

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Regular First Appeal No.393-P of 2012

JUDGMENT

Date of hearing...11-12-2017 (Announced on 22.12.2017)

Appellant: (Saleem Dad) by Mr.Zia-ur-Rehman, Advocate.

Respondents:(Collector Acquisition, NHA, Peshawar and others) by Mr.Sikandar Rashid, Advocate.

YAHYA AFRIDI, C.J.- Through this single judgment, this Court proposes to dispose of the twenty eight appeals, as they arises out of the common award and decision of the Referee Court.

The particulars of the cases are as follows:-

1. **R.F.A.No.393-P/2012.**
(Saleem Dad –vs- Collector Acquisition, NHA, Peshawar and others).
2. **R.F.A.No.395-P/2012.**
(Syed Khalid Shah and others –vs- Collector Acquisition, NHA, Peshawar and others).
3. **R.F.A.No.396-P/2012.**
(Syed Nadir Shah –vs- Collector Acquisition, NHA, Peshawar and others).
4. **R.F.A.No.397-P/2012.**
(Iqbal deceased through legal heirs and others –vs- Collector Acquisition, NHA, Peshawar and others).
5. **R.F.A.No.416-P/2012.**
(Musharaf Khan and others –vs- Collector Acquisition, NHA, Peshawar and others).
6. **R.F.A.No.417-P/2012.**
(Faridullah and others –vs- Collector Acquisition, NHA, Peshawar and others).
7. **R.F.A.No.418-P/2012.**
(Abdul Ghaffar –vs- Collector Acquisition, NHA, Peshawar and others).

8. **R.F.A.No.419-P/2012.**
(Sikandar Khan and others –vs- Collector Acquisition, NHA, Peshawar and others).
9. **R.F.A.No.420-P/2012.**
(Noor Muhammad –vs- Collector Acquisition, NHA, Peshawar and others).
10. **R.F.A.No.426-P/2012.**
(Mohib Gul and another –vs- Collector Acquisition, NHA, Peshawar and others).
11. **R.F.A.No.86-P/2013.**
(National Highway Authority through its Project Director –vs- Mohib Gul and another).
12. **R.F.A.No.87-P/2013.**
(National Highway Authority through its Project Director –vs- Iqbal and others).
13. **R.F.A.No.88-P/2013.**
(National Highway Authority through its Project Director –vs- Syed Nadir Shah).
14. **R.F.A.No.89-P/2013.**
(National Highway Authority through its Project Director –vs- Saleem Dad).
15. **R.F.A.No.90-P/2013.**
(National Highway Authority through its Project Director –vs- Syed Khalid Shah and another).
16. **R.F.A.No.91-P/2013.**
(National Highway Authority through its Project Director –vs- Abdul Ghaffar Ali).
17. **R.F.A.No.132-P/2013.**
(National Highway Authority through its G.M –vs- Land Acquisition Collector NHA, Peshawar and others).
18. **R.F.A.No.133-P/2013.**
(National Highway Authority through its G.M –vs- Farid Ullah).
19. **R.F.A.No.134-P/2013.**
(National Highway Authority through its GM –vs- Muhammad Arshad Khan and others).
20. **R.F.A.No.135-P/2013.**
(National Highway Authority through its GM –vs- Muhammad Riaz and others).
21. **R.F.A.No.136-P/2013.**
(National Highway Authority through its GM –vs- Musharaf Khan and others).
22. **R.F.A.No.137-P/2013.**
(National Highway Authority through its GM –vs- Sikandar Khan and others).
23. **R.F.A.No.138-P/2013.**
(National Highway Authority through its GM –vs- Noor Muhammad and others).

24. R.F.A.No.286-P/2013.
(*Syed Nadar Shah and others –vs- Collector Acquisition, NHA, Peshawar and others*).
25. R.F.A.No.287-P/2013.
(*Abdul Wahid –vs- Collector Acquisition, NHA, Peshawar and others*).
26. R.F.A.No.288-P/2013.
(*Raza Khan and others –vs- Collector Acquisition, NHA, Peshawar and others*).
27. R.F.A.No.330-P/2013.
(*National Highway Authority through its GM –vs- Raza Khan and others*).
28. R.F.A.No.331-P/2013.
(*National Highway Authority through its GM –vs- Abdul Wahid*).

2. Brief and essential facts of the cases are that National Highways Authorities, Islamabad decided to acquire land measuring 79 *kanal* 7 *marla* and 3 *sarsai* in *Mouza Kokar*, Tehsil and District Peshawar (“**acquired property**”) for the Construction of Peshawar Northern Bypass Project (“**Project**”). Accordingly, proceedings were initiated for the said acquisition under the enabling provisions of the Land Acquisition Act, 1894 (“**Act**”). Notification under section 4 was issued on 28.05.2008 and consequently possession of the acquired property was taken over by NHA on 21.04.2010. Finally, the proceedings culminated in the announcement of Award No.3/LAC/PNBP/NHA/10, dated 24.06.2010 (“**Award**”) in terms that;

“After receiving the amount/ fund the undersigned has personally visited the area

under acquisition in the presence of land owners/ notable persons and observed that the land under acquisition is extremely fertile produce valuable fruits and crops. Commercial, Agricultural, Agricultural-cum-residential, valuable and has the potential value of being a site for residential as well as commercial purpose/ activities. The proposed rate as Rs.40,000/- per marla keeping in view the above mentioned factors following the provision of Section 23(1) approved by the competent authority. The rate in my opinion is suitable/ reasonable justified and meet the ends of justice.

*The award for the acquisition of an area of 79 kanals 07 marla 03 sarsai of land situated in Mauza Kukar Tehsil and District Peshawar for the Construction of Peshawar Northern Bypass Road is announced u/s 11 of the Land Acquisition Act, 1894. The land will be vested in the name of National Highway Authority, Islamabad free from all encumbrances. The award is filed u/s 12(1) of the Land Acquisition Act, 1894 in the office of Land Acquisition Collector (PNBP, Peshawar Northern Bypass Project, National Highway Authority, Peshawar. ”
(emphasis provided)*

3. Aggrieved by the compensation determined in the Award, the land owners and the acquiring authority both impugned the same. The divergent pleadings of both the parties led to the formation of following issues by the Referee Court;-

Reference of the Land owners

1. *Whether the petitioners have got the cause of action?*
2. *Whether per marla compensation of land fixed vide impugned award dated 24.06.2010, is much less than the actual market and potential value of the suit property?*
3. *Whether petitioners are entitled to enhance rate of compensation as prayed for?*
4. *Relief.*

Objection petition by the acquiring authority/NHA

1. *Whether the petitioners have got the cause of action?*
2. *Whether respondent No.1, ignored one year average pertaining to the suit land and announced the award at enhanced rate in an arbitrary manner?*
3. *Whether the rate of compensation was fixed in accordance with the potential and market value of the acquired land as well as of surrounding area?*
4. *Relief.*

4. During the reference proceedings Muhammad Khurshid, *Patwari Halqa, Mauza Kukar* appeared and in addition to producing the relevant revenue record relating to the acquired property also furnished sale mutations No.4369, 4371, 4284, 4934, 5071 and 5112 (Ex.PW1/4 to 1/9). He further deposed that;

“It is correct that the property sold vide the above said mutations are partially adjacent to the land acquired by the respondent. It is correct that the above said acquired land is nearer and adjacent to the abadi of village Kukar while some of the properties under the award is on the bank of ghair mumken road.”

5. Jehanzaib Khan, a former General Councilor of the area, also appeared, who clearly deposed that the acquired property was situated “*near and on the bank*” of Charsadda Road, and that in the vicinity thereof, were CNG Stations, petrol pumps, a school, and hospital, describing the

property to be suitable for *residential* and *commercial purposes*, while the value of the acquired land was suggested to be between four and five lacs.

6. The owners also appeared in support of their objections to the compensation, as determined in the Award. Interestingly, they produced the decision of the Referee Court with regard to the acquisition of property for the Project in the adjacent *Mauzas of Wadpaga and Hargoni* (Ex.PW2/3 and Ex.PW2/4) adjudging the price of the property at Rs.300,000/- per *marla*.

7. Manzoor Ahmad, Steno Typist NHA, and Faqir Hussain, *Qanoongo* NHA, appeared on behalf of the acquiring department/NHA. The gist of their testimony was that the *ausat yaksala* of the acquired property came to Rs.16,354/-, while the market rate ranged between Rs.50,000/- to Rs.100,000/-. Even these witnesses of the acquiring department frankly conceded that the acquired property was close to residential *abadi*.

8. During the proceedings before the Referee Court, the land owners moved an application for constituting a *local commissioner* to enquire and report the *market value* of the acquired

property. The Referee Court allowed the said application vide its order dated 30.04.2012 by appointing M/s Naqeebullah Khattak, Advocate, as a *local commissioner*, with direction to visit the spot in presence of the parties and with the help of *Patwari Halqa* for responding to seven terms of reference, which are;-

1. *Evaluate the potential of the acquired property at the time of acquisition period.*
2. *Determine the location and market value of the property at the time of acquisition and at the time of institution of the suit.*
3. *Described its nature and whether through the road for the purpose of which it is acquired, increase has caused in the value of the acquired property and the property contiguous with it.*
4. *How much property of each objector has been acquired as per the disputed award with the specification of its Khasra and Khata numbers.*
5. *Prepare the site plan of the acquired property alongwith the contiguous properties which were existed at the time of acquisition.*
6. *As in respect of the disputed award several land owners have brought objections petitions, so the acquired property of each objector shall be separately specified in the light of above directions in each objection petition separately.*
7. *Record the statements of the independent witnesses and of the parties in this regard.*

9. Accordingly, after inspecting the site, examining the representative of the acquiring authority, *Halqa Patwari*, four independent locals of the area and Qiaser Khan, a Property Agent, the potential value of the acquired property was assessed @ Rs.200,000/- per *marla*. What is interesting to note is that all the locals of the area

had opined that the *market value* of the acquired property was around Rs.400,000/- per *marla*, but none produced any documentary evidence in support of their claim.

10. The worthy Referee Court after considering the evidence produced by the parties decided all the References and Objections through a consolidated decision dated 27.09.2012, wherein it was held that;

“In view of the above discussion as the objectors have proved their objections petitioners at serial No.1 to 12 in this judgment, so their references are accepted and the rate of the their acquired property is enhanced from Rs.40,000/- to Rs.100,000/- per marla while the reference of respondents NHA at serial No.13, is dismissed. Parties are left to bear their own costs.”

11. The worthy counsel for the land owners vehemently contended that clear sale transactions in the adjacent *Mauza* to the acquired property brought to the attention of the Referee Court were wrongly ignored; that for the same Project in the adjacent *Mauzas* of *Wadpaga* and *Hargoni*, Award No.2 was erroneously ignored; that there was clear evidence brought on the record that the acquired property could be put to commercial and residential purposes; that even the witnesses of the acquiring department conceded that the acquired property was adjacent to *abadi* of village *Kukar*. In support of their above

contention, the worthy counsel for the land owners made reliance upon *Ramzan's case* (PLD 2004 SC 512), *Mst.Iqbal Begum's case* (PLD 2010 SC 719) and *Begum Aziza's case* (2014 SCMR 75).

12. In rebuttal, the worthy counsel for the acquiring authority vehemently argued that there was no evidence to support the contention that the acquired property could be used for commercial or residential purposes; that the *ausat yaksala* was the correct barometer to determine the compensation for the acquired property; that the sale mutations brought in evidence did not lend credence to the version of the land owners and some of them were in fact manipulated transactions, merely to create evidence for enhancing compensation in the present proceedings.

13. Valuable arguments of the worthy counsel for the parties heard and the record perused with their assistance.

14. Section 23 of the Land Acquisition Act, 1894 (“Act”) provides for determining the compensation to be awarded to the land owners for compulsorily acquiring their property, reads as;-

"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,

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the of the declaration under section 6 and the time of the Collector's taking possession of the land.

(2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition."

15. This crucial issue for determining compensation of acquired property has been earlier explained by this Court in **Sultan Shah's case (PLD 2011 Peshawar 60)**, wherein after discussing the decision of the Apex Court, it was held that;-

"The two most essential issues on which the present appeals hinges are that;

(i) whether in determining the compensation of the acquired

property only the market value of the same at the time of issuance of Notification has to be considered or future prospects of the said property including future sales prices could also be considered in determination thereof.

- (ii) *whether the "yaksalas" and "panchsals" were the only guiding consideration for determining the compensation of the acquired property.*

In view of the aforementioned clear annunciation of the august Supreme Court of Pakistan, it is now settled that in order to determine the compensation for the acquired property, the determining factor should not only be the "Market" value of sales taking place at the time of Notification but it should also be with reference to the use to which the acquired property was reasonably capable of being put in future. In this regard, future sales could also be taken into consideration, while determining the compensation for the acquired property.

In view of the aforementioned discussion on the two essential issues, this court is of the considered view that:

- (i) *in determining the compensation for property being acquired, the "potential" value thereof can and should be considered, which would depend upon the future prospects of the similarly placed property. This can be determined by factors including the sale price or the market value of similarly placed property even E on a future date, subsequent to the Notification but not beyond the announcement of the Award.*
- (ii) *the 'yaksalas' and 'punjsalas' can and should not be the only consideration for determining the compensation for the property being acquired under the Act."*

16. The distinction and the relevance of the *market value* and the *potential value* of the acquired property has finally been settled by the apex Court in **Begum Aziza's case supra (2014 SCMR 75)**,

wherein, the apex Court tracing decisions of the superior courts concluded 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. In *Abdur Rauf Khan v. Land Acquisition Collector/ D.C (1991 SCMR 2164)* this Court while dilating upon the question of rate of compensation laid down following principles germane to section 23 of the Land Acquisition Act which may be kept in view. Those are as follows;-*

- (i) *That an entry in the Revenue Record as to the nature of the land may not be conclusive, for example, land may be shown in Girdawari as Maira, but because of the existence of a well near the land, makes it capable of becoming Chahi land;*
- (ii) *That while determining the potentials of the land, the use of which the land is capable of being put, ought to be considered;*
- (iii) *That the market value of the land is normally to be taken as existing on the date of publication of the notification under section 4(1) of the Act but for determining the same, the prices on which similar land situated in the vicinity was sold during the preceding 12 months and not 6-7 years may be considered including other factors like potential value etc.”*

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. In appropriate cases there should be no compulsion even relying upon the oral testimony with respect to the market value of the property intended to be acquired, because even while deciding cases involving question of life and death, the Courts rely on oral testimony alone and do not insist on the production of documentary evidence.....The previous sales of the land, cannot, therefore, be always taken to be an accurate measure for the determining the price of land intended to be acquired. (Fazalur

Rehman and others –vs- General Manager, SIDB and another (PLD 1986 SC 158).

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. (Raza Muhammad Abullah through his legal heirs v. Government of Pakistan and others (1986 MLD 252).

The learned Referee Court neither adverted to the afore-mentioned principles nor appreciated the evidence in proper perspective. There is yet another aspect of the matter which may have a bearing on the value of the property. 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).”

(emphasis provided)

17. The *ratio decidendi* of the above cited cases are that;-

- I. The *market value* of the acquiring property, at the time of issuance of notification under section 4 of the Act or taking possession should not be the sole criterion for determining the compensation of the acquired property.
- II. The fair compensation for the acquired property in the open market had to be determined which could be ascertained where the price of the *willing purchaser*

and *willing seller* meets and they agree to the sale of land.

- III. Oral testimony of persons who are well acquainted with and likely to know the price of property including the local property dealers could be considered.
- IV. Value of land in the adjoining *Mauza* was also to be taken into consideration for determining the compensation to be awarded to owners of the acquired property.
- V. The escalation of price of land during the acquisition period till its culmination in issuance of the award could be taken into consideration which was, in essence, determining the *potential value* of the acquired land.
- VI. To what purpose and use the acquired property could be put to in present or in the future. In this regard, the nature of land, the facilities available thereon and in its surrounding would also be relevant and thus to be considered.

VII. Referee Court not taking into account the *potential value* of the acquired property and restricting his assessment of the *market value* would always fall in error and thus its decision would warrant correction.

18. Now, let us consider the evidence relating to the sale transactions produced by the parties. In this regard, the acquiring authority/NHA banked upon the *yaksalas* of the acquiring property.

The particulars of which are as follows;-

<i>Sr.No.</i>	<i>Period</i>	<i>Value</i>
1	27.05.2007 to 27.05.2008	Rs.11,171/-
2	27.08.2008 to 28.08.2009	Rs.14,572/39
3	23.06.2009 to 24.06.2010	Rs.13,955/47
4	02.03.2009 to 02.03.2010	Rs.16,572/77

19. The land owners on the other hand, relied upon other sale transactions, the particulars of which are as follows;-

<i>Sr.No.</i>	<i>Date</i>	<i>Mutation No</i>	<i>Area</i>	<i>Value</i>
1	29.02.2008	4369	4 marla	Rs.200,000/-
2	29.02.2008	4371	4 marla	Rs.200,000/-
3	07.04.2008	4384	4 marla	Rs.100,000/-
4	02.03.2010	4934	6 marla	Rs.50,000/-
5	30.07.2010	5071	13 marla	Rs.300,000/-
6	12.11.2010	5112	17 marla	Rs.88,235/-

20. There can be no mathematical formula set for the determination of the compensation due to the land owners for the compulsory acquisition of their property. Various factors depending on the circumstances of each case would cumulatively be the basis for arriving at a *potential value* of the acquired property. The most critical factor, which is to be kept in mind for such determination is the utility of the acquired land, keeping in view the availability of facilities for its said utilization.

21. Now, when we review the findings of the Referee Court in rejecting the claim of the land owners with regard to mutation Nos.4369 and 4371, the same are based on valid reasons, as the two transactions clearly appear to have taken place between the families of the *buyers* and the *sellers*, and that too immediately before the notification under section 4 of the Act. The said transaction appears to be '*tailored*'. However, what irks this Court is that the Referee Court has only taken into consideration the *market value* of the acquired property at the time of its notification under section-4 of the Act, without appreciating the prospective

utility of the acquired land and the sale transactions of the surrounding areas.

22. This Court is not in consonance with the findings of the Referee Court regarding the report of the *local commissioner*, whereby oral testimony of locals of the area has been outrightly rejected. The crucial factor to be kept in mind is that oral testimony of relevant person, and that too, confidence inspiring should be considered. In the present case, the property Agent namely, Faqir Khan and five other local private persons, who were not the land owners of the acquired property and yet all in consonance brought the price of the acquired property to be around Rs.400,000/-. Their testimony could not be disregarded simply on the ground that it was after the announcement of the Award and without documentary proof.

23. It is an admitted position that the acquired property can be put to residential and commercial purposes, as the same was testified by the worthy Collector in the Award and not rebutted by the witnesses produced by the Acquiring Authority. The provision of natural gas, electricity, main road, school and hospital are admittedly very much available in the surrounding area.

24. Finally, this Court finds that the reasons rendered for not accepting the compensation awarded in the adjoining *Mauza* for land acquired for the present Project, were also contrary to the settled law. In fact, Award No.2 relating to the adjoining *Mauza Wadpaga*, which was duly produced in evidence has now been decided by this Court in RFA No.54-P/2011 vide judgment dated on 25.10.2017, whereby the compensation for the acquired property in the adjoining *Moza* for the present Project has been adjudged at Rs.300,000/- per *marla* with 15% compulsory acquisition charges and 6% simple interest from the date of acquisition till final payment.

25. Thus, denying the present owners of *Mauza Kukar*, the said compensation would surely be discriminatory when the nature of the two properties is not starkly different in its present and future utility.

26. Before parting with this judgment, it would also be important to note that four persons in RFA No.286-P/2013 and twelve persons in RFA No.417-P/2012 vide C.Ms No.210-P/2015 and No.371-P/2016 respectively have sought

impleadment as appellants in the respective appeals pending before this Court.

27. The worthy counsel for the petitioners seeking impleadment based their claim on the judgment rendered by the Apex Court in *Sadaqat Ali Khan's case* (PLD 2010 SC 878). When confronted, the worthy counsel for the acquiring Department-NHA brought to the attention of the Court that the said judgment is now under review before the Apex Court, and in this regard, he relied upon the order dated 1.3.2017 of the Apex Court in *Fazl-e-Raheem Khan's case* (Civil Appeal No.83-P of 2016). No doubt, review petitions are pending against the judgment rendered in *Sadaqat Ali Khan's case*, however, there is no injunctive order disturbing the operation of the said decision. Accordingly, this Court is bound under the law to follow the law laid down in *Sadaqat Ali Khan's case* (*supra*), as is the command of Article-189 of the Constitution.

28. Accordingly, for the reasons stated herein above,

- I. C.M.No.210-P/2015 in RFA No.286-P/2013 and C.M.No.371-P/2016 in RFA No.417-P/2012 for impleadment

of the applicants as appellants in the
aforementioned R.F.As are allowed
and they are impleaded as appellants.

II. The appeals of the Acquiring
Authority, NHA at Sr.No.11 to 23, 27
and 28 are dismissed and

III. The appeals filed by the land owners,
at Sr.No.1 to 12, 24 to 26 are allowed
in terms that the compensation for land
acquired would be Rs.300,000/- per
marla with 15% compulsory
acquisition charges and 6% simple
interest from the date of acquisition till
its final payment.

Announced:
Dt.22.12.2017

CHIEF JUSTICE

F.Jan/*
(SB) Hon`ble Mr.Justice Yahya Afridi, Chief Justice.