

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED MANSOOR ALI SHAH
MR. JUSTICE YAHYA AFRIDI

**CIVIL APPEALS NO. 2186 TO 2199, 59-P, 60-P, 61-P
AND 27-P OF 2017 AND CIVIL MISC. APPLICATIONS
NO. 9482 TO 9495 OF 2019**

(On appeal against the judgment dated 06.11.2017 of the Peshawar High Court, Peshawar passed in R.F.A.No.200-P, 216-P, 12-P, 208-P, 209-P, 210-P, 211-P, 215-P, 212-P, 214-P, 201-P, 213-P, 204-P/2016 & 198-P/2016).

Sarhad Development Authority N.W.F.P : (In CAs.2186 to 2199/2017)
(now KPK) through COO/CEO (Officio)
Nawab Ali Khan & others : (In CA.59-P/2017)
Haroon ur Rasheed & others : (In CA.60-P/2017)
Noor Alam Khan & others : (In CA.61-P/2017)
Khushdil Khan & another : (In CA.27-P/2017)
... **Appellants**

Versus

Nawab Ali Khan & others : (In CA.2186 & 2195 /2017)
Noor Alam Khan & others : (In CA.2187 & 2199 /2017)
Asghar Khan & others : (In CA.2188 & 2192/2017)
Gohar Ali Khan and others : (In CA.2189 & 2190/2017)
Malook Shah & others : (In CA.2191/2017)
Haroon-ur-Rasheed & others : (In CA.2193 & 2197/2017)
Khushdil Khan & others : (In CA.2194/2017)
Usman Gul & others : (In CA.2196/2017)
Muhammad Israel & others : (In CA.2198/2017)
Project Manager, Industrial Estate : (In CA.59-P/2017)
Risalpur, Tehsil & District Nowshera &
others
Collector Land Acquisition, Tehsil & : (In CA.60-P, 61-P & 27-P/2017)
District Nowshera & others
... **Respondents**

For the Appellants : Mr. Shazib Masud, ASC and
Mr. Dil Muhammad Khan Alizai, ASC
Mr. Zair Nawaz, Manager, SDA
(In CAs.2186 to 2199/2017)

Haji Muhammad Zahir Shah, AOR/ASC
(In CAs.59-P to 61-P/2017 & 27-P/2018)

For the applicants : Mr. Dil Muhammad Khan Alizai, ASC
(In CMA.9482 to 9495/2019)

Respondent SDA : Mr. Shazib Masud, ASC
Ch. Akhtar Ali, AOR
(In CAs.59-P to 61-P/2017 & 27-P/2018)

Respondent No.1 : In-person
(In CAs.2193 to 2198/2017)

On behalf of Respondent No.2 : Mr. Zahid Hussain, Tehsildar Nowshera
(In all cases)

On behalf of Land Acquisition KPK: : Barrister Qasim Wadood, Addl.AG. KPK
(In CAs.59-P-61-P/2017 and CA.27-P/2017)

Other Respondents : N.R.
(In all cases)

Date of Hearing : 07.11.2019

JUDGMENT

YAHYA AFRIDI, J. – Through these direct appeals, Sarhad Development Authority, Khyber Pakhtunkhwa (“the **Acquiring Authority**”) has challenged the judgment of the Peshawar High Court, Peshawar dated 06.11.2017 passed in R.F.A Nos. 200-P, 216-P, 12-P, 208-P, 209-P, 210-P, 211-P, 215-P, 212-P, 214-P, 201-P, 213-P, 204-P/2016 and 198-P/2016.

2. The Acquiring Authority, to expand the Nowshera Industrial Estate, Risalpur (“**Project**”), situated in *Mauza Mera Kander* District Nowshera, moved for the acquisition of land under the enabling provisions of Land Acquisition Act, 1894 (“**Act**”). In furtherance thereof, notification dated 25.05.2004 under Section 4 *ibid* proposed to acquire 1205 *kanals* and 17 *marlas*, which was further enhanced to 1476 *kanals* and 18 *marlas* (“**Acquired Property**”) vide notification dated 04.11.2004 (“**Notification**”). The acquisition proceedings, which followed thereafter, culminated in

Award No. 495-502/DOR/ACQ dated 16.05.2007 ("Award"), *inter alia*, in the terms that:

"Cost of the land as determined by the field Revenue as under:

- (i) ***Cost of the Land measuring 1476 Kanal 18 Marla Rs.4,11,55,590/-***
- (ii) ***15% compulsory acquisition charges.***
Rs.61,73,338/50
Total Rs.4,73,28,928/50

Under the circumstances explained above, I hereby pass an award for Rs. 4,73,28,928/50 in respect of the above land. The land owners shall be entitled for their share as entered in the Register Haqdaran-e-Zamin in the ownership column and in case of shamilat Deh, according to HASB-E- RASAD KEWAT of Muza Mera Kander, Tehsil and District Nowshera.

All the Government taxes will be paid by the acquiring Department at the time of attestation of mutation"

3. The landowners being dissatisfied with the above Award moved references to the Referee Court under the enabling provisions of the Act for enhancement of the compensation of Acquired Property. The Referee Court *vide* judgment dated 28-10-2009, after considering the evidence of the parties and report of the local commissioner ("**Commission Report**"), adjudged the compensation for the Acquired Property to be Rs.5,000/- per *marla* along with 15% compensation charges and 6% simple interest from the date of taking possession of the property till the actual payment. This decision of the Referee Court was challenged by the Acquiring Authority and the private landowners ("**both parties**") before the Peshawar High Court, and the same was set aside *vide* its common judgment dated 23.12.2010, wherein it was held that:

"The contentions of the learned counsel for both the parties appear to be correct as the report of the Commissioner is not supported by any cogent and convincing oral as well as documentary evidence. Even the evidence of the owners is not of a nature as could be considered of unquestionable worth for determining the market value of the property. We, thus, allow these appeals, set aside the impugned judgments and sent

back the cases to the learned Referee Judge for decision afresh after issuing a fresh Commission at the expense of the respondents. In the circumstances of the case, the appellants as well as the respondents shall be at liberty to adduce additional evidence in support of their claim."

4 After remand, the compensation of the Acquired Property was again considered by the Referee Court, and relying upon the findings of another Commission Report adjudged the same to be Rs.22,000/- per *marla*. Both parties being dissatisfied with the said determination of the compensation, impugned the same before the Peshawar High Court, which *vide* judgment dated 30-10-2014, set aside the decision of the Referee Court, in terms that: -

"The order of this Court has not been complied with properly and report of Local Commission relied upon is lacking the evidence in support of opinion framed by the learned Local Commissioner on points No. 1 to 4 as mentioned in the report Ex.CW.1/1 and has not based his opinion upon cogent & convincing evidence including averages rather opted to take the mutation in isolation along with un-registered documents which are not safe to be relied upon, rather the cogent oral and documentary evidence has to be considered for the purpose of assessment of market value/compensation. As such the report commission which was without any substance was wrongly relied upon by the trial Court thus the findings of Referee Court are not sustainable.

8. In view of what has been observed above, we allow all the appeals, set aside the judgment and decree dated 15.12.2011, by remanding the case to the trial Court with the direction to appoint a fresh Local Commission for submitting report with clarity about prevailing rate at the time of possession and notification strictly in accordance with parameters given in Section 23 of the Land Acquisition Act, 1894. The learned Referee Court shall decide the matter afresh in the light of available evidence along with report commission and after hearing the parties within a period of two months positively."

5. Again after the second remand, yet another commission was constituted, and the report so submitted recommended the value of the Acquired Property to be Rs.20,000/-

per *marla*, which was accepted by the Referee Court, and so the compensation of the Acquired Property was determined to be Rs.20,000/- per *marla*. Yet again, the decision of the Referee Court was challenged by both parties before the Peshawar High Court, and it decided the matter *vide* the impugned judgment dated 06.11.2017, whereby the Court held that: -

"12. For what has been discussed and deriving wisdom from the judgments of the Hon'ble Supreme Court (supra), the appeals of the landowners are allowed. The impugned judgments of the learned Referee Court are modified in the manner that the market price of per marla acquired land is fixed Rs.23,684/-. The appeals of the Acquiring Department (SDA), being merit less are hereby dismissed."

6. Both parties being aggrieved of the above impugned-decision, moved the appellate jurisdiction of this Court, while others claiming to be landowners of the Acquired Property have moved applications to be impleaded as parties in the instant appeals.

7. After carefully considering the valuable submissions of the learned counsel for the Acquiring Authority, two crucial issues require resolution in the instant connected appeals: firstly, whether sale transactions subsequent to the issuance of the notification under Section 4 of the Act could be considered in determining the amount of compensation to be awarded to landowners for the Acquired Property; and secondly, whether this Court in its present jurisdiction, could for the first time determine disputed question of facts, in particular, whether the sale transactions relied by the Courts below were from a different *mauza*, and that the third commission report based its valuations

on sale transactions relied by the previous commissions, which had been rejected by the High Court in its earlier decisions.

Object envisaged under the Act

8. Before we consider the above issues, it would be appropriate to first appreciate that the Act¹, aims to provide the procedure for compulsory acquisition of privately owned land needed for public purposes and for companies, and to this end, the mode and manner of determination of the amount of compensation to be awarded to the rightful owners of the Acquired Property. The legislature in its wisdom has provided in the Act, an inbuilt mechanism for redressal of grievances of persons interested in the land being compulsorily acquired. Firstly, we note that the formal declaration of the Provincial Government to acquire a particular land² only takes place after the objections of interested persons, if any, are addressed by the competent authority³. This protection afforded to the private landowners under the Act surely bolsters their fundamental right enshrined under Article 24 of the Constitution, as has been earlier dilated upon by this Court⁴. Secondly, any person aggrieved of the measurement of the acquired property, the amount of or to whom the compensation is payable, or the apportionment of the compensation among the

1 Preamble of the Act.

2 Section 6 of the Act.

3 Section 5-A of the Act.

4 **Sub. (Retd.) Muhammad Ashraf v. District Collector Jhelum and others** (PLD 2002 SC 706) in terms that:

"...under Article 24 of the Constitution is that no private property can be acquisition save in accordance with law and that too for a public purpose and on payment of compensation. (Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457). It can thus be concluded that a land can be acquired for public purpose subject to payment of compensation to be determined by the competent forums provided under the Act."

persons interested, may in writing seek the Collector to refer the same for determination by the Referee Court⁵.

Sale transactions to be considered in determining the Compensation

9. To address the first contention raised by the learned counsel for the appellants, we note that Section 23 of the Act provides for the essential criteria to be considered for determining the amount of compensation to be awarded to the landowners for compulsorily acquiring their property. The relevant provision of the said section, applicable to the present cases, as it read before NWFP Ordinance No.XVII of 2001 (“**Ordinance**”), provided that:

"23. Matters to be considered in determining compensation.--

*(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration **Firstly, the market-value of the land on the date of publication of the notification under section 4, sub-section (1).***

(emphasis provided)

10. The Ordinance introduced various amendments in the Act, and the one relevant to the present matter, was in Section 23 (1) (“**Amendment**”), which since then remains to read:

"23. Matters to be considered in determining compensation.--

*(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration **Firstly, the market-value of the land on the date of taking possession of the land,***

(emphasis provided)

11. What is interesting to note is that, unlike Khyber Pakhtunkhwa, in the other three provinces, Section 23(1) of the Act has not been amended, and the “market value” of the land, as originally enacted, is determinable on basis of the value prevailing on the date of gazette publication of the notification under Section

5 Section 18

4(1) *ibid*. Thus, it is crucial to note that since 2001, when the Amendment was introduced in the Act, it is only in Khyber Pakhtunkhwa that, the determining criteria for deciding the “market value” of the property proposed to be acquired within the contemplation of Section 23(1) has been the prevalent value of land on the date of taking possession of the said property, and not the date when the notification under Section 4 (i) *ibid* was published in the official gazette. As far as transfer of possession of the acquired property is concerned, we note that Section 16 of the Act, expressly mandates that the possession thereof is to be taken by the acquiring authority, after the announcement of the award⁶, unless there are circumstances, as provided in Section 17 *ibid*, warranting taking the said possession of the acquired property at an early stage, which was admittedly not the case in the present appeals. In fact, in the present cases, the actual date of transfer of possession of the Acquired Property to the Acquiring Authority has not been brought on record, and thus, the High Court was legally correct in its cautious approach: to consider the “market value” recorded in sale mutations of similar properties dated after the publication of the Notification; and to discard sale mutations taking place subsequent to the date of the Award.

12. To sum up the first contention of the learned counsel for the appellants, we note that, the Amendment in the Act, peculiar to acquisition of property in Khyber Pakhtunkhwa, escaped his attention. Resultantly, his said contention being bereft of legal merit is dispelled.

6 Section 11 of the Act

13. Before parting with the issue in hand, it is pertinent to note that, precedents reflect a consistent trend to also consider for the purposes of determining the "market value" of property to be acquired, its "potential value" or essentially, the future use to which the said property can be put to. And in doing so, there is judicial consensus in considering sale transactions of similar nature of immovable property in the adjoining *khasras* or even *mauzas* taking place even after the date of publication of the Notification under section 4(1) of the Act for adjudging the "market value", and in doing so to finally fix the amount of compensation to be awarded to the landowners for the property acquired.

14. This Court in MST. IQBAL BEGUM's case (PLD 2010 Supreme Court 719) after tracing its earlier decisions on the issue in hand, declared that:

"The principles laid down for determination of compensation reflect anxiety of law-giver to compensate those deprived of property adequately enough so as to be given gold for gold and not copper for gold." Various factors have to be taken into consideration i.e. the size and shape of the land, the locality and its situation, the tenure of property, the user, its potential value, and the rise or depression in the value of the land in the locality and even in its near vicinity. In our view real, proper and potential value, keeping in view all the relevant factors have been determined and it is unexceptionable.

15. Later, this Court in BEGUM AZIZA'S case (2014 SCMR 75), further clarified and expanded the scope of considering sale transactions, as to its time and location, for determining the amount of compensation to be paid for the acquired land in terms that:

"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.....

While determining the value of the land acquired by the Government and the price which a willing purchaser would give to the willing seller, only the past sales should not be taken into account but the value of the land with all its potentialities may also be determined by examining (if necessary as Court witness) local property dealers or other persons who are likely to know the price that the property in question is likely to fetch in the open market.....The value of the land of the adjoining area which was simultaneously acquired and for which different formula of compensation has been adopted, should be taken into consideration.....The notification under section 4 of the Act was published on 27.04.1981; two corrigenda were issued on 6.10.1982; notification under section 5 was published on 20.7.1983; the declaration under section 6 was published on 1.2.1984 and the award was announced on 28.03.1985. Thus it took four years for appellants to complete the acquisition proceedings. The prices may have escalated during this period and this escalation has to be kept in view while assessing the potential value of the land. This is in line with the law laid down by this Court in Province of Sindh v. Ramzan (PLD 2004 SC 512), Abdul Majeed etc v. Muhammad Subhan etc. (1999 SCMR 1245 at 1255) and Pakistan Burma Shell Limited v. Province of N.-WFP etc (1993 SCMR 1700)."

16. More recently, this Court in **MST. SURRAYA MEHMOOD JAN's case** (2015 SCMR 28), has confirmed its earlier views in terms that:

"While undertaking this exercise, contemporaneous transactions of the same, adjoining or adjacent as well as the land in the same vicinity or locality; in dissenting precedents, may be taken into account. An award of compensation of a similar, adjacent, adjoining land or in respect of the land acquired in the same vicinity or locality cannot be ignored. The classification of the land in the Revenue Record cannot be the sole criteria for determining its value and its potential i.e. the use of which the said land can be put, must also be a factor. In this behalf, the use of the land in its vicinity needs to be examined"

17. Thus, in view of the above, it would be safe to state that not only in Khyber Pakhtunkhwa, but even in other three provinces, where Section 23(1) of the Act has not been amended, it is noted that: firstly, the value of similar land in the adjoining *khassas* and *mauzas* to the acquired land was taken into

consideration for determining the amount of compensation to be awarded to owners of the acquired property; and secondly, the escalation of price of land during the acquisition period till its culmination in issuance of the award could be taken into consideration; and thirdly, for assessing the "potential value" of the acquired land, the most critical factor, which is to be kept in mind is the future utility of the proposed acquired land, keeping in view the availability of facilities for its said utilization; and finally, there can be no mathematical formula set for the determination of the compensation due to the landowners for the compulsory acquisition of their property. And thus, various factors depending on the circumstances of each case would cumulatively form the basis for determining the "market value" of the acquired land within the contemplation of Section 23(1) of the Act.

Jurisdiction to determine disputed questions of fact not agitated earlier

18. Now coming to the next contention of the learned counsel for the Acquiring Authority. It has been urged that the Courts below had considered sale mutations of property having no nexus to the location of the Acquired Property, and that the same had already been rejected by the earlier decisions of the High Court. In this regard, when the learned counsel for the Acquiring Authority was confronted to point out whether these grounds were taken by the Acquiring Authority in its objections to the last Commission Report or as a ground of appeal before the High Court leading to the impugned decision, he was unable to positively do so. It is by now settled⁷ that this Court in its appellate jurisdiction,

⁷ ALI KHAN's case (1968 SCMR 565), ADEEBA MUSHARRAF's case (1993 SCMR 2354) and Malik GHULAM HUSSAIN's case (PLD 1971 Supreme Court 573).

would generally not determine any question of fact, that has not been pleaded or raised by the parties at any stage before the learned Referee Court or the High Court, and is for the first time raised in appeal before this Court. Hence, we are not inclined to enter into the disputed questions of fact raised for the first time before this Court. Accordingly, the second contention of the learned counsel for the Acquiring Authority is also devoid of legal merit, and so declined.

19. For the reasons stated hereinabove, we are of the view that the impugned decision rendered by the High Court is in accord with the settled principles of the law and has also correctly appreciated the evidence on the record, and thus, warrants no interference by this Court. These appeals being devoid of merit are dismissed.

CMA. NOS.9482 TO 9495 OF 2019:

Learned counsel for the applicants does not press these civil Miscellaneous Applications and wishes to withdraw the same in order to pursue the remedy before the proper forum. Accordingly, the same are dismissed as withdrawn.

Judge

Judge

Islamabad
07.11.2019

Approved for reporting.