Privy Council Appeal No. 33 of 1968

Collector of Land Revenue – – – – – – *Appellant*

v.

A. K. A. C. T. V. Alagappa Chettiar – – – – *Respondent*

and

Collector of Land Revenue – – – – – – *Appellant*

v.

Ong Thye Eng – – – – – – – – *Respondent*

(and Cross Appeals)

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER 1970

Present at the Hearing:

LORD HODSON
VISCOUNT DILHORNE
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD DIPLOCK]

In June 1964 the land of which the market value is in dispute in the instant appeals was held in undivided shares by ten owners, of whom the first respondent (herein called " Alagappa ") held a one-half share and the second respondent (herein called " Ong Thye Eng ") held a one-twelfth share. The land was situate in Kuala Lumpur. It was 991,730 square feet viz. about 23 acres in extent. Alagappa had held his one-half share for many years; but Ong Thye Eng and the other eight co-owners had purchased the remaining half-share between them as recently as November 5, 1963, at a price of $1·10 per square foot from Devarayan Chettiar (herein called " Devarayan ") who had himself become sole owner of that one-half share in 1962 as a result of a distribution of assets of a partnership on dissolution.

Notice that the land was likely to be acquired under the Land Acquisition Act 1960 was given on June 4, 1964. This was the relevant date at which its market value fell to be ascertained. The Collector valued it at $2,975,190·00 or $3 per square foot. This was the valuation put upon it in a report by the Government valuer. The total sum was apportioned between the co-owners proportionately to their respective undivided shares in the land.

Each of the co-owners objected to the Collector's award on the ground that the amount of compensation was too low. Their objections were referred to the High Court, under section 38 of the Act, for its decision. Mr. Justice Gill, sitting with two assessors, heard the objections. He dismissed them and upheld the Collector's award of $3 per square foot. In doing so he differed from the assessors, one of whom would have valued the land at $4·80 and the other at $6·00 per square foot.

Alagappa and Ong Thye Eng appealed to the Federal Court under section 49 of the Act. It was agreed that the other co-owners should be bound by the decisions in these appeals. The Federal Court (Ong Hock Thye F.J., Raja Azlan Shah and Pawan Ahmad J.J.) allowed the appeals. The judgment was given by Ong Hock Thye F.J. He valued the land at $6,960,456·00. This figure was arrived at by taking a value of $8·00 per square foot, deducting $200,000 as the cost of clearing squatters from the land, and subjecting the balance to a further reduction of 10% to cover "the bare possibility that I may have overlooked some other factor in the Collector's favour, although I do not think so".

Leave to appeal to the Yang di-Pertuan Agong was granted to the Collector. He seeks to have the High Court's valuation of $3·00 per square foot restored. Alagappa and Ong Thye Eng also obtained leave to cross-appeal against the final 10% reduction for factors which may have been overlooked. The Collector has not sought to justify this 10% reduction if the valuation to which it was applied is correct. The real issue in the instant appeals is whether the Federal Court erred in principle in setting aside the valuation of Gill J. at $3·00 per square foot and substituting their own valuation of $8·00 per square foot less a deduction of $200,000 for squatter clearance.

At the hearing before their Lordships' Board the Appellant sought leave to support the valuation of Gill J. upon an additional ground which did not form the basis of his judgment and was not relied upon by the Appellant at the hearing in the Federal Court. This was that the compensation ought not to have been assessed upon the value of the land as an undivided whole and apportioned among the co-owners proportionately to their respective undivided shares in it, but should have been assessed upon the aggregate of the separate values of the undivided shares in which the land was held. This new contention would involve a question of law of general public importance as to the true construction of a Malaysian statute dealing with the measure of compensation for land compulsorily acquired throughout the Federation. If their Lordships were to entertain it they would be doing so without the advantage of the opinion of any court in Malaysia upon it. This would be contrary to the usual practice of their Lordships' Board. Leave was accordingly refused. Their Lordships will proceed to deal with the appeal on those grounds only which were argued in the Federal Court.

In cases relating to the amount of compensation to be paid for land acquired under the Land Acquisition Act 1960 the respective functions of the High Court in deciding objections to the Collector's award, of the Federal Court in determining appeals from the decision of the High Court, and of their Lordships' Board in advising the Yang di-Pertuan Agong as to the disposition of an appeal from the Federal Court differ from one another.

Although upon referring an objection to the High Court for its determination the Collector is required to state the grounds on which the amount of compensation was determined, the reference to the High Court is not in the nature of an appeal from the Collector's award. It is in the nature of an original hearing, in which the applicant is the plaintiff and

the Collector the defendant. The onus lies upon the applicant to satisfy the court by evidence that the amount of compensation awarded is inadequate; and the Collector is entitled to call evidence in support of the amount awarded. His evidence is not confined to supporting the award upon the grounds stated in the notice of reference. He may amplify them or justify the amount awarded on other grounds. The judge, with the assistance of the advice proferred to him by the assessors, makes his own estimate of the amount of compensation upon the evidence adduced before him; but if at the conclusion of the evidence he is not satisfied that the amount awarded by the Collector is inadequate, the award must be upheld and the application dismissed.

The appeal to the Federal Court under s. 49 of the Land Acquisition Act 1960 is like any other civil appeal, by way of re-hearing. The Federal Court is entitled to review the inferences and conclusions of the High Court and to draw its own inferences and conclusions *Aik Hoe & Co. Ltd. v. Superintendent of Lands and Surveys* [1969] A.C.1. But where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, an appellate court ought to accept the High Court's findings of primary fact save in very exceptional cases. Similarly where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's finding as to which he regarded as most reliable is entitled to considerable weight though it is less sacrosanct than his findings of pure fact which are dependent upon his view of whether or not particular witnesses were telling the truth. Finally, their Lordships would observe that land valuation inevitably involves an element of appreciation and impression. There is room for divergence of opinion. As in the case of appeals against assessments of damages or against apportionment of blame in actions for negligence an appellate court ought not to reject the judge's assessment and to embark upon a fresh valuation of its own unless it is satisfied for good reason that the judge's assessment must be wrong.

This was the approach adopted by the Federal Court in the instant case. They considered first the findings of fact and the reasons given by Gill J. in his judgment for holding that the Collector's valuation of the land at $3·00 per square foot was correct. They came to the conclusion that his award was based upon false premises of fact and must be set aside. This left them free to make their own valuation of the land upon their independent consideration of the record of the evidence adduced in the High Court. They proceeded to do so and arrived at the figure already stated.

In reviewing the decision of the Federal Court, their Lordships have a more restrictive function than that of the Federal Court in reviewing the decision of Gill J. The principle upon which this Board acts upon appeals in land valuation cases is well-settled.

> " Appeals in valuation cases will only be entertained on questions of principle . . . Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and will be dealt with on appeal by this Board. . . . Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinion of competent courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere . . . unless there appears to be an error in law or a miscarriage of justice ". (*Nowroji Rustomji Wadia v. Bombay Govt.* 1925 L.R. 52 I.A. 367 at pp. 369 370.)

In accordance with this practice if their Lordships were of opinion that the Federal Court were justified in its reasons for setting aside the valuation of Gill J. they would not think it appropriate to review the Federal Court's own substituted valuation of the land—except as respects the 10% reduction which it is conceded must be wrong in principle and is the subject of the Cross Appeal. They will accordingly restrict themselves to considering the grounds upon which the Federal Court justified their discarding Gill J.'s valuation.

At the hearing before the High Court expert oral evidence was given by the Government valuer and the applicants' valuer. There was conflict of opinion between them as to what sales of other land could be regarded as comparable for the purpose of assessing the value of the acquired land. On this aspect of the case Gill J. accepted the evidence of the Government valuer and rejected that of the applicants' valuer. Oral evidence was also given, *inter alia,* by Alagappa, by two of the other co-owners and another Chettiar, Palaniappa. The Government valuer based his valuation of $3·00 per square foot upon the price of $1·10 per square foot at which Devarayan had sold his undivided half-share in the land to the applicants (other than Alagappa) in November 1963. For the purpose of comparison with other sales this has throughout been expressed as if it were $2·20 for the whole interest in the land. He had checked this figure against the prices realised upon sales of smaller areas of land in the vicinity of the acquired land during the years 1962 and 1963; and reached the conclusion that the price given for the half-share in the acquired land in November 1963 was slightly high. In arriving at his valuation of $3·00 per square foot he had made an allowance for the general rise in prices of land in Kuala Lumpur in the seven months between November 1963 and June 1964.

The applicants, who were claiming $12·00 per square foot, were concerned to persuade the judge that the transaction in November 1963 ought to be ignored. Their oral evidence, much of which was hearsay, was directed to proving that the sale by Devarayan of his half-share was a forced sale made by a young and inexperienced man, a permanent resident of India whose temporary permit to remain in Malaysia was due to expire, and who would be compelled to pay capital gains tax in India at the rate of 65% unless he sold his share in the land before he returned to India.

Their Lordships need not examine this evidence further, for the judge who heard and saw the witnesses said of it:

> "I have no hesitation whatsoever in saying that I can place no reliance whatsoever on all this evidence which, to my mind, was produced in order to boost the applicants' claim to higher compensation."

Some of these witnesses also gave evidence that at the time of the sale by Devarayan some 10½ acres of the land were occupied as a military camp, but that it had been vacated between that date and the acquisition date. This was with a view to showing that its potentialities for early development as a building site had increased substantially between November 1963 and June 4, 1964. Alagappa had, however, himself produced a newspaper of January 3rd, 1962, dealing with a proposal to construct a dual-carriage highway crossing the acquired land which he relied upon as enhancing its potentialities as a building site. But this article also stated that the military camp on the acquired land had by that date been closed down and was proposed to be demolished. The Government valuer's unchallenged evidence was that the lease to the military, to which Alagappa must have been a party, had expired in 1961. It was these vacated buildings which were occupied by squatters.

Gill J., did not deal specifically in his judgment with the question whether or not the military were still in occupation of nearly half the area when Devarayan sold his half-share in November 1963. Plainly, however, the judge did not accept the applicants' evidence on this point either. It appears to have been jettisoned even by their own counsel. It was neither relied upon in their final addresses to the judge nor in their notices of appeal to the Federal Court.

Gill J. found that at the time of the sale in November 1963, everyone concerned knew of the potentialities of the land as a building site and that Devarayan's half-share was sold and bought on that basis. He dealt with the applicants' contention that the legal incidents attaching to an undivided share in land make the price at which it has been sold a wholly unreliable indication of the value of the entirety of the land. He took the view that its usefulness as a factor in the valuation of the land itself depended upon all the circumstances of the sale in question. In the circumstances of the instant case, in which a half-share of a large area of land which the owner of the remaining half-share wished to develop as a building site was sold to purchasers who wished to join in its development, he was of opinion that the price paid did provide an appropriate starting point from which a suitable allowance could be made for the sale being that of an undivided share. He considered that the best guide as to the amount of the allowance lay in the prices paid upon recent sales of similar land in the same neighbourhood. For this purpose he relied principally upon a sale in September 1962 of an area of 2·85 acres at $1·12 per square foot. In so doing he preferred the evidence of the Government valuer as to comparables to that of the applicants' valuer. Allowing for the general rise in land prices between September 1962 and November 1963 he thought that $2·20 did represent the market value of the entirety of the acquired land at the date of the sale of Devarayan's half-share in it at $1·10 per square foot. He concluded with these words "In valuing the land acquired in June 1964 the Collector has allowed an increase of approximately 38% over a period of seven months. The value of $3·00 per square foot reflects not only the general increase in the price of land annually but also a reasonable allowance for the fact that its previous sale was of an undivided half-share."

Their Lordships would point out that there were two findings of fact and one finding that the opinion of one expert witness was to be preferred to that of another, which underlay the decision of Gill J. that the Collector's valuation of $3·00 per square foot had not been shown to be wrong.

The first finding of fact was that the sale by Devarayan of his undivided half-share was not a forced sale but one in the open market between parties at arms length. This finding rested upon the judge's assessment of the credibility of the witnesses who gave oral evidence before him. It was one peculiarly within the province of the trial judge, with which an appellate court should not interfere save in most exceptional circumstances.

The second finding of fact was that everyone knew about the potentialities of the land as a building site at the time of the sale of Devarayan's half-share. This rested, *inter alia,* upon the judge's rejection of the applicants' evidence that 10½ acres of the land was still occupied as a military camp in November 1963. This was another question which depended upon the witnesses' credibility.

A finding that the opinion of one expert witness is to be preferred to that of another, is also one which is not lightly to be disturbed by an

Appellate Court unless it can be demonstrated that the judge who heard and saw them give their evidence has misunderstood it or that his reasons for preferring one to the other are clearly unsound.

The Federal Court approached the underlying basis of the judge's decision by considering first what they described as the closely related questions (1) as to whether the price at which an undivided share of land was sold could ever be a relevant figure to be taken into account in estimating the value of the entirety of the interests in the land, and (2) as to whether the sale of Devarayan's half-share was in fact a sale of his interest at its market value. They recapitulated as " facts not open to dispute " what had been said about the circumstances of the sale at the trial by witnesses whose evidence the judge had indicated in most emphatic terms he did not believe. They summarised their own conclusions as follows: " (*a*) that $2·20 was not even *prima facie* the true market value of the undivided half interest on November 5, 1963; (*b*) that there were ample grounds for the conclusion that Devarayan accepted an offer below the market value of his share and (*c*) that, in any event, the sale price of the undivided half interest provided no proper criterion for the subsequent valuation of the whole interest ".

In their Lordships' view conclusion (*a*) and (*b*) depended upon the credibility of oral evidence given at the trial upon which the Federal Court, who had only the judge's notes of the evidence, were not entitled to substitute their own view for that of the judge who had heard the evidence *in extenso* and observed the demeanour of the witnesses as they gave it. If conclusion (*c*) is based upon (*a*) and (*b*) it is open to the same criticism. If on the other hand it is intended as a general proposition that recent sales of undivided shares of land should always be ignored in valuing the entirety of the land, the proposition in their Lordships' view is far too wide. As Gill J. pointed out in his judgment, the relationship between the price obtained upon a recent sale of an undivided share of land to the market value of the land as a whole will obviously be *one* of the factors in determining the price at which the vendor is willing to sell and the purchaser willing to buy a share in it. What discount (or addition) should be made for the other factors is very much a matter for the judge who had the advantage of seeing and hearing the evidence of the purchasers of one half-share and the co-owner of the remaining half-share. Their Lordships are not satisfied that Gill J. erred in principle in his approach to the question of the relationship between the sale price of Devarayan's undivided share and the value of the land as a whole, checking it as he did by a comparison with what he considered to be the most comparable recent sale of land in the same neighbourhood.

The Federal Court next dealt with a comparison of the potentialities of the land in November 1963 and June 1964. Their main criticism of the judgment of Gill J. was based upon the evidence of the applicants already referred to, that a large area was occupied as a military camp in November 1963 which had been vacated by June 1964 a factor which in their view should have easily doubled the market value between the two dates quite apart from the general rising trend of land prices. This evidence that the military camp was still occupied in November 1963 had plainly been disbelieved by the judge. The issue depended upon its credibility and in their Lordships' view, there was no material, upon which an appellate court was entitled to reverse the judge's finding that the full potentialities of the land were well known to all concerned at the time of the sale in November 1963.

The Federal Court also criticised the judge because he valued the whole 23 acres as a single unit which would command a lower price per square foot in the market than smaller areas would. The Federal Court while

accepting as " plausible " the proposition that large areas of land command a lower price per square foot than smaller areas, held that it was inapplicable in the instant case because the totality of the land acquired was held by the applicants under seven separate titles for areas " varying in area between approximately $6\frac{1}{2}$ acres (actually 11 acres) and just under a half-acre ". In this it is conceded that the Federal Court erred in law. Under the Land Acquisition Act 1960 the Scheduled lands are to be valued as a whole. The judge was right in law in doing so. Indeed the Court of Appeal itself did likewise in arriving at its own valuation.

These were the main grounds upon which the Federal Court justified the setting aside of Gill J.'s valuation. In their Lordships' view, in addition to the error of law last mentioned, they disclose errors in appreciating and applying the judicial methods of weighing evidence which should be observed by an appellate court. The issues as to whether the sale of Devarayan's half-share was a forced sale or one in the open market between willing buyer and willing seller and as to whether or not the acquired land was still occupied as a military camp at the time of that sale depended almost exclusively upon oral evidence of primary fact which the judge had found to be intentionally false. There was no material upon which the Federal Court was entitled to reject this finding and to base fresh inferences or conclusions upon the premise that this evidence of primary fact was true.

In their Lordships' opinion these errors are sufficient to vitiate the Federal Court's conclusion that Gill J.'s valuation ought to be set aside. But for them it does not appear that the Federal Court would have reached the stage at which it felt entitled to embark upon its own valuation. It has not been made apparent to their Lordships that there are any other grounds upon which it can be shown that the judge either failed to weigh correctly the reliability of the divergent opinions of the respective valuers as to comparables or to appreciate the different legal incidents of divided and undivided shares in land.

For these reasons, their Lordships consider that the Federal Court erred in principle in rejecting the valuation placed upon the land by Gill J. They will advise the Yang di-Pertuan Agong that this appeal should be allowed and the decision of the High Court restored and that the respondents should pay the appellant's costs of this appeal and in the Federal Court.

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