IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. (Appeal) No. 12/2006
S.C. (Spl.) L.A. No. 66/2005
C.A. No. 4/2001
Land Acquisition Board
of Review No. CL 1214

1. Mohamed Thawfeek Mukthar,
No. 610, Galle Road,
Colombo 03.
(now deceased)

1A. Mohamed Sahad Mukthar,
No. 26/3, Alwis Place,
Colombo 03.

Substituted 1A Appellant-
Respondent-Appellant

2. Mohamed Fhamy Mukthar,
No. 221/3, Dharmapala Mawatha,
Colombo 03.

3. Mohamed Luthfi Mukthar,
No. 1, Anderson Road,
Colombo 05.

4. Mohamed Nawaaf Mukthar,
No. 26, Alwis Place,
Colombo 03.

5. Mohamed Rila Mukthar,
No. 26, Alwis Place,
Colombo 03.
(now deceased)

5A. Fathima Shezaa Deen nee Mukthar,
No. 26, Alwis Place,
Colombo 03.

Substituted 5A Appellant- Respondent-Appellant

6. Sithy Aadila Mukthar,
No. 26, Alwis Place,
Colombo 03.

Appellants-Respondents-Appellants

Vs.

J.I. Ratnasiri,
Divisional Secretary,
Acquiring Officer,
Divisional Secretariat,
Kolonnawa.

Respondent-Appellant-Respondent

BEFORE : Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
P.A. Ratnayake, J.

COUNSEL : Faiz Musthapha, PC, with Faizer Marker and Hussaain Ahamed for Appellants-Respondents-Appellants

M.N.B. Fernando, DSG, with Rajiv Gunatillake, SC, for Respondent-Appellant-Respondent

ARGUED ON: 04.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Appellants-Respondents-Appellants: 05.02.2009
Respondent-Appellant-Respondent: 26.02.2009

DECIDED ON: 18.06.2009

Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 11.03.2005. By that judgment the Court of Appeal allowed the appeal of the respondent-appellant-respondent (hereinafter referred to as the respondent), set aside the decision of the Board of Review and affirmed the award of compensation made by the acquiring officer based on the market value of the property as at the commencement of Act, No. 15 of 1968. The appellants-respondents-appellants (hereinafter referred to as the appellants) appealed to the Supreme Court against the said judgment of the Court of Appeal for which this Court granted Special Leave to Appeal on the following questions:

1. Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?
2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?
3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?
4. Did the Court of Appeal misdirect itself on the burden of proof?

The facts of this appeal, as stated by the appellants, *albeit* brief, are as follows:

The appellants had filed an appeal before the Land Acquisition Board of Review against an award made by the respondent regarding an undivided ½ share of late Ummu Shifa Musthar, one of the respondents of the application before the Court of Appeal and who had died during the pendency of that appeal and 1/12th share each of the 2nd to 7th appellants respectively. The property acquired bears assessment No. 13, Horadehipitiya Road, Kolonnawa, containing in extent 11A–0R–31.00P.

The Board of Review was, *inter alia*, entrusted with the task of deciding the relevant date on which the market value of the acquired property should be determined. The main dispute therefore involved the question as to whether compensation of the property to be acquired was to be arrived at in terms of Section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board, Act No. 15 of 1968 (hereinafter referred to as Act, No. 15 of 1968) or in terms of Section 7 of the Land Acquisition Act.

The appellants maintained that the relevant date for valuation should be the date on which notice under Section 7 of the Land Acquisition Act was published in the Gazette, viz., 24.04.1981, whereas the respondent took up the position that compensation should be awarded on the basis that acquisition falls within the purview of Section 4(2) of Act, No. 15 of 1968 and therefore the date of commencement of that Act, viz. 22.09.1968, should be adopted as the relevant date for the purpose of computing compensation.

The appellants had admitted that Act, No. 15 of 1968 came into effect on 22.09.1968 and the Gazette Notification of the intention to acquire the property in question in terms of the Land Acquisition Act was published on 12.08.1970. The appellants have also admitted that the said property was acquired on 02.03.1979, when Section 38(a) notice was published in the Gazette.

The Board of Review, which initially heard this matter, by their order dated 20.02.1995 had held that the market value would be determined as at 22.09.1968, only if the land acquired at the time of acquisition was in the same condition it was on 22.09.1968.

According to the appellants, the land acquired was not in a marshy, waste or swampy state, but in an improved condition at the time of acquisition on 02.03.1979 and in those circumstances determination of the question of compensation had to be made in terms of Section 7 of the Land Acquisition Act, the material date being 24.04.1981, the date on which Section 7 notice of the Land Acquisition Act was published in the Gazette.

Accordingly, it was held that the relevant date for the purpose of computing the quantum of compensation for the property in question was 24.04.1981 that date being the date of publication of Section 7 Notice under the Land Acquisition Act, and not 22.09.1968, viz., the date of commencement of Act, No. 15 of 1968.

The total award of compensation by the respondent was Rs. 350,000/- and the appellants were awarded same in proportion to their respective shares. The appellants' original claim after certain restrictions had amounted to Rs. 8,860,150/- as compensation.

The Board of Review, which subsequently heard the appeal by the appellants had by their order dated 20.12.2000 quashed the award made by the respondent in respect of the amount of compensation and substituted the total amounting to Rs. 6,621,500/- stating that the appellants will be entitled to compensation in proportion to their respective shares.

The respondent being dissatisfied with the decision of the Board of Review preferred an appeal to the Court of Appeal. Learned Counsel for the appellants took up a preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981. The Court of Appeal, by their judgment dated 11.03.2005 held against the appellants and allowed the appeal of the respondent. The Court of Appeal thereby had set aside the decision by the Board of Review dated 20.12.2000 and had affirmed the Award of compensation made by the respondent based on the market value of the property at the commencement of Act, No. 15 of 1968.

Having stated the facts of this appeal let me now turn to consider the questions raised in this appeal on the basis of the submissions made by both learned Counsel for the appellants and the respondent.

1. **Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?**

Learned President's Counsel for the appellants contended that although the appellants' original restricted claim was Rs. 8,860,150/- as compensation, the respondent had awarded only Rs. 350,000/-. The Board of Review had quashed the Award made by the respondent in respect of the amount of compensation and had substituted the total amount to be Rs. 6,621,500/-. The respondent being dissatisfied with the said decision of the Board of Review had preferred an appeal to the Court of Appeal and had sought to appeal from the decision of the Board of Review on the following questions of law:

1. Should the relevant date on which the market value of the acquired property be determined according to the date on which Notice under Section 7 of the Land Acquisition Act was published in the Gazette or should the relevant date be determined according to the date of commencement of the Colombo District (Low Lying Areas) Reclamation and Development Board Act, No. 15 of 1968?

2. Whether the part of Section 4(2) of which reads as "the market value of that land for the purposes of determining the amount of compensation to be paid in respect of that land shall, notwithstanding anything to the contrary in that Act, be deemed to be the market value which that land would have had at the date of commencement of that Act if it then was in the same condition as it is at the time of acquisition" should be interpreted as if the condition of the land has changed from the time of acquisition, the provisions of the said Section 4(2) will not be applicable and the relevant date for the valuation should be taken as Section 7 date?

The appellants had taken up a preliminary objection before the Court of Appeal that the said questions are only pure questions of fact and that no questions of law had been disclosed. Their position was that the comparison of the condition of the land as at the date of acquisition and as at the date of Act, No. 15 of 1968, came into being (which was on 19.09.1968) was a pure question of fact.

It is not disputed that the question to be considered before the Land Acquisition Board of Review was whether the land in question was in the same condition at the time of acquisition, as was at the date of commencement of the Act, No. 15 of 1968. The said Board of Review had accordingly examined the applicability of Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act. Considering the issue in question, the said Board of Review had stated that,

> "Learned Counsel for appellants submitted that, according to the description given in the tenement list R1(a) dated 30.07.80, this land has been described as a garden containing eight temporary buildings and 25 coconut trees 10 to 25 years old, and therefore if one keeps in mind the fact that at the commencement of the Reclamation and Development Board Act it applied to "low lying, marshy, waste or swampy areas" the land acquired was not in that state, but in an improved condition at the time of acquisition, namely on 02.03.79. Learned Counsel for appellants' contention is that in view of the aforesaid circumstances, determination of the questions of compensation had to be made under Section 7 of the Land Acquisition Act, the material date being the date on which the Section 7 notice was published in the Gazette, namely 24.4.81".

It is therefore quite clear that the question of condition of the land had to be considered by the Board of Review. On a careful examination of the proceedings and the order made by the Board of Review, it is apparent that the condition of the land as of the date of acquisition compared with the condition of the land as at the date of Act, No. 15 of 1968 was not arrived at by the Board of Review on an assessment of facts. Further the Board of Reviews had led no evidence on the condition of the land in 1968 at the time the said Act, No. 19 of 1968 came into

operation and had come to the conclusion of the condition of the land, not on an assessment of the facts, **but purely by inference**.

In fact the Court of Appeal had given its mind to this question and had correctly found that no evidence had been led before the Board of Review with regard to the condition of the land in 1968, viz., at the time Act, No. 15 of 1968 came into operation. Since no evidence had been led before the Board of Review, it was erroneous for the Board to have concluded that the land in question earlier had been marshy and swampy and that 'the land acquired was not in that state, but in an improved condition at the time of acquisition'. On that basis the Board of Review had decided that the relevant date for the purpose of computing the quantum of compensation for the land is 24.04.81 and not 22.09.68, which was the date Act, No. 15 of 1968, came into operation.

What constitute a question of law was considered and determined by this Court in **Collettes Ltd.** v **Bank of Ceylon** ([1982] 2 Sri L.R. 514), where it had been stated *inter alia*, that,

i. **inferences from the primary facts found are matters of law**;
ii. whether there is or not evidence to support a finding, is a question of law; and
iii. whether the provisions of a statement applying 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.

As stated earlier the Board of Review had drawn inferences from the primary facts, which were before them and no evidence was led to support their findings. Further the Board of Review interpreted the statutory provisions in arriving at the date for the purpose of computing the quantum of compensation for the land in question. The Court of Appeal, after considering the matter before it, quite correctly came to the conclusion that the questions referred to the Court of Appeal for determination were questions of law that had to be decided by that Court.

It is not disputed that before the Board of Review the appellants and the respondent were relying respectively on the applicability of Section 7 of the Land Acquisition Act and Section 4(2) of the Act, No. 15 of 1968 for the purpose of arriving at the relevant date to compute the quantum of compensation. Considering the submissions made before the Board of Review and for the reasons stated above it is quite apparent that the Board had arrived at a decision, not on the basis of the facts before the Board, but on an interpretation of the aforementioned statutory provisions.

Accordingly it is apparent that the Court of Appeal was not wrong in rejecting the preliminary objection that 'no question of law had been disclosed and what was referred to was a pure question of fact', which was in relation to the state of the land in 1968 and 1981.

2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?

Learned President's Counsel for the appellants contended that he relied on the decision in **Mahawitharana** v **Commissioner of Inland Revenue** ((1962) 64 N.L.R. 217), where H.N.G. Fernando, J. (as he then was) had adopted a statement by Gajendragadkar, J. in **Naidu and Co.** v **The Commissioner of Income Tax** ((1959) A.I.R. S.C. 359).

The contention of the learned President's Counsel for the appellants was that what was held in the decision in **Naidu and Co.** (supra) by Gajendragadkar, J., was that finding of facts could be challenged only within narrow limits and limited to improper admission of evidence or exclusion of proper evidence or not supported by legal evidence or is not rationally possible. Learned President's Counsel submitted that the Court of Appeal had distinguished this decision on the basis that what was considered in that case relates to a pure question of fact, which is not the issue in question in this case.

In **Mahawitharana** v **Commissioner of Inland Revenue** (supra), the Supreme Court had to consider the question as to whether 'on the facts and circumstances proved in the case, the inference that the transaction in question was *an adventure or concern in the nature of trade* is in law justified? While answering the said question of law in the affirmative, the Supreme Court had held that in a case stated under Section 78 of the Income Tax Ordinance, the Supreme Court could consider the correctness of the inference drawn by the Board of Review as to the Assessor's intention, only a) if that inference had 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 was not rationally possible and was perverse and should therefore be set aside. This was laid down on the basis of the decision in **Naidu and Co.** (supra) and in both **Naidu and Co.** (supra) and in **Mahawitharana** (supra) the questions in issue were based on pure questions of fact.

The issue in question in this matter, as was stated earlier, was on the basis of the condition of the land in 1968 and the condition of the land at the time of acquisition. Whilst, the respondent contended that the applicable date should be the date when Act, No. 15 of 1968 came into operation, the appellants submitted that what should be taken into consideration was the date of acquisition. Admittedly it is necessary to arrive at the correct date for the purpose of computing compensation to be payable and for that purpose it is necessary to know whether there had been a change in the condition of the land between 1968 and the date of acquisition, as, if there had been such a change in the condition of the land, Section 4(2) of Act, No. 15 of 1968 would not be applicable for the payment of compensation.
It is not disputed that although the condition of the land at the date of acquisition was arrived at by the Board of Review based on evidence, there had been no evidence with regard to the condition of the land in 1968.

Accordingly as stated earlier, under question No. 1, the Court of Appeal had accepted that the Board of Review, in determining the condition of the land in 1968, had arrived at a decision, not purely on fact, but on **an inference** on the applicability of the Act, No. 15 of 1968 and an

interpretation given to Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act.

It is not disputed that the appellants' Valuers and the state Valuer had given evidence with regard to the valuation of the land, but no evidence was led as stated earlier, in relation to the condition of the property in question in 1968. The Land Acquisition Board of Review, in considering the question of computation of compensation had considered the question on the basis that the land had been 'in an improved condition' at the time of its acquisition and it is important to note that the Board of Review had arrived at this conclusion on the premise that Act, No. 15 of 1968 was applicable to low lying, marshy, waste or swampy areas and therefore this land was marshy in the year 1968. It is therefore apparent that the Board of Review in order to arrive at its finding had interpreted the provisions of Act, No 15 of 1968 and such a cause of action could not be accepted as considering a pure question of fact.

Accordingly the Court of Appeal was correct in concluding that the decision in **Mahawitharana** (supra) could be distinguished on that basis.

It is therefore evident that the Court of Appeal did not interfere with a finding of pure fact.

3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?

Learned Counsel for the appellants contended that the Court of Appeal misdirected itself in interfering with questions of fact and determining that the land had not undergone any changes.

As stated earlier, the Board of Review, after interpreting the provisions of Act, No. 15 of 1978 and the Land Acquisition Act, had determined erroneously that the land in question had undergone changes after 1968.

The Court of Appeal after determining that there was a question of law that whether there was a proper interpretation and application of Section 4(2) of Act No. 15 of 1968, had proceeded to examine the documents relating to the land in question, which included the Deed of Transfer at the time the said land was purchased by the appellants' predecessors and the condition of the land as referred to in the said Deed of Transfer.

It is not disputed that the said land was purchased by the appellants on 04.10.1968. Accordingly, the Court of Appeal considered a question of law based on the determination made by the Board of Review and had correctly examined the relevant documents, which were tendered to the Court of Appeal. Since the land in question had been purchased by the appellants' predecessors in 1968, and that being the year in which the condition of the land was relevant, after examining the said Deed, the Court of Appeal had correctly held that there had been no change in the condition of the land.

4. Did the Court of Appeal misdirect itself on the burden of proof?

Learned President's Counsel for the appellants submitted that the respondent had taken up the position that the computation of compensation should be calculated on the basis of Section 4(2) of Act, No. 15 of 1968 and therefore the burden of establishing the fact that the condition of the land had not changed after 1968 until the date of acquisition on 24.04.1981 was on the respondent.

As stated earlier, the following facts were common ground in this appeal: the land in question was purchased by the appellants' predecessors on 04.10.1968 and the Act, No. 15 of 1968 came into being on 22.09.1968. In terms of the acquisition process, the Section 4 notice under the Land Acquisition Act was dated 12.08.1970, order had been made in terms of Section 38(a)7 of the Land Acquisition Act on 02.03.1979 and the Section 7 notice in terms of the said Act was issued on 24.04.1981.

It is also common ground that the land was vested in terms of Section 38(a) of the Land Acquisition Act on 02.03.1979 and that at that time there was no Condition Report prepared for the land in question. In such circumstances when the Acquiring Officer took over the land it was presumed that there had been no change in the condition of the land. Accordingly the respondent had decided to compute the amount of compensation in terms of Section 4(2) of Act, No. 15 of 1968, where it is stated that,

> ". . . . notwithstanding anything to the contrary to that Act, be deemed to be the market value which that land would have had at the date of commencement of this Act **if it then was in the same condition as it is at the time of acquisition**" (emphasis added).

If the appellants had been of a contrary view to the effect that the land in question had changed from its original position at the time of its acquisition, then in terms of Section 101 of the Evidence Ordinance the burden of proving that assertion lies on the appellants. Section 101 of the Evidence Ordinance stated that,

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Accordingly if the appellants had asserted that the condition of the land in question had changed from its original position at the time of its acquisition, in terms of Section 101 of the Evidence Ordinance, the appellants should lead evidence to prove that position. Further in terms of Section 102 of the Evidence Ordinance, the burden of proof lies on the appellants, who required the Court to determine the amount of compensation they would be entitled to which

was different from what the respondent had computed as compensation. When the appellants claimed that the compensation should be computed in terms of the Land Acquisition Act as the condition of the land had changed from the time it was purchased by the appellants' predecessors and when the respondent had stated that there had been no change in the condition of that land, the burden of proof lies on the appellants to lead evidence that the land had undergone a change in its condition. Further as correctly pointed out by learned Deputy Solicitor General for the respondent, if no evidence is given by either party, in terms of Section 57(9) of the Evidence Ordinance it would be presumed that in the ordinary course of nature there would be no change in the condition of the land. Section 57(9) clearly states that there is no need to prove the ordinary course of nature and if there is no evidence of the condition of the land in 1968 to the contrary by the appellants, it is presumed that in terms of the ordinary course of nature that there was no change in the condition of the land. Therefore the burden of proving that there had been a change in the condition of the land solely rests on the appellants.

For the reasons aforesaid the questions of law for which special leave to appeal was granted are answered in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 11.03.2005 is affirmed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court