

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

1. Jewelarts Limited,

No. 79, 5<sup>th</sup> Lane,

Colombo 03.

2. Jewelarts Construction & Engineering  
Limited,

No. 79, 5<sup>th</sup> Lane,

Colombo 03.

**APPELLANTS**

**CA Case No. BOR 0001/09**

**(Board of Review)**

**Board of Review No. 87/2005 CL Vs**

C. Ranasinghe,

Land Acquiring Officer,

Greater Colombo Flood Control and  
Environmental Development Project,

Thimbirigasyaya Divisional Secretary's  
Division,

Land Acquisition Project Office for  
Controlling Floods in the Greater  
Colombo Area,

No. 3, Sri Jayewardenapura Mawatha,  
Rajagiriya.

**RESPONDENT**

**AND NOW BETWEEN**

1. Jewelarts Limited,

No. 79, 5<sup>th</sup> Lane,

Colombo 03.

2. Jewelarts Construction & Engineering

Limited,

No. 79, 5<sup>th</sup> Lane,

Colombo 03.

**APPELLANTS-APPELLANTS**

1. C. Ranasinghe,

Land Acquiring Officer,

Greater Colombo Flood Control and

Environmental Development Project,

Thimbirigasyaya Divisional Secretary's

Division,

Land Acquisition Project Office for

Controlling Floods in the Greater  
Colombo Area,

No. 3, Sri Jayewardenapura Mawatha,

Rajagiriya.

1A. C. W. Ranasinghe,

Land Acquiring Officer,

Greater Colombo Flood Control and

Environmental Development Project,

Thimbirigasyaya Divisional Secretary's

Division,

Land Acquisition Project Office for

Controlling Floods in the Greater  
Colombo Area,  
No. 3, Sri Jayewardenapura Mawatha,  
Rajagiriya.

**RESPONDENT-RESPONDENT**

<b>BEFORE</b>	:	Shiran Gooneratne J. & Dr. Ruwan Fernando J.
<b>COUNSEL</b>	:	Faisz Mustapha, P.C. with Razik Zarook, P.C., Thusitha Nanayakkara, Chankya Liyanage, Thushani Machado, Rohana Deashapriya for Appellants-Appellants
		Chaya Sri Nammuni, S.S.C. for Respondent-Respondent
<b>ARGUED ON</b>	:	19.06.2020, 29.07.2020 & 25.08.2020
<b>WRITTEN SUBMISSIONS</b>	:	22.05.2019, 02.08.2019 & 12.10.2020 (by the Appellants-Appellants 21.01.2020 (by the Respondent- Respondent)
<b>DECIDED ON</b>	:	16.11.2020

## **Dr. Ruwan Fernando, J.**

### **Introduction**

[1] This is an appeal from the decision of the Land Acquisition Board of Review dated 08.12.2008, awarding compensation to the Appellants-Appellants in respect of the contiguous allotments of land depicted as Lots 1, 4 and 5 in the Preliminary Plan bearing No. CO 775 dated 12.07.1997 marked as A6A and R3 and in the Tenement List marked as A6B and R3Aa and R3B at the proceedings before the Board of Review.

### **Background**

[2] The contiguous allotments of land depicted as lots 1,4 and 5 in the Preliminary Plan bearing No. Co 775 was vested in the State in terms of an order made under the proviso to section 38 (a) of the Land Acquisition Act No. 09 of 1950 as amended and published in the Government Gazette (Extraordinary) No. 775/3 dated 12.07.1993. The subject property is situated next to the Port access road bearing Assessment Nos. 579/2 and 579/3, Sirimavo Bandaranayake Mawatha in Madampitiya in Ward No. 6, Bloemendhal within the Municipal Limits of Colombo.

[3] It is not in dispute that the relevant date of valuation is **11.01.2002**, being the date on which the notice under section 7 of the Land Acquisition Act was published by the Acquiring Officer in the Government Gazette. The Appellants-Appellants (hereinafter referred to as the Appellants) who claimed the subject land, forwarded a claim of Rs. 656,250,000/- at the rate of Rs. 1,500,000/- per perch for 437.5 perches.

[4] The valuation of the Acquiring Officer was for a total sum of Rs. 65,000,000/- for lots 1, 4 and 5 depicted in the Preliminary Plan and the Appellants were awarded a sum of Rs, 43,431,625.40 for 430.08 perches at the rate of 99,586.41 per perch as the market value after deductions subject to Mortgage in favour of the Bank of Ceylon.

#### **Appeal to the Land Acquisition Board of Review**

[5] Being aggrieved by the said amount of compensation awarded by the Land Acquiring Officer (hereinafter referred to as the Respondent), the Appellants made an appeal to the Land Acquisition Board of Review and claimed a sum of Rs. 210,739,200/- calculated at the rate of 490,000/- per perch for 430.08 perches after deducting 10% for developer's profit, surveying, risks etc. and present value of Rs. 1/- deferred by 1 year @ 10% of the net value as at 11.01.2002, being the relevant date (Vide- Appellants' valuation marked "A1").

#### **Inquiry before the Land Acquisition Board of Review**

[6] At the inquiry, the following persons testified before the Land Acquisition Board of Review on behalf of the Appellants and produced documents marked A1 to A16:

1. Abdul Malik, Valuer;
2. M. M. Kaleel, Chairman of the Appellants' Company.

On behalf of the Respondent, N. A. S. Wasantha Kumara, the District Valuer testified and produced documents marked R1 to R12a.

#### **Decision of the Land Acquisition Board of Review**

[7] The Land Acquisition Board of Review considered the following two matters before the decision on the valuation was made:

1. Physical condition of the land acquired at the time of acquisition;

2. Number of unauthorized households (squatters) living in the land acquired at the time of the acquisition.

[8] The Land Acquisition Board of Review (hereinafter referred to as the Board of Review) disregarded the State valuation of Rs. 65,000,000/- and the Appellants' valuation of Rs. 210,739,200/- and proceeded to value the subject property on Hypothetical Development Method. Accordingly, the Board of Review by its decision dated 08.12.2008 enhanced the compensation to Rs. 56,317,244.96 calculated at the rate of Rs. 130,946/- per perch for 430.08 perches after deductions. For the purpose of gross realisation, the initial value of the land has been taken by the Board of Review as Rs. 225,000/- per perch.

[9] The Board of Review adopted Hypothetical Development Method and proceeded to value the subject property as follows:

Land 649.70 @ Rs. 225,000/- per perch - Rs. 146,482,500/-  
(Gross realisation)

**Less- Cost of Development**

(i) to obtain vacant possession 22 unauthorised tenements @ Rs. 100,000/- per tenement - Rs. 2,220,000

(ii) cost of filling

Lot 4, 4 ft. filing - Rs. 936,490

(iii) 30% gross realisation for cost of development, survey fees, cost of finance, development profit for taking the risk, etc. - Rs. 43,854,750

Rs. 46,991,240

Rs.99,191,260/-

P.V. of one rupee at 12% in one-year time

0.892

Residual figure, available to the developer to purchase the land which includes the legal fees, stamp duty and amount to be paid to the land as its value

Rs. 88,478,603.92

Value of land is assumed as Rs. X/- and legal fees, etc. as 4% of Rs. X/-	
X-0.04X =	-
Value of land (X)	-
	Rs. 88,478,603.92
	<u>Rs.88,478,603.92</u>
	1.04
	Rs. 85,075,580/-
Value of the corpus acquired Say -	Rs.85,075,600/-

Appellants share as per Section 10(1)(a) 430.08 perches is Rs.  
56,317,244.96.

### **Appeal to the Court of Appeal**

[10] Being aggrieved by the decision of the Board of Review, the Appellants have appealed to the Court of Appeal under section 28 of the Land Acquisition Act No. 9 of 1950 as amended. The Appellants have sought to set aside the said decision of the Board of Review and enhance the amount of compensation awarded by the Board of Review from Rs. 56,317,244.96 to a sum of Rs. 210,739,200/- together with usual interest in terms of section 35 of the Land Acquisition Act.

### **Scope of the Appeal to the Court of Appeal**

[11] Before dealing with the grounds of appeal that have been urged by Mr. Faisz Mustapha, the learned President's Counsel for the Appellants, it is necessary to observe that in terms of Section 28(1) of the Land Acquisition Act, an appeal can lie to the Court of Appeal from a decision of the Board of Review only upon a question of law. In *Mahawithara v. Commissioner of Island Revenue* 64 NLR 217, the Supreme Court followed the dicta of Gadjendragadkar J. In *Naidu & Co. v. The Commissioner of Income Tax* 1959 A.I.R. 359 (S.C.) which dealt with the corresponding functions of the High Court in India upon references of

questions of law under section 66 of the Indian Income Tax Act, 1922. Having followed the dicta of Gadjendragadkar J., our Supreme Court held at page 223 that it is open to the Supreme Court to reconsider the correctness of the inferences drawn by the Board of Review (Board of Review constituted under the Income Tax Ordinance) on a question law as to the assessee's intention only:

- (a) if that inference has been drawn on a consideration of inadmissible evidence, or after excluding admissible and relevant evidence;
- (b) if the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence or;
- (c) if the conclusion drawn from relevant facts is not rationally possible and is perverse and should therefore be set aside.

[12] Since an appeal on a question of law is intended to be a beneficial remedy, the Supreme Court in *Collettes Ltd v. Bank of Ceylon*, (1982) 2 Sri LR, 514 considered the question: what constitutes a "question of law" within the meaning of the provisions of Article 128 (1) of the Constitution. In *Collettes Ltd v. Bank of Ceylon* (supra), their Lordships of the Supreme Court considered the following questions as "questions of law":

- (a) The proper legal effect of a proved fact is necessarily a question of law;
- (b) Inferences from the primary facts found are matters of law;
- (c) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in

certain other respects is a question of law. Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law;

- (d) Whether the evidence is in the legal sense sufficient to-support a determination of fact is a question of law;
- (e) If in order to arrive at a conclusion on the facts, it is necessary to construe a document of title or correspondence, then the construction of the document or correspondence becomes a question of law;
- (f) Every question of legal interpretation which arises after the primary facts have been established is a question of law;
- (g) Whether there is or is not evidence to support a finding, is a question of law.
- (h) Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect, of such provision are all questions of law;
- (i) Whether the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law.

[13] The Court of Appeal in *Amarasinghe v. Acquiring Officer, Kegalle*, (2008) 1 Sri LR 120, applied the tests adopted by the Supreme Court in *Collettes Ltd v. Bank of Ceylon* (*supra*), to an appeal filed under section 28 of the Land Acquisition Act and observed that it would be sufficient for the question or questions of law to be stated in the averments in the Petition of Appeal which would be easily discernable and apparent on the face of the Petition.

[14] Applying the principles that have been laid down by the Supreme Court in *Mahawithara v. Commissioner of Island Revenue* (*supra*) and *Collettes Ltd v. Bank of Ceylon* (*supra*), let me now proceed to consider

the questions of law that have been averred by the Appellants in their Petition of Appeal and the questions of law relied on by Mr. Mustapha in his oral submissions.

### **Questions of Law urged by the Appellants**

[15] Although in the Petition of Appeal, several questions of law had been raised, at the hearing, Mr. Mustapha confined his submissions on the following questions of law averred by the Appellants in the Petition of Appeal:

1. The Board of Review has failed to consider the relevant evidence of the Appellants' Valuer in regard to the Appellants' valuation due to misdirection on the applicable law and wrongful reliance on the evidence of the State Valuer in regard to the comparable sales relied upon by the State Valuer;
2. The Board of Review has failed to properly analyse and judicially evaluate the relevant evidence led before the Board of Review and consequently, misdirecting itself in the application of the principles governing the determination of the value of the acquired land;
3. The Board of Review has made a manifest error and a serious misdirection in adopting the standard of proof beyond a reasonable doubt and not upon a balance of probability;
4. The Board of Review has failed to give reasons for the rejection of the valuation of the Appellants and thus, the calculations made by the Board of Review are arbitrary, capricious and without any reasons.

[16] On a perusal of the Petition of Appeal and the application of the principles laid down in the said two Supreme Court decisions, it is crystal

clear that the averments contained in paragraph 7 (a) -(j) of the Petition of Appeal could be considered as questions of law in terms of Section 28 of the Land Acquisition Act.

### **Market Value**

[17] The crucial question that arises is what was the reasonable market value which the acquired land was capable of fetching as at the date of publication of the notice under Section 7, namely, 11.01.2002 being the relevant date. The standard method of determination of the market value of any acquired land is by the valuer evaluating the land on the date of valuation, being the relevant date, on which notice under Section 7 was published in the Government Gazette acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price.

[18] “Market Value” means the value of land determined in accordance with Section 46 (1) of the Land Acquisition Act. In terms of Section 46 (1) of the Act, the amount of compensation to be paid to any person for the acquisition of any land under the Land Acquisition Act shall be based on the market value of that land.. Section 45 (1) of the Act defines the market value as follows:

(1) For the purposes of this Act the market value of a 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 realized 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**.

[19] Thus, the market value for the purpose of the Act shall be the amount which the land might be expected to have realized if sold by a

willing seller in the open market as a separate entity on the date of publication of the notice under section 7 of the Act in the Gazette. The Indian Supreme Court in *Maj. Gen. Kapil Mehra v. Union of India* (UOI) 2014 (145) DRJ497 held that while fixing the market value of the acquired land, the Land Acquiring Officer is required to keep in mind the following factors:

1. Existing geographical situation of the land;
2. Existing use of the land;
3. Already available advantages, like proximity to National or State Highway or road and/or developed area; and
4. Market value of other land situated in the same locality/village/area or adjacent or very near to the acquired land (comparable sales).

[20] Since these factors are not exhaustive, let me now reformulate the factors that are required to be considered by a valuer for the determination and fixing of a reasonable market value which the acquired land is capable of being fetched as follows:

1. The existing geographical situation of the land and proximity to developing activity zones (location of the land);
2. Physical condition, including size, level, shape, nature of soil and any encumbrances (condition of the land);
3. Economic/commercial potential and capacity for a higher development potential within the locality;
4. Already available advantages and disadvantages, like proximity to National or State Highway or road and/or developed area and Road Frontages;
5. Highest and best and the most profitable use to which it may be devoted in the reasonably near future (notional development);

6. The existing use of the land (whether income method/investment method or residual method).
7. Proposed use of the land by the State and its economic advantages to the State and investors;
8. The market value of other land situated in the same locality/village/area or adjacent or very near to the acquired land (comparable sales);

#### **Geographical location**

[21] The Appellants' Valuer has stated in evidence that the land acquired is located as per the City Development Plan in the Port Related Activity Zone and that it is located in close proximity to the Port of Colombo at a distance of 500 meters. The State Valuer has not challenged the evidence of the Appellants' Valuer on that point. According to the Summary of Valuation produced by the State Valuer marked R12a, the land is located next to the Port Access Road bearing Assessment No. 579/2 and 579/3 Sirimavo Bandaranayake Mawatha in Madmpitiya in Ward No. 06 Bloemendhal within the Municipal Limits Colombo District Western Province.

[22] The State Valuer has further stated in his "Summary of Valuation" marked R12a that the area in which the subject property is located has been described as the Port Related Activity Zone by UDA in the Colombo City Development Plan. The State Valuer in his "Summary of Valuation" has stated that there are two access roads to the acquired land, one from the Prince of Wales Road and (presently, Sirimavo Bandaranayake Mawatha and the other from Stadiumgama road. The State valuer has described the access road as follows:

"From Diwulagama Junction, proceed along the jethawana Road up to the Ingurukada Junction for about 1.2 K.m. the subject properties

are situated with about 15 ft. front of Prince of Wales Road. However, as a separate entity lot No. 04, has no access along said road. Lot 4 can be reached from Colombo fort travel up to end of Stadiumgama road and turn right to about 20 ft. wide road and proceed about 111 meters to reach to the property".

[23] It is clearly seen from the location sketch marked R10 and A5 that the subject property is located in front of Sirimavo Bandaranayake Mawatha and the Port Access Road. Further, there is another access road to the acquired property from the Stadiumgama road as shown in the Preliminary Plan marked R3, R2, and R12a (Summary of Valuation). Accordingly, there is no dispute that the subject land is located in a Port Related Activity Zone at a distance of about 500 meters from the Colombo Port with 3 access roads and two road frontages.

[24] At the hearing, the learned Senior State Counsel submitted that the Board of Review had taken the location of the subject land within the Port Development Area. A perusal of the decision of the Board of Review reveals that the Board of Review has merely stated that the parties agreed that the subject land is located within the Port Related Activity Zone and there is a development potential. There is nothing in the decision of the Board of Review to support this view that apart from the mere reference that the Board of Review had taken into account the location of the subject land within the Port Related Activity as a factor when the Board decided without reasons that the value of the subject land at the relevant date was only Rs. 225,000/-, apparently on the basis of the sale S1 relied on by the State, which is located out of the Port Related Activity Zone.

[25] The Board of Review has, however, not taken the advantageous location of the subject property within the Port Related Activity Zone as a factor in considering and fixing the market value of the subject property

when it decided that the value of the land was only Rs. 225,000/- for the gross realisation.

### **Commercial and Economic Potential of the Subject Property**

[26] The Appellants' Valuer has stated in evidence that the location of the subject property has been approved and designated by the UDA as a Port Related Activity Zone as per the City of Colombo Development Plan. The State Valuer has confirmed in his evidence that the acquired land as per the Gazette No. 935/6 dated 06.08.1996 published in 1999 (A13) could only be utilised for Colombo Port Development Activity (pages 52 and 57).

[27] The Appellants' Valuer has further stated in evidence that as the subject property in extent of 643.92 perches is located in the Port Development Activity Zone, the subject property could be utilised for a Warehouse Complex, Container Terminal or any such mega development business activity such as the Oil Refinery (page 5) and this piece of evidence has not been challenged by the State Valuer in his evidence.

[28] Although the subject property has been acquired for Greater Colombo Flood Control and Environmental Improvement Project, as per the Cabinet Memorandum marked A14, the State Valuer has clearly reported in "Summary of Valuation" and stated in evidence that the subject property is to be utilised only for a Store Complex. Page 1 of the "Summary of Valuation" reads as follows:

"The area which the subject property located is named as Port Related Activity Zone by UDA in Colombo City Development Plan in 1999. This activity zone was established specially to accommodate the Port related activities to improve the Colombo Ports into a very high Standard. So, the subject properties to be developed as a storage complex".

[29] The State Valuer has further confirmed his position in his evidence that the valuation was done on the basis that the subject land would be utilised only for a Container Storage facility within the Port Development zone:

මෙම ඉඩම අත්කර ගත් පසු අදාල ඉඩම පර්වස් 12 ක ඉඩමක් ලෙස විකුණා ඇත. අනියාවක සමාගම එය විකුණා ඇත. එම විකුණා අත්කර ගැනීමෙන් පසුවයි සිදුවන්නේ. අදාල ඉඩම අත්පත් කර ගැනීමෙන් පසු විකුණා ඇත. මෙය දැනගත් පසු ජෙල්ටෙල් සමාගම නඩු දමා ඇත. මෙම විකුණුම බල රහිත කර ඇත. ඒ වන විට එහි කුලින්ක් සකස් කර ඇති අතර මෙම ඉඩම පහත් බිම් මණ්ඩලයට අත්පත් කරගෙන ඇත. ඒ අනුව එම සමාගමේ කුලිනා එහි ඇත. ඒ අනුව වරාය සංවර්ධනය ප්‍රදේශය තුළ කන්ටේනර් කටයුතු වලට එය සංවර්ධනය කළ යුතුයි. වරායට සම්බන්ධ ගොඩා කටයුතු සඳහා කන්ටේනර් බහාලුම් සඳහා පමණක් මේ පදනම මත තමා තක්සේරුව කර ඇත්තේ.....

[30] It is crystal clear that the entire subject property is to be developed by the State for a period of 1 ½ years as a container storage complex only within the Port Development Zone with investment as an income generating project. The subject land has a higher commercial value for a Container Storage facility with its close proximity to the Port of Colombo at a distance of 500 meters with major access roads (Sirimavo Bandaranajake Mawatha and the Port Access Road within the Colombo Port Activity Zone.

[31] As noted in paragraph 24, apart from the mere reference in the decision that both Valuers were of the view that there is a development potential of the subject land, the Board of Review has failed to take into account the commercial value and the economic demands of the subject property within the Port Development Activity Zone as a factor for the determination of the market value of the subject property.

#### **Condition of the Land and Standard of Proof adopted by the Board of Review**

### (i) Burden of Proof

[32] At the hearing, Mr. Mustapha strenuously contended that the Board of Review has made a fundamental error with regard to the standard of proof in rejecting the evidence of the Appellants' witnesses on the basis that the Appellants' witnesses had failed to prove **beyond a reasonable doubt** the nature of the land acquired when the yardstick is on the balance of probability. The Board of Review has rejected the evidence of the Appellants' witnesses on the ground that they had failed to prove beyond a reasonable ground the nature of the land for the following reasons:

1. The Appellants Valuer could not identify the land owned by the Appellants out of the acquired land as he had only stated that approximately 3 to 3 ½ acres of land is good while the balance is not good;
2. The Appellants' Valuer could not identify the area owned by the Appellants out of the acquired land;
3. The Appellants could not convince the Board about the dates of the photographs and the nature of the land at the time of the acquisition.

[33] It is settled law that the burden of proof is on the claimant to establish that the land is possessed of advantageous features and therefore, it is capable of fetching higher market value prevailing as at the relevant date. In the Indian case of *Gafar & Ors v. Moradabad Development Authority AIR 2007 SCW 5372*, the Supreme Court of India held that (i) the burden is on the claimants to establish that the amounts awarded to them by the Land Acquisition Officer are inadequate and that they are entitled to more; and (ii) that burden had to be discharged by the claimants and only if the initial burden was discharged, the burden shifted to the State to justify the award.

[34] As in a civil case, the burden on the Appellants is only on a preponderance of the evidence. As "preponderance of the evidence" and "beyond a reasonable doubt" are different standards, that require different amounts of proof. However, the Appellants have no burden whatsoever, to prove their claim beyond reasonable doubt as decided by the Board and all what they have to prove on a balance of probability is that the amounts awarded to them by the Land Acquisition Officer are inadequate and that the acquired land ought to be afforded a higher value. In the present case, the Board of Review adopted the standard of proof beyond a reasonable doubt in rejecting the evidence of the Appellants' Valuer and its Chairman in violation of the fundamental principles of evidence as correctly submitted by Mr. Mustapha.

## **Rejection of the Evidence of the Appellants' Valuer and Chairman**

[35] At the hearing, the learned Senior State Counsel submitted that the Board of Review correctly rejected the evidence of the Appellants' Valuer and the Chairman as they failed to contradict the Preliminary Plan and the condition report of the Acquiring Officer (R1) and satisfy the condition of the land as at the date of the acquisition.

[36] A perusal of the decision of the Board of Review reveals that it has rejected the evidence of the Valuer and its Chairman for their failure to explain the physical condition of the land including the nature of soil as at the time of the acquisition.

## **Physical Condition & Nature of Soil**

[37] It is not in dispute that the extent of the acquired land depicted as lots 1, 4 and 5 in the Preliminary Plan No Co/7775 marked R3 is 649.70 perches is as follows:

Lot 1- 0.0153 Hectares (06.046 Perches);

Lot 4-0.4352 Hectares (171.991 Perches);

Lo5- 1.1935 Hectares (471.67 perches)

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649.70 perches

[38] Out of 649.70 perches, an extent of 213.58 perches is unclaimed land and thus, the remaining land for the purpose of compensation for the Appellants is only 430.08 perches and the Board has finally taken the said 430.08 as the Appellants' share as per Section 10 (1) (a) of the Act. The Appellants' Valuer has blocked out the entire land in 4 blocks with provision of 30 feet wide roads as follows (Vide- A1 and A2):

Lot 1 - 171 perches

Lot 2 - 156 perches

Lot 3 - 115 perches

Lot 4 - 120 perches

Road 30 feet wide- 87.7 perches

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Total 649.7 perches

[39] For the purpose of valuation, the Appellants' Valuer has taken only lots 1, 2, 3 and 4 excluding the extent for 30 feet wide roads-87.7 perches as follows:

Lot 1 171 perches Rs. 650,000/- pp

Lot 2 156 perches Rs. 750,000 pp

Lot 3 115 perches Rs. 750,000 pp

Lot 4 120 perches Rs. 650,000 pp

Road 87.7 perches

Total	649.7 perches
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[40] It is not in dispute that the Appellants are only entitled to an undivided portion of 430.08 perches and the Board has awarded compensation for a portion of 430.08 perches. The Appellants' Valuer has stated in evidence that part of the land acquired is a garden and the other part is a loose soil but not muddy, as suggested by the State. He has stated under cross examination that out of the entire land, an extent of, approximately, 3- 3 ½ acres are a garden while the remaining extent is a loose soil. He has further stated that an extent of 2 acres is loose soil (page 17) and the land consisting of loose soil is lot 4 depicted in the Preliminary Plan (page 21) and lot 5 is a garden (page 24).

[41] A perusal of the Preliminary Plan marked A6/R3 reveals that lot 5 in extent of 471 perches is a garden which is approximately 3 acres, while lot 4 is only 172.06 perches which is approximately 1 acre and 12 perches. There is no dispute with regard to the soil condition of lot 5 which is a garden.

[42] According to the Preliminary Plan, lot 4 is a marshy land. The Appellants' Chairman Mohamed Kaleel testified that at present, the entire land is a garden and not a marshy land (page 30). He has rejected the suggestion of the State that the land shown in the photographs marked A9 is a marshy land with Salvinia and stated that the land shown in A9 is covered with grass and not a marshy land.

[43] The Appellants have shown Photographs marked A7-A10 taken by the Appellants' Chairman Kaleel to show the situation of the land prior to clearance and after clearance for the purpose of constructing a Warehouse Complex and the land shown in the photographs was developed including the filling of lot 4 took place prior to the acquisition of the land by the State in 1993.

[44] Although the State rejected the photographs A7-A11, no evidence was produced by the State to challenge the authenticity of the said photographs taken by Kaleel or to show that the filling of lot 4 took place after the acquisition of the land by the State. If the filling of lot 4 had taken place after the acquisition was made by the State, the Acquiring could have easily adduced evidence at the inquiry, including the photographs to contradict the photographs taken by Kaleel.

[45] On the other hand, the State Valuer admitted in evidence that when he visited the land on 08.03.2006 (Vide- documents marked R4 and R5), the land was a filled land (page 46) and no evidence was presented by the State that lot 4 was a marshy land as at the date of the acquisition or as at the relevant date and the filling had taken place thereafter.

[46] Although the Advance Tracing marked R2 describes lot 2 as a marsh, the undated Condition Report (R1) and handwritten condition Report (page 93) prepared by the Acquiring Officer describes lot 2 as follows:

“According to Advance Tracing No. 342, the land is described as Marshy land. It is almost flat land in level with the adjacent lands on its southern boundary and it contains an Asbestos roofed building”.

[47] The condition report marked R1 is undated and unsigned. The State Valuer merely stated that the Condition Report R1 was prepared between 12.10.1994 to 20.11.1994 (page 60). The Board of Review has relied on his evidence that since the condition report R1 was prepared between 11.10.1994 to 02.02.1994, it may not give the true picture of the property as at the time of acquisition.

[48] There appears to be two condition reports in the brief, one is a typed but, undated and unsigned report marked R1 and the other one is a handwritten condition report at page 93, which is not signed by the

Chairman of the Appellants. There is no proof whatsoever, as to when the condition report was prepared by the Acquiring Officer. The Board of Review correctly rejected the condition report R1 of the Acquiring Officer for the following reasons:

*"In determining the amount of compensation State Valuer Mr. Kumar was mainly guided by the undated condition report (R1) which was said to be prepared during 11.10.1994 to 02.12.1994. It appears that the condition report has been prepared 1 ¼ years after the acquisition. The Board is of the view that this condition report may not give the true picture of the property as at the time of the acquisition, specifically with respect of the number of unauthorised households".*

[49] The Board while rejecting the condition report R1, erroneously relied on the evidence of State Valuer that the condition report was prepared between 11.10.1994 to 02.12.1994 and thus, it does not give the true picture of the condition of the land as at the date of the acquisition.

[50] The Board of Review was in error in holding that the photographic evidence is not credible when no evidence was presented by the State to contradict the photographs taken by Kaleel with regard to the date of the photographs concerning lot 4. In rejecting the evidence of Kaleel, the Board of Review has failed to consider the admission of the State Valuer that when he inspected the land on 28.03.2006, which was well after the relevant date on 11.01.2002, lot 4 was a filled land.

### **Shanties**

[51] It is not in dispute that there were unauthorised occupiers on the land acquired by the State. The undated condition report R1 states that there were 85 shanties in the land whereas advance tracing marked R3 states that there are 22 shanties on lot 5 of the land. No independent evidence is available that the shanties are located outside lot 5 along the canal and thus,

the Board of Review in my view is correct in deciding that there are 22 shanties on the subject land.

### **Notional Development Plan of the Appellants**

[52] In the present case, both Valuers have taken into account development potential of the subject land and the Appellants' Valuer has produced a Notional Development Plan marked A2 and valued the property on the basis of the Notional Development Plan. The learned Senior State Counsel submitted at the hearing that the Appellants' Notional Development Plan is flawed for not describing the physical features, directions, filling needs and access roads. The State Valuer has disputed the Appellants' Notional Development Plan marked A2 at the inquiry for not showing the canal and having the access roads less than 40 feet as required by the UDA guidelines relating to the City of Colombo Development Plan 1999.

[53] A perusal Notional Development Plan marked A2 reveals that the Appellants' Valuer has divided the total extent of the acquired land which is 649.7 perches, into 4 lots (lots 1,2,3 and 4). He has shown a 30 ft wide road which consists of 87.7 perches as an access road to lots 1, 2, 3 and 4. He has further shown the road depicted in the Preliminary Plan as lot 1 in his Notional Development Plan.

[54] The Board of Review has rejected the Appellants' Notional Development Plan marked A2 and accepted the evidence of the State Valuer Wasantha Kumara who merely stated without any supporting documents that the width of the roads given in A2 is only 30 feet wide whereas it should be 40 feet according to the City of Colombo Development Plan. The findings of the Board of Review are as follows:

**“Appellants’ Valuer Mr. Mallick valued the subject property at Rs. 490,000/- p.p. on a Notional Development Plan (A2), Sales (A3) and a previous award (A4A.). Width of the roads given in A2 is only 30 ft. wide. This should be 40 ft. according to said City of Colombo Development Plan 1999”**

[55] The State Valuer’s evidence that the width of the roads shown in the Notional Development Plan marked A2 should be 40 feet, according to the City of Colombo Development Plan is not supported by any documentary evidence such as any Gazette issued by the UDA. No evidence was adduced by the State Valuer to establish that the access roads shall be 40 feet as per City of Colombo Development Plan.

[56] On the other hand, the Regulation made by the Minister in Charge of the Urban Development Authority and published in the Gazette Extraordinary No. 935/6 dated 06.08.1996 marked A13 reveals that the access road should be only 9 meters, which is equivalent to 30 feet as shown in the Appellants’ Notional Development Plan marked A2. The relevant parts of the Gazette read as follows:

“22 (1) - Where the parcel of land or site to be sub-divided exceed 1.0 hectares an area of not less than ten per centum of the land or site, excluding streets shall be reserved for community recreation and open space uses in appropriate locations except in the following instances-

(a) In commercial and industrial land sub-divisions, if the minimum and parcel of the sub-division is not less than 2,024sq. m. (80 perches) and all the road widths are not less than 9 meters the land may be sub-divided without reserving 10 percent of the land for open space uses, but subject to the condition that in the event of further sub-division of any of the developers should either:

- (i) reserve the 10 percent of the land so sub-divided; or
- (ii) deposit the market value of 10 percent of the land so sub divided at the relevant local authority.”

[57] At the hearing, the learned Senior State Counsel conceded that the requirement of 40 feet for access roads is wrong and thus, it is crystal clear that the access roads to lot 1,2,3 and 4 depicted in the National Development Plan is 30 feet which is equivalent to 9 meters as per the Gazette marked A13a. To that extent, the Board of Review is wrong in relying on the evidence of the State Valuer and holding that widths of the access roads shall be 40 feet as required by the City of Colombo Development Plan.

[58] The second question that arises however, is whether the valuation of the property at Rs. 490,000/-per perch on the basis of the same National Development Plan of the Appellants and comparable sales contained in A3 and previous award marked A4A are entirely acceptable according to the principles of valuation.

### **Comparable Sales**

[59] The traditional method to value property appears to be the comparative method whereby information is obtained about market transactions of identical or similar properties in the same vicinity about the time of acquisition (comparison of the property with similar transactions (see-*Government Agent v. Perera* 7 NLR 313). This was followed in Perera (G.A., N.W.P.) and Fernando et al. 51 NLR 121 that in deciding upon the market value of property compulsorily acquired evidence of recent sales in the vicinity is an important test, provided that such sales were of properly similarly situated and are shown to have been by a willing seller to a willing buyer.

[60] It was held by the Supreme Court of India in *Special Land Acquisition Officer, Davangere v. Veerabhadarappa and Others*, (1984)2 SCC 120:

*8- It is axiomatic that the best evidence to prove what a willing purchaser would pay for the land under acquisition would be the evidence of sales of comparable properties, proximate in time to the date of acquisition, similar situation and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a purchaser. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under section 4 (1) or otherwise, the court has no other alternatives..."*

[61] Under the comparable sales method, the Acquiring Officer has to thus, enquire about transactions of sale of similar lands and the market value of the land has to be assessed on the basis of the sale price of other comparable lands in the adjoining area (*O. K. Muthuswamy Mudaliar v State of Madras* (1968) 2 SCWR 264). There are, however, certain factors which are required to be satisfied for the application of the comparable method of valuation and the compensation can only be awarded on fulfilment of those factors. In *Karnataka Urban Water Supply and Drainage Board and Others. v. K.S. Gangadharappa and Another*, MANU/SC/0598/2009/(2009) 11 SCC 164, the High Court of Karnataka identified *inter alia*, the following factors which merit consideration as comparable sales:

- (i) When a sale is within a reasonable time of the date of notification  
Under Section 4 (1) -(Section 7 under our law);
- (ii) It should be a bona fide transaction;

- (iii) It should be of the land acquired or of the land adjacent to the land acquired; and
- (iv) It should possess similar advantages.

[62] Supreme Court of India in *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona and Anr.* AIR (1988) SC 1652 (points- 7-14) further held that in doing so:

- (1) The Court has to correlate the market value reflected in the most comparable instance, which provides the index of market value, but only genuine instances have to be taken into account as there can be instances where prices are sometimes rigged up in anticipation of Acquisition of land;
- (2) Even post notification instances can be taken into account (i) if they are very proximate, (ii) genuine and (iii) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects;
- (3) The most comparable instances out of the genuine instances have to be identified on the following considerations: (i) proximity from time angle, (ii) proximity from situation angle.
- (4) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments to the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.
- (5) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do

- (6) The market value of the land under acquisition has to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors;
- (7) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

#### **Comparable Sales relied on by the Appellants**

[63] The Appellants' Valuer has produced the document marked A3 which refers to the following 2 sales together with the relevant deeds and a previous award in respect of a portion of the land depicted in the Preliminary Plan:

[64] Item 1 refers to the sale of 12 perches block of land at Rs. 450,000/- per perch by the Appellants to Celltell Lanka Ltd on 13.03.1995 by deed No. 1822 (A9). This land is a portion of the land which had been acquired by the State. This sale has, however, been set aside by the District Court on the basis that the sale had taken place after the Section 2 notice was published in terms of section 4A of the Land Acquisition Act. As the sale has been cancelled in terms of section 4A of the Act, the Board correctly disregarded the said sale as it could not be regarded as a valid comparable sale.

[65] Item No. 2 is also a sale of 10.78 perches by the Appellants to Mercantile Shipping Company Ltd on 26.03.2001 by deed No. 3752 (A10), located in Cyril C. Perera Mawatha. The Board has refused to consider this sale on the ground that this sale is a small extent of land to the commercial use value and thus, it cannot be considered as comparable to value the subject property. Mr. Mustapha submitted that the Board has misdirected itself into thinking that sales of small lands cannot be

considered in determining the compensation due for larger lands. At the hearing, no local authority was cited by both Mr. Mustaph and the learned Senior State Counsel on the question whether there is any absolute prohibition on taking the rates fixed for the sale of the smaller lands as a basis for determining compensation for larger lands.

[66] In the Indian case of *Suresh Kumar v. Town Improvement Trust, Bhopal* (1989 (1) SVLR (C) 399), the Supreme Court of India held that the rates paid for small parcels of land do not provide a useful guide for determining the market value of the land acquired. While determining the market value of the land acquired it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner.

[67] In the Indian Supreme Court case of *Ravinder Narain And Anr v. Union of India*, 28/02/2003, the issue was whether the High Court was in error in not taken into account sale of small plots in determining the compensation due for larger extents of lands. Pasayat J. took the view that although there is no absolute proposition that the rates fixed for the small plots cannot be the basis for fixation of the rate, necessary deductions/adjustments have to be made while determining the price. Pasayat J. further said that it is only when the following factors are present, it can merit a consideration as a comparable sale:

1. when a sale is within a reasonable time of the date of notification under Section 4(1);
2. it should be a bona fide transaction;
3. it should be of the land acquired or of the land adjacent to the land acquired; and
4. it should possess similar advantages.

[68] In *Gafar & Ors v. Moradabad Development Authority*, (2007) 7 SCC .614, decided on 17 August, 2007 Balasubramanyan, J. observed at paragraph 8 that although there is no such a prohibition, “the fact remains that normally, when larger extents are involved in an acquisition, it will be more prudent to rely on sale deeds of larger extents and not to base the assessment of the compensation on values fetched at sales of small extents”.

[69] A perusal of the evidence adduced before the Board reveals that no evidence whatsoever, adduced by the Appellants other than to produce the deed A10 to establish the second sale instance (A10) referred to by the Appellants in A12 is a sale of a developed land or underdeveloped land or marshy land possessing similar advantages and disadvantages to be regarded as a comparable sale. Apart from the proximity, other relevant factors such as the condition, shape, nature of soil, level, frontage, encumbrances, potential uses of the land, potential economic value and similar advantages or disadvantages are not available.

[70] The mere production of the sale deed A10 without describing the above-mentioned factors are not sufficient to merit a consideration of the said sale as a comparable sale. Under such circumstances, it cannot be said that the Board of Review was in error in not relying on the sale of a small extent (A10) in assessing the compensation payable on the basis of a comparable sale.

[71] Item No. 3 relates to a land in extent of 81.8 perches, which abuts the acquired land for the expansion of the Port Access Road. The compensation paid for the acquisition is on the basis of a market value at the rate of Rs 125,000/- per perch as at 12.08.1991, being the relevant date as per the Supreme Court decision in 62/99 (A5). According to the State Valuer, although the said land is located in close proximity to the subject

land, the extent of the said land is 81.3 perches whereas the subject land has 649 perches said land is a garden and it has no filling portion of the land (page 66).

[72] Apart from the proximity in location and the acquisition of the land for the expansion of a roadway in 1991, factors that merit the application of the comparable sale valuation in terms of the condition, shape, nature of soil, level, encumbrances, similar advantages or disadvantages are not available. Although the Board has not considered the previous award in respect of the acquisition of the adjacent land in detail, the Appellants have not adduced sufficient evidence and satisfied that the acquisition of a small extent of land with commercial use value merits consideration of the award as comparable to value the subject property.

#### **Comparable Sales relied on by the State**

[73] The State Valuer has made reference to 3 sales in the Schedule of Land Sales Evidence marked R11. The purchase price in the first sale (S1) was Rs. 206,260/-, the second sale (S2) was for Rs. 115,384 and the third sale-(S3) was for Rs. 200,000/- The State Valuer has clearly stated in evidence, however, that he only relied on the first sale namely, item No. S1, which is a sale of a land in extent of 1 acre 2 roods 34.25 perches at the market rate of Rs. 206,200/- per perch (page 66). The Board of Review has mistakenly stated that the State Valuer relied on 3 sales given in R11 and thereafter, adopted the land value of Rs. 225,000/- per perch to value the subject property as at the relevant date.

[74] A perusal of first sale in R11 reveals, however, that the land in extent of 1A-2R-34.25 perches is said to have been sold by deed No. 3575 dated 08.03.2004 at the purchase price of 206,260/- and the said land is located at Madampitiya Road. The State Valuer has not produced documentary

evidence at all to substantiate the sale S1 referred to in R11 such as the relevant deed or any other evidence on a very crucial point to determine the valuation of the subject property. The schedule marked R11 states that this land is an irregular shape block of land having frontage to Srimavo Bandaranayake Mawatha and Madampitiya Road which is located at Madampitaya Junction. The State Valuer has merely stated that the land-S1 is not a marsh and the land is having 2 two road frontages without any proof whatsoever.

[75] The absence of any such documentary evidence casts serious doubt about the credibility of the reliance of S1 on vital questions-first, whether such a sale had in fact taken place and if it had taken place, to identify the extent, location, condition, commercial value, proximity, similar advantages, development costs, access roads and disadvantages of the purported sale (plus and minus factors).

[76] In any event, the land in S1 is located 1 KM away from the acquired land (page 65,66) and the said land is located out of the Port Development Zone as admitted by the State Valuer in his evidence (page 67). A perusal of the location sketch produced by the State Valuer shows that Madampitiya junction referred to by the State Valuer is located outside Port of Colombo Development Zone. Under such circumstances, the sale S1 referred to in R11 cannot be considered as a comparable sale for the purpose of the determination of the subject property.

#### **The Valuation method adopted by the Board of Review and of valuation of the subject property**

[77] A perusal of the Board of Review decision reveals that whilst rejecting the Appellants and the State Valuations including the comparable sales, the Board has adopted the Hypothetical Development Method to value the

subject property without giving reasons for the figures referred to in the hypothetical Development valuation method.

[78] Hypothetical Development is a method of deriving a land value to be paid for a land which is not developed to its highest and best use by hypothetically developing it, and then systematically stripping back the components of the development including construction costs, profit or holding costs to arrive at the value to be paid for the property as a development land. (Hypothetical Development Method of Valuation & Site Sale Analysis, University of Technology, Sydney, [www.coursehero.com](http://www.coursehero.com)).

[79] The methodology involves determining the value of a proposed development on completion (known as the gross realization) and then working backwards by deducting selling costs, developers profit and development costs such as design and construction, professional fees, holding, interest and acquisition costs to derive a residual land value. (Supra). The Board of Review has followed the following steps in the application of the Hypothetical Development Method:

1. Determine the expected gross realization of the proposed development of the land of 649.70 P (land value (LV)@ per perch-Rs. 225,000 pp ( $225,000 \times 649.70P = \text{Rs. } 146,482,500/-$ )
2. Determine the amount for the cost of development (CD) and deduct it from the new realization;
  - (i) determine the costs for obtaining vacant possession of 22 unauthorized tenements (22 unauthorised tenements @ Rs. 100,000 = **Rs. 2,200,000/-**);
  - (ii) determine costs of filling (Lot 4-, 4 ft. filling ( $171.991 \times 272.25 \times 4 \div 100$ )

1872.97 cubes @ Rs. 500 per cube = **Rs. 936,490**

- (iii) determine the percentage of profit and risk (PR) of the developer for the development of land such as survey fees, cost of finance, (interest), and deduct the profit and risk from the gross realization (PR)-percentage-30% (Rs. 146,482,500/- x 30% = **Rs. 43,854,750/-**)
- (iv) deduct the costs of development (CD) (i + ii + iii above) from the gross realization and determine the value = Rs, 2,200,000/- + 936,490 + 43,854,750/- = **Rs.46,991,240**
3. The value obtained from deducting the cost of development from gross realisation (Rs. 146,482,500 -46,991,240 = **Rs. 99,191,260**) is multiplied by the present value (PV) of Rs. 1 at 12% in one year's time and determine it as the residual figure (**Rs. 99,191,260**);
4. After obtaining the residual figure, exclude the legal fees and stamp duty to determine the value of acquired land which is 4% of the value of the land (Rs. 88,478,603.92 ÷ 1.04);
5. Deduct the legal fees and stamp fees (Rs. 3,403,023.92) from the residual figure of Rs. 88,478,603.92 -3,403,023.92 = **Rs. 85,075,580**);
6. Determine the new value of the land for 649.70 perches (85,075,580 rounded off as Rs. 85,075,600);
7. Determine the total net value for 649.70 perches (85,075,600÷649.70) = **Rs.130,945.9750744 pp**
8. Determine the market value for 430.08 perches (Rs. 130,945.9750744 x 430.08 = **Rs. 56,317,244.96**).

[80] A perusal of the Hypothetical Development Method adopted by the Board of Review reveals that the Board has taken Rs. 225,000/- per perch as the initial land value for gross realization. In this context, the crucial

question that goes to the root of the compensation formula for fixing the market value of the land is whether the reliance of Rs. 225,000/- per perch for the initial land value is contrary to the applicable principles of valuation.

[81] The Board of Review has not given reasons for the deciding the initial land value of the land as Rs. 225,000/-. The appears to have taken into account the absence of any evidence for comparable sales, existence of shanties, and physical conditions but the reasons for arriving at Rs. 225,000/- as the initial land value are not given. The Board of Review has failed to take into account the following plus factors for the determination of the initial value of the land for gross realization including:

1. Existing geographical location of the land and proximity to developing activity zones;
2. Economic/commercial potential and capacity for a higher potential within the locality;
3. Proposed use of the land by the State and its economic advantages to the State and investors;
4. Already available advantages, like proximity to the Port of Colombo within the Port Development Zone;
5. Road frontages, access roads, National or State Highway or road and/or developed area within the locality;
6. Highest and best and the most profitable use to which it may be devoted in the reasonably near future.

[82] The Board of Review appears to have relied more on factors that should be taken into account in deducting the total value of the land from the gross realisation without taken into account all plus factors that demand a higher value in all logical sense in the application of the Hypothetical Development Method for valuation.

[83] It is settled principle of law that for determining just and adequate compensation for lands acquired under the Land Acquisition Act, Courts must not indulge in feats of imagination but, sit in the armchair of a prudent purchaser in open market and to put a question to itself whether as a prudent purchaser, it would offer same price in open market as is to be determined (*Hookiyar Singh v Special Land Acquisition Officer, 1996* (5) Supreme 97 AIR 1996 SC 3207). After deciding the initial land value of Rs, 225,000/- for gross realization, the Board of Review has deducted the cost of development which includes the cost of filling, costs for obtaining vacant possession and 30% profit and risk percentage and thereafter, considered the residual figure excluding the legal fees and stamp duty to determine the new value of the land and thereafter, the market value for 430,08 perches as described.

[84] It is common ground that the land acquired is located in very close proximity to the Port of Colombo at a distance of 500 meters, which has been designated for Port development as per the Colombo Development Plan. The initial valuation taken by the Board of Review appears to be based on the State's initial valuation of Rs.206, 260/- set out in sale S1 in R12a with no credible proof of the existence of such a sale in the absence of any documentary proof that such a sale had ever taken place.

[85] In the Indian Case of *Tribeni Devi Sarawgi v. Collector, Ranchi* 1981 (29) B.L.J.R. 31, 32, it was held that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future.

[86] The importance of taking into account relevant evidence by the Board of Review was emphasized in *Public Trustee and D. Rajaratnam (District*

*Land Officer*, 75 NLR 391 where the Board of Review excluded relevant evidence from consideration and acted somewhat arbitrarily in assessing the value of two portions of the land sought to be acquired. The Supreme Court held that the claimant was entitled to be granted relief.

[87] The acquired land appears to be one of the largest extents of land available in the Port Development Zone with long road frontages along the New Port Access Road and two more Roads from Sirimavo Bandaranayake and Stadiumgama road. As the acquired land which is suited for a bigger investment such as the Oil Refinery, Warehouse complex, Container Terminal or any such mega industrial activity, the State Valuer had proposed to develop the acquired land only for a Container Storage Complex to be completed within a period of 1 ½ years with private investment generating economic benefit to the State and the investor equally. The Board of Review has failed to consider the future potential value and the fact that the acquired land is capable of being put in the future for a mega development activity such as a Container Storage Complex within the Port Development Zone and its close proximity to the Port of Colombo in affording a higher value on account of these reasons.

[88] Mr. Mustapha submitted that the Board of Review had relied on the State Valuer's initial valuation of Rs. 200,000/- per perch as set out in R12a for the purpose of expected gross realization for a highly and economically valuable land located within the Port Development Zone. Mr. Mustapha submitted that the reliance of Rs. 200,000/-per as the initial valuation whilst disregarding the Appellants' claim of Rs. 490,000/- per perch without any reasons vitiates the entire Hypothetical Development Method adopted by the Board of Review. He further submitted that the admission of the State Valuer that the land in respect of which the initial value of Rs. 206,260/- is based is located out of the Port Development Zone is proof that the

acquired land ought to be afforded a higher value in all logical sense on account of its proximity to Colombo Port.

[89] The Board of Review appears to have relied on the evidence of the State Valuer to determine the initial sale price of the land in sale S1 as a reasonable purchase price by just adding a sum of Rs. 18,740/- to the State's initial valuation of 206,260/- per perch. No other relevant plus factors have been considered in the determination of the land value for gross realization.

[90] The Board of Review has failed to take into account that the sale of Rs. 206,260/- in sale S1 is out of the Port Development Zone and hence, the acquired land should be afforded a higher value than the purported purchase price of Rs. 206,260/- in R12a. It is to be observed that a proper determination of the market value of the subject property cannot be made on the basis of the mere figures without reference to the evidence led at the inquiry or the material on record. The determination of the initial land value and the market value without considering the factors which ought to have been taken-both plus and minus, like in the present case will have larger repercussions, inasmuch as, about 640 perches of land are stated to have been acquired for the construction of the container storage complex as admitted by the State Valuer. In a matter of such importance and magnitude where heavy stakes are involved both for the State and for the land-owners, it is only appropriate that awards are made after a sound and careful analysis of all relevant criteria.

[91] As noted, the Board has failed to afford a higher value in all logical sense sitting as a prudent purchaser in the open market in the determination of the initial land value for the gross realization without reasons and considering the relevant factors that ought to have been taken

into account for the purpose of gross realization. The determination of the market value of Rs. 130,945.97 pp in terms of section 45 (1) of the Act and the final sum of Rs. 56,317,244.96 calculated for 430.08 perches on that basis is highly inadequate and ought to be varied and the compensation ought to be enhanced in all logical senses on account of the above-mentioned factors.

### **Proper Valuation of the Subject Property**

[92] Next question is whether this should order a fresh inquiry to reconsider the quantum of compensation by the Board of Review or proceed to make an order for enhanced compensation on the basis of the evidence on record as a fresh inquiry will lead to undue delay, hardships to the Appellants and the State who litigated this case for nearly 27 years without any finality. If the record is sent back at this stage, it will further delay the compensation process causing undue delays, misery and hardships to the both parties.

[93] It is to be noted that since the record contains the evidence adduced by both parties at the inquiry led before the Board of Review, there is nothing to prevent this Court from granting relief to the parties by way of fresh order enhancing compensation. In *Public Trustee v. Rajaratnam* 75 NLR 391, the Supreme Court amended the valuation made by the Board of Review and enhanced the amount of compensation when it found that the Board of Review excluded relevant evidence from consideration and held that the claimant was entitled to be granted relief.

[94] As the record contain evidence adduced by both parties at the inquiry before the Board of Review and the question is now limited to the determination of the initial land value and then, apply the Hypothetical Development Method of Valuation having regard to the relevant factors on

the basis of the evidence on record, I proceed to determine the question of reasonable and fair market value to be afforded to the acquired land having first determine the initial land value.

### **Initial Land Value**

[95] As noted, all factors which would be considered by a reasonable purchaser and a seller in fixing the land value should be determined having taken into account the factors described in paragraph 20 of this judgment.

[96] The Appellants have claimed a sum of Rs. 210,739,200/- at the market rate of Rs. 490,217/- per perch having valued lots 1-4 depicted in Notional Development Plan A2 and the Summary of Valuation as follows:

Lot 1-	171. 0 P-Rs. 650,000/- pp
Lot 2-	156. 0 P-Rs. 750,000/- pp
Lot 3-	115.0 P- Rs. 750,000/- pp
Lot 4-	120,0 P-Rs. 650,000/- pp

[97] The Appellants had relied on the documents marked A3 and the previous sales to justify the overall market value of Rs. 490,217/. As noted in paragraphs 60-69, the said sales are not transactions involving lands that are the same or similar to the subject property to arrive at an indication of value at a market value of Rs. 490,217/- per perch in the absence of any other similarity factors for a comparable method of valuation. There are some minus factors in the determination of the market value of the property at a rate of Rs. 490,217/- per perch such as the costs for the infrastructure development of a mega development project, including the fact that lot 4 which is a filled land that requires further 4 feet, filling for investment, 22 unauthorized occupiers to be ejected and the land is subject to a mortgage as at the relevant date. Accordingly, the Appellants'

compensation of Rs. 210,739,200/- at the market value of Rs. 490,217/- per perch is too high having considered the said minus factors

[98] However, the Board of Review has failed to consider other vital plus factors identified in paragraph 78 of this judgment. The initial land value of Rs. 225,000/- determined by the Board of Review appears based on the State's first sale-S1 which is Rs. 206,260/- as set out in R11. As the land in sale S1 is located out of the Port Development Zone, it is crystal clear that the acquired land should be afforded a higher value than Rs. 225,000/- per perch on account of its proximity and other factors described earlier.

[99] The Board of Review has clearly failed to consider the other plus factors for the determination of the market value on the basis of the evidence adduced by the parties and admissions made by the State Valuer at the inquiry such as (i) the location of the land within the Port Development Zone and its proximity to the Colombo Port at a distance of 500 meters; (ii) the economic potential and capacity of the land for a higher potential within the Port Development Zone, (iii) the proposed use of the land by the State to establish a Container Storage Complex with high investment for generating income both for the State and the Investor, (iv) already available advantages such as two road frontages to main roads-Port Access Road and Sirimavo Bandaranayake Mawatha and another access road to the land from Stadiumgama Road; (v) the land being a larger land is suitable for the highest, best and the most profitable use to which it may be devoted in the reasonable near future by the State for a mega development project, namely income generating Container Storage Complex.

[100] Under such circumstances, the intended development project can be easily distinguished from any other public interest project such as building

schools or hospitals or housing facilities for people, which do not generate income to the State.

[101] As noted, there is sufficient evidence that has been led by both parties at the inquiry before the Board of Review for this Court to determine the initial land value for the gross realization and thereafter decide the market value after deductions on Hypothetical Development Valuation on the basis of the factors that ought to be applied as described in paragraph 78 of this judgment.

[102] Having taking into consideration all relevant facts and the uses to which the land is to be reasonably used and the evidence and inputs given by the Appellants' witnesses and the State Valuer, a reasonable willing purchaser and a willing seller would have fixed a sum of Rs. 280,000/- per perch as the land value as at the relevant date, for gross realization subject to valid deductions from the total gross realization value.

#### **Percentage of deduction for development costs- profit and risks (PR)**

[103] A submission has been made on behalf of the Appellants that the 30% development costs for profits and risks (PR) taken by the Board of Review is unreasonable (Vide- written submissions dated 12.10.2020). The Appellants' Valuer has only added 10% of the development costs for profit and risk without any costs for obtaining vacant possession from 22 unauthorized occupiers (Rs. 936,490/-) and cosys for 4 feet filling of lot 4 which is 4 feet below the road level (Rs. 2,220,000/). In my view, those costs ought to be deducted from the gross realization value of the land.

[104] Under costs of development, the Board of Review has allowed 30% towards developers' profits and risk and surveyors fees, cost of finance etc. The percentage of 33% -1/3% towards the developers profit and risks

appears to be the standard percentage, but deduction for development factor is a variable percentage and the range of percentage may vary.

[105] *In in Major General Kapil Mehra and Others v. Union of India and Another* (2015) 2 SCC 262, paragraph 36, the Supreme Court of India held that while determining the market value of the acquired land, normally one-third deduction i.e. 33 1/3% towards development charges is allowed and the Rule of one-third deduction towards development is the general rule. It further held that depending upon the purpose of acquisition and taking note of well-planned layouts, if any, the deduction for development cost may vary from 20% to 75%”.

[106] *In Lal Chand v. Union of India* 2009 (15) SCC 769, paragraph 8, 9, the Supreme Court of India held that:

- (i) The percentage of deduction for development to be made in arriving at market value of large tracks of undeveloped agricultural land with potential for development varies between 20% to 75% of the price of developed plots;
- (ii) The deduction for development consists of two components. The first is with reference to the area required to be utilized for developmental works and the second is the cost of the development works;
- (iii) The Development Authority will also incur considerable expenditure for development of undeveloped land into a developed layout, which includes the cost of levelling the land, cost of providing roads, underground drainage and sewage facilities, laying waterlines, electricity lines and developing parks and civil amenities, which would be about 35% of the value of the developed plot;

(iv) The two factors taken together would be the 'deduction for development' and can account for as much as 75% of the cost of the developed plot.

[107] In the present case, the area required to be utilized for developmental works is a larger area and thus, the cost of the development expenditure ought to have been considered having regard to the extent of the land as well. The cos of development may include, the 4 ft. filling and levelling of lot 4, cost of providing roads within the land, underground drainage, sewage facilities and waterlines and electricity lines and other building facilities for a mega development project such as a Container Storage Facility or Oil Refinery or Warehouse Complex. Thus, the percentage of 33% towards the developers profit and risks, which also includes survey fees, cost of finance cannot be regarded as unreasonable.

[108] A submission has been made on behalf of the Appellants (Vide-written submissions dated 12.10.2020) that the 4% as stamp duty and legal fees is not based on the Appellants and the Respondents' valuation formula and thus, it is not justified. It seems that the 4% appears to be the standard formula for both stamp duty (3%) and legal fees (1%) and thus, it cannot be said that the figure of 4% as stamp duty and legal fees taken for valuation under the Hypothetical Development Method is unjustified.

[109] For those reasons, the valuation of the land set out in the decision of the Board of Review on the application of the Hypothetical Development Method is amended as follows:

1. Expected gross realization of the proposed development of the land of 649.70 P (land value (LV)@ per perch-Rs. 280,000/- pp

$$649.70P \times \text{Rs. } 280,000/- = \text{Rs. } 181,916,000/-$$

## 2. Costs of development (CD)

(i) Costs for obtaining vacant possession of 22 unauthorized tenements (22 unauthorized tenements @ Rs. 100,000 = **Rs. 2,200,000/-**

(ii) Costs of filling

Lot 4, 4 ft. filling  $171.991 \times 272.25 \times 4 \div 100$

1872.98 cubes @ Rs. 500/- per cube =**Rs.936, 490/-**

(iii) 30% of gross realization of cost of development,  
survey fees, cost of finance, developers' profit for  
taking the risk, etc. **=Rs. 54,574,800/-**

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**Rs. 61,609,490/-**

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**Rs. 124,204,710**

3. P.V (present value) of one rupee at 12% in one years' time-0. 892

Residual figure, available to the developer to purchase the land which includes the legal fees, stamp duty and the amount to be paid to the land as its value ( $124,204,710 \times 0.892$ ) **Rs. 110,790,601.32**

4. Value of land is assumed as Rs. X/-

and legal fees, etc. as 4% of Rs. X/-

$X + 0.04X =$  **Rs. 110,790,601.32**

Value of the land (X) **Rs. 110,790,601.32 ÷ 1.04**

5. The value of the land acquired =	<b>Rs. 106,529,424.35</b>
6. Market value of the land acquired pp	<b>Rs.106,529,424.35</b>
÷649.70P = <b>Rs. 163,967.1</b>	
7. Appellants share as per Section 10(1) a for 430.08 P	

$$\text{Rs. } 163,967.1 \times 430.08 \text{ P} = \underline{\text{Rs. } 70,518,970.37}$$

### Conclusion

[110] Accordingly, the total amount of compensation payable to the Appellants is enhanced from Rs. 56,317,244.96/- and fixed at Rs. 70,518,970.37 (subject to any mortgage in favour of the Bank of Ceylon).

[111] The Appellants are further entitled to usual interest due in terms of Section 35 of the Land Acquisition Act.

I make no order as to costs.

**JUDGE OF THE COURT OF APPEAL**

Shiran Gooneratne J.

I Agree.

**JUDGE OF THE COURT OF APPEAL**