Department and others (2010 SCMR 1523)**, it was held by the Supreme Court of Pakistan with reference to the Judgment of the learned Division Bench of the High Court that:

> *"It is settled law that burden of proving the entitlement to higher rate of compensation is on the land owner. Reference in this context may be made to Government of India and others v. Muhammad Usman and others (1984 CLC 3406). The mere statement of owner without supportive evidence would be inconsequential"*. It was further held by the Supreme Court that: *"In our considered opinion the petitioner has failed to substantiate that the land in question was superior as compared to the other land in the vicinity. It also could not be established that it was a commercial land and it could not be such because construction of brick-kiln installed by the petitioner was not disputed. It would have no bearing on merits of the case as to whether it was functional or otherwise but it indicates the nature of the land which by no stretch of imagination can be termed as commercial. The petitioner also failed even to point out the exact distance between the land in question and that of the road. The learned ASC was asked pointedly that as to how Aks Shajra Kishtwar could be taken into consideration which was never got exhibited hence no evidentiary value could be attached to it but no answer could be given"*.

In the case of **Jind Wadda and others v. General Manager NHA (LM & IS), Islamabad and others (2023 SCMR 1005)**, it was held by the Supreme Court of Pakistan that:

> *"The appellants have failed to produce any independent, trustworthy and credible evidence for their claim qua enhancement of the compensation. The burden of proof in such cases is 'incumbent' upon land-owners [see Land Acquisition Collector v. Muhammad Sultan (PLD 2014 SC 696)]. The appellants were legally bound to produce tangible evidence in support of their plea of enhancement but they failed to discharge their burden. Despite the fact that the learned Referee Judge accepted the reference petition of the appellants and enhanced the compensation from Rs.33,657/- to Rs.96,830/-, the appellants have failed to bring on record any document showing value of the land adjacent and surrounding to the land of the appellants to be more than Rs.96,830/- per kanal. In the case reported as Commandant Indus Rangers v. Zaheer Muhammad Khan (2007 SCMR 1817), it was held that for an enhancement appeal to be successful, the evidence pertaining to the land in question has to be properly ascertained: whether the land is barren or fertile; the surrounding of the land in question; and the state of development etc."*

23. The question arises as to whether the compensation would be payable from the year 2005 or the year 2008. The landowner claims that the possession of the subject land was taken over from him in 2005. However, the Land Acquisition Officer has refuted this in his evidence, stating that possession was not taken over in 2005. Nevertheless, he has admitted in his cross-examination that a notification was issued on June 8, 2005. It is also a matter of record that, according to the Corrigendum dated May 5, 2006, the notification under Section 4 of the Act of 1894, dated June 14, 2005, was recalled, and the subject land was removed from the Land Acquisition proceedings and subsequently included vide Sindh Government Gazette No.RB/LA/2325/2008 Khairpur dated 25.07.2008. Therefore, given these circumstances, the landowner is entitled to compensation from the date of the Notification under Section 4 of the Act of 1894, dated June 14, 2005, until it was de-notified, viz: May 5, 2006. Furthermore, the landowner is entitled to

compensation from the date of the Award, dated November 27, 2008, at the rate specified in the Award.

24. For the foregoing reasons, the captioned appeal is allowed, thereby impugned Judgment and Decree dated 17.5.2014 are set aside with the above modification. Parties are left to bear their costs.

JUDGE

JUDGE

Suleman Khan/PA