

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

RFA No. 371-P/2014

**WAPDA through Chairman,
WAPDA House and others**

Vs

Syed Sajjad Bukhari

Date of hearing 15.09.2020 (announced on 17.09.2020)

Appellant (by) Mr. Fida Gul, Advocate

Respondents (by) Qazi Jawad Ehsan Ullah, Advocate

JUDGMENT

MUHAMMAD NASIR MAHFOOZ, J. Through this single judgment, we intend to dispose of six connected matters, having common question of law and facts involved therein. The particulars of the same are as under:-

- I. RFA No. 371-P/2014 (WAPDA through Chairman WAPDA and others .Vs. Syed Sajjad Bukhari)*
- II. RFA No. 372-P/2014 (WAPDA through Chairman WAPDA and others .Vs. Syed Arshad Hussain Shah)*
- III. RFA No. 373-P/2014 (WAPDA through Chairman WAPDA and others .Vs. Javed Iqbal)*
- IV. RFA No. 478-P/2014 (Ghazi Barotha Contractors through Legal Advisor .Vs. Javed Iqbal)*

V. *RFA No. 479-P/2014 (Ghazi Barotha Contractors through Legal Advisor .Vs. Syed Arshad Hussain Shah and others)*

VI. *RFA No. 480-P/2014 (Ghazi Barotha Contractors through Legal Advisor .Vs. Syed Sajjad Bukhari)*

RFA No. 371-P/2014, RFA No. 372-P/2014, RFA No. 373-P/2014, RFA No. 478-P/2014, RFA No. 479-P/2014 and RFA No. 480-P/2014

2. Appellants in the captioned appeals have sought similar prayer in terms:-

“It is, therefore, humbly prayed that on acceptance of this appeal, judgment / decree dated 06.05.2014 of the learned ADJ-IV / Referee Court, Swabi may very kindly be set aside and also to dismiss Reference under Section 18/30 of the Land Acquisition Act, 1894 of the respondent No.1 with cost. Any other relief which is not specifically asked for may also be granted in favour of the appellants’ department and against the respondent No.1”.

3. The flurry of events unfolded for filing of the captioned appeals are as follows:-

Respondents filed Reference under Section 18/30 of the Land Acquisition Act, 1894 against the appellants before the Referee Judge, Swabi. The defendants/appellants were summoned by the learned trial Court, who appeared and submitted their written statement and the parties produced their evidence and the

impugned judgment and decree dated 06.05.2014 was passed, hence the instant appeals.

4. Learned counsel for the parties submitted their written submissions/arguments instead of arguing the case in open court. The arguments of learned counsel for the appellant are summarized below:-

5. Learned counsel for the appellants has raised several legal and factual objections to the *locus standi* of the respondents for filing objection petitions, besides their lack of bonafides and request for setting aside the impugned judgment and decree.

6. Similarly, the arguments of learned counsel for the respondents, inter alia, are that;

I. All appeals filed by WAPDA and Ghazi Barotha contractors are not maintainable;

a) RFA No.371-373 have been filed by WAPDA who is a statutory body having corporate status. All these appeals are required to be filed with proper authorization from the board in the form of resolution. As no such authorization or resolution is made available in any of the appeals filed by WAPDA, therefore, the RFAs are liable to be dismissed for lack of authority as envisaged in Order XXIV Rule-1 of the CPC.

- b)* It needs to be added at this juncture that as provided in S.117 of the CPC, all provisions of CPC including Orders and Rules are equally applicable to High Courts. Given that, the provisions of Order XXIV Rule-1 regarding want of resolution from the Board of corporation to authorize someone to file the suit would be equally applicable to appeals.
- c)* Not only that but all RFAs filed by WAPDA do not even have Vakalatnama authorizing the counsel to file and plead the same. Office has raised objection to this effect too but that has not gone unnoticed and un-addressed by the WAPDA and has not been cured within the time period allowed to the appellant by the office. Now that prescribed period of limitation as well as extension granted by the office has long been expired, the defect (non-availability of Power of Attorney favoring the counsel) has been rendered incurable.
- d)* As regards RFA No.480-P/2014, the appeal has been filed in the name of Ghazi Barotha Contractors through its Legal Advisor. The record does not give any clue as to whether Ghazi Barotha Contractors is a firm, a company or a sole proprietor. In the absence of any record to that effect, one is at loss to understand that whether the appellant by the name of Ghazi Barotha Contractor is a natural person or a legal one. It needs hardly to emphasis that only a natural or legal person could sue or file appeals and other than that a suit or appeal filed by someone who is neither a natural person nor a legal one is not maintainable.

- e) The record is also not giving any clue if Legal Advisor of the appellant (Ghazi Barotha Contractors) holds any authority in the form of resolution etc. empowering him to file the instant appeal. The Vakalatnama attached in the file would be merely for the purposes of allowing the Legal Advisor/lawyer to act as the counsel in the appeal which would not, in the absence of any specific resolution/authority letter, empower him to question the impugned judgment by way of filing subject RFA.
- f) Also please see that the requisite court fee of Rs.15,000/- has not been affixed on RFA No.480-P/2014. It is rather averred in the heading of RFA that because in the connected RFAs court fee is paid, therefore, the appellant considers that court fee is exempt, which assumption is contrary to law.
- g) The RFA No.480 is hopelessly time barred. It is filed on 16.08.2014 to challenge judgment of Referee Court which is announced and made on 06.05.2014. As is evident from the certified copy of impugned judgment attached with the RFA that its attested copy thereof was applied for on 13.8.2014. Same was prepared and delivered to Ghazi Barotha Contractors on the same day. That by the time appellant had applied for the certified copy of the judgment(i.e. on 13.08.2014), the limitation period of 90 days, as prescribed in Art. 156 of Sch.I of the Limitation Act, 1908, had already expired. So, even on this score alone the said RFA can be left completely out of consideration.

II. Locus standi of WAPDA and Ghazi Barotha Contractors to file appeals.

- i.* Record of the case clearly divulges, and so is admitted by the other side in the written arguments, that in the instant case land was acquired by the Federal Govt. for the benefit of WAPDA for construction of its Ghazi Barotha Project.
- ii.* As against the judgment of the Referee Court (which amounts to a decree), appeals have been preferred by WAPDA and Ghazi Barotha Contractors through its Legal Advisor. As a matter of law both of them do not possess any legal authority to file appeals against the judgments of Referee Court in view of clear provisions of section 54 of the Act.
- iii.* The proposition has long been dilated upon and decided by our superior courts in numbers of cases. The judgments of Supreme Court of Pakistan in the case of *'Pir Khan through his L.Rs Vs. MEO and others reported in PLD 1987 SC 485*, a larger bench judgment in the case of *'Iftikhar Hussain Shah and others Vs. Pakistan etc.'* reported in 1991 SCMR 2193 and *'Land Acquisition Collector Abbottabad and others Vs. Muhammad Iqbal and others'* reported in 1992 SCMR 1245 give ample guidance on the subject.
- iv.* In the case-law referred to above, it is quite settled now that a company or department for whose benefit land has been acquired does not have any right to prefer an appeal u/s 54 of the Act against the judgment of the Referee Court. As in the case in hand land has been acquired by the Federal Govt. for the benefit of WAPDA and former did

not chose to challenge the judgment impugned in these appeals. Thus WAPDA, simply being beneficiary of the acquisition or award, cannot file present appeals in the instant case as it cannot invoke the provisions of section 54 of the Act.

- v. At this juncture one may not lose sight of the law laid down by the apex court in the case of ***LAC and others Vs. Allah Nawaz and others*** reported in ***PLD 2010 SC 745*** which holds that appeals against the judgment of Referee Court could be filed the acquiring department in view of law laid down by the Shariat Appellate Bench of the apex court, but this very judgment is in the context of law of land acquisition and amendments made therein for the province of Punjab and not for the Province of Khyber Pakhtunkhwa. In the same very judgment in its paragraph 8 and onwards it is observed while discussing case-law reported in 2001 MLD 459 that an appeal filed by WAPDA in that case having Collector Land Acquisition as co-appellant is competent but again it is to be kept in mind that Land Acquisition Collector is a representative of provincial govt. and not of WAPDA appellant or Federal Govt. who has acquired land for the benefit of WAPDA. So, in order to enable him to file an appeal against the judgment of Referee Court he must have specific authority from the provincial govt. who appoints him to act as Collector u/s 3 of the Act.

Therefore, notwithstanding the fact that in the memo of present appeals Land Acquisition Collector is arrayed as co-appellant, but he too could not file an appeal unless of course if the

appeals had been filed by the Federal/Provincial Govt. through Land Acquisition Collector. Even otherwise, because Land Acquisition Collector is not the agent of company/department for whose benefit land is acquired but a representative of the provincial Govt, so he cannot be joined as co-appellant in an incompetent appeal filed in the instant case by WAPDA having no authority to prefer the same. In an appeal filed by provincial govt. through Land Acquisition Collector, if the same is filed (which in this case is not preferred), he would be represented by Advocate General's Office and not by the counsel for acquiring entity (viz. WAPDA in this case). So, on all fours the appeals preferred by WAPDA are barred by law and are not maintainable.

- vi. As to RFA No.480-P/2014, same has been filed by Ghazi Barotha Contractors through Legal Advisor who is employed by WAPDA to execute the construction of Ghazi Barotha project. Considering the true interpretation of section 54 of the Act in view of the law laid in the case-law discussed above, such a contractor by no means can file an appeal against the judgment of Referee Court.

7. After perusal of written arguments, the findings are as under:-

The Provincial Government of Khyber Pakhtunkhwa (then NWFP) commencing in the year, 1994 and then vide two Awards dated 08.06.1996

acquired 14303 Kanals and 15 marlas property in Mouza Gala Tehsil and District, Swabi for the purpose of Barrage known as *Ghazi Bharotha Hydropower Project (GBHP)* and for this purpose, the private owners were paid huge sum of money as compensation for their land acquired. The said Barrage consisted of two parts namely, CO-I and CO-II spreading inter Province through the district of Haripur, Swabi of the Khyber Pakhtunkhwa and district Attock of Punjab. After duly complying with the provisions of Land Acquisition Act, the Award was announced and the project was initiated that has now completed. The present respondents filed an objection petition before the learned Referee Judge exercising jurisdiction under the Land Acquisition Act, claiming to be leaseholder of Mines and Mineral to the extent of different areas of 401.952 acres to Syed Sajjad Bukhari, 400 acres to Syed Arshad Hussain Shah and 200 acres to Syed Javed Iqbal. This objection petition was filed on 05.12.1996 claiming to have leasehold rights qua the acquired property on the basis of different letters dated 16.05.1996 issued by the Deputy Commissioner,

Swabi purportedly exercising powers under the NWFP (Mines & Mineral) Mining Concession Rules, 1971.

Their claim as per objection petition is for compensation of Rs. 20,00,00,000/- (200 Millions) of Syed Arshad Hussain Shah, respondent, Rs. 22,50,00,000/- (202.5 Millions) by Syed Sajjad Bukhari, respondent and Javed Iqbal Rs. 18,00,00,000/- (180 Millions), which has been generously granted by the learned Referee Judge.

8. Respondents' grievances were that due to acquisition of the property vide the subject Award, they sustained huge losses as they could not continue quarrying of mineral, sand, gravel etc. on the demand of construction companies which could have fetched them profits to the tune of amount claimed in the objection petition.

Learned Referee Judge entertained the objection petition and framed the following issues:-

1. *Whether the petitioner has got a cause of action? OPP*
2. *Whether the petition is time barred? OPD*
3. *Whether the Court has got no jurisdiction? OPD*
4. *Whether the petition in the present form is mala fide? OPD*

5. *Whether the value of the suit property assessed by the respondents/collector is not adequate and in accordance with the prevailing rate in the area? OPP*
6. *What is the exact value of the subject matter of the property? OPP*
7. *Whether the petition is liable to be rejected for want of necessary parties? OPD*
8. *Relief.*

Additional Issue:

Whether the petitioner is entitled for the decree as prayed for

After recording evidence and hearing the parties, the learned Referee Judge allowed the objection petitions vide judgment and decree, referred to above, hence the instant RFAs.

9. It would be worthwhile to first decide the preliminary objections regarding maintainability of appeal.

Objection on Maintainability of Appeals

In this respect, first of all Section 54 of the Land Acquisition Act, 1894 is quoted below:-

“54. Appeal in proceedings before Court: Subject to the provisions of the Code of Civil Procedure, 1908 (V of 1908), applicable to appeals from original decrees, and notwithstanding anything to the contrary in the enactment for the time being in force,

an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to the Supreme Court subject to the provisions contained in Section 110 of the Code of Civil Procedure, 1908, and in order XLV thereof”.

10. For the purpose of determining the maintainability of appeals, the judgments cited by learned counsel in the written submissions are distinguishable when the law is itself clear. Section 18(4) of the Land Acquisition Act, 1894 is also quoted below:-

18. (1)

(2).....

(3).....

‘(4) Notwithstanding anything to the contrary contained in Section 21, the Federal Government, the Provincial Government, a local authority or a Company, as the case may be, for or on behalf of whom the land is being acquired, may, if it has not accepted the award, refer the matter to the Court within a period of six months from the date of announcement of the award:

Provided that the Court shall not entertain the reference unless in its opinion there is a prima facie case for inquiry and determination of the objection against the award’.

(The underlying is for emphasis only)

In addition to the words, Federal Government or Provincial Government, the words local authority or

company is mentioned too and WAPDA being an authority established under the WAPDA Act, 1958 was previously responsible for the electric power and the Water Wing but after the separation of electricity wing under the National Electric Power Regulatory Authority (NEPRA) the distribution and generation companies regulate the electric power while the Water Wing is still functioning under the WAPDA. Land was acquired for WAPDA, so it is an aggrieved person in view of the words used in Section 18 subsection (4) *“for or on behalf of whom”* for filing objections to the award, so can file appeal as well. More-so, expression *“subject to the provisions of the Code of Civil Procedure, 1908 applicable to appeals from original decrees”*, used in Section 54 of the *ibid* Act of 1894 includes WAPDA as an aggrieved person under Section 96 CPC. No exception could be taken to the maintainability of appeals in view of the express provision of law. Objection regarding non-maintainability is being misconceived and rejected, hence the appeals are maintainable.

11. As regards the connected RFA Nos. 478, 479 and 480 of 2014, filed by Ghazi Barotha Contractors through Legal Advisor, they could not be termed as '*person interested*' in view of Section 18(4) of the *ibid* Act and Section 96 CPC, thus the same are not maintainable. Moreover, the said appeals are filed on 16.08.2014 while application for attested copies of the judgment and decree dated 06.05.2014 was filed on 13.08.2014, but by that time, the limitation period of 90 days had lapsed. Hence, the appeals are also barred by time.

So far as the RFA Nos. 371 to 373-P/2014 are concerned, the same were filed on 09.07.2014 against the impugned decision dated 06.04.2014. Limitation period prescribed under Article 156 of the Limitation Act is 90 days. Hence, the same are within time.

12. Now coming to the controversial points/issues, it would be essential to refer to the expression "*person interested*" used in Section 3(b) of the *ibid* Act which includes all persons claiming interest

in compensation to be made on account of the acquisition of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land. Reference would also be made to Section 105 of the Transfer of Property Act, 1882, wherein the word "*lease*" is defined as follows:-

105. Lease defined. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, service or other thing to be so rendered is called the rent.

A leaseholder is deemed to be enjoying the lease property for a certain time express or implied in accordance with the terms and conditions settled between lessor and lessee and the words "*or in perpetuity*" could be not construed to mean and include the ownership rights like the one that an owner exercises in his own property. The rights of lessor are given in Section 109 of

the *ibid* Act of 1882, as lessee could continue beyond the terms of the lease only when he remains in possession and rent paid to the lessor is received by him, called “*holding over*” as provided in Section 116 of the *ibid* Act. Under Section 111, a lease of immovable property is determined in the cases *a to h* mentioned in the Act.

13. In the present case, the lease letter issued by the Deputy Commissioner in the name of respondents are couched in the following words and quoted below:-

No. _____/4/42/SB/ALM
Office of the District Collector
Deputy Commissioner Swabi
Dated seal the 16/05/96

To

Mr. Syed Arshad Hussain Shah
S/o Ali Asghar Shah, Kaghan Colony,
Mansehra Road, Abbottabad.

Sub: **GRANT OF MINING LEASE FOR MINOR MINERALS (OF ORDINARY STONE, BAJARY AND SAND) OVER AN AREA OF 400 ACRES (CONSOLIDATED) NEAR VILLAGE GALLA INDUS RIVER BED DISTRICT SWABI NWFP.**

Since your higher bid for the subject area has been accepted and you have also deposited 1st installment and security in Government Treasury, therefore, it has been decided to grant you two years Mining Lease for Minor Mineral over the subject area auctioned separately for 100 acres land (as per plan attached) in accordance to NWFP (Minor Mineral) Mining Concession Rules, 1971.

You are allowed to start work as stipulated under intimation to the undersigned as well as Assistant Director Mineral Development Mardan, Division Mardan.

Sd/-
District Coordinator/Deputy Commissioner,
Swabi.

Endst. No.709-12/4/42/SB/ALM Dated 16.05.1996

Copy to:-

1. *The Commissioner Mardan, Division, Mardan.*
2. *The Assistant Director Mineral Development Mardan Division.*
3. *The Superintendent of Police District Swabi.*
4. *The Director of Industries Commerce & Mineral Development Department, NWFP Peshawar.*

*Sd/-
District Coordinator/Deputy Commissioner,
Swabi.*

14. The date of commencement is 16.05.1996 that is after about one year of issuance of Notification under Section 4 of the Land Acquisition Act, 1894, dated 27.06.1995 by the Deputy Commissioner, though we have no proof that his role was enigmatic to benefit the respondents from the acquisition proceedings. On the face of it, this lease was a mining lease for minor minerals for some area for a period of two years that later on may be submerged in the GBHP Barrage or adversely affected in any manner but the lease hold rights were not in perpetuity and could not be so being property of the Provincial Government as provided by Section 49 of the Khyber Pakhtunkhwa Land Revenue Act, 1967, whereunder, *all mines and minerals in a Province shall be and shall always be deemed to have been the property of Government, and Government shall have all powers*

necessary for the proper enjoyment of its rights thereto.

Except nuclear energy, mineral oil and natural gas, the other mines and mineral shall be the property of the Provincial Government (then Government of West Pakistan).

15. We fail to understand that how the learned Referee Judge equated the leasehold rights of respondents similar to the rights of land owners or that the words “*person interested*” used in Section 18 of the *ibid* Act, 1894 was interpreted to mean lessee of the property as well. Articles 23 and 24 of the Constitution only protects the rights of owners. Lessee could avail remedy either for return of his bid amount deposited alongwith any improvements, if made but from the Mineral Department. In repealed law appeal by lessee was to be filed before Director General, Mines and Mineral for any determination. Respondents/lessees were not aggrieved person as the land was not acquired from them. We would, therefore, hold that no provision of law could mean to include a lessee in temporary possession

of property as a person interested, he could ask for the determination of his lease from the Provincial Government, Officer of the Provincial Government or any other head of the Department. It is equally important to note that the Land Acquisition Collector was specifically appointed for the acquisition of property and was not performing other administrative duties. Deputy Commissioner, Swabi acted as the lessor. In exercise of his such rights, the respondents applied to the Deputy Commissioner concerned and the matter was then referred to Director General, Mines and Mineral Department who ordered to appoint a technical committee for the subject inspection and ascertaining the actual loss that might have been suffered by the respondents. It appears that the appellant/WAPDA itself challenged the proceedings of Director General, Mines and Mineral by filing a connected W.P.No. 3170 of 2011, wherein status quo order was issued on 21.12.2011.

16. In view of the issues framed in the objection petition, the evidence is being appreciated with reference

to a very significant fact that could not escape attention.

Since the principles underlying the Code of Civil Procedure are fully applicable to the acquisition proceedings, so the statement of a party coming to the Court for the redressal of his grievance either in the shape of applicant, plaintiff/petitioner (as in the instant case objector) must appear before the Court as a witness in support of his contention raised in the application/plaint/petition and objection petition in the instant case. Officials of revenue department, the Mineral Department, WAPDA and GBHP had appeared as witnesses but stark absence of the objector, Javed Iqbal and Syed Sajjad Bukhari to appear as witnesses has made it mandatory to discard their statements as an evidence. It is the basic rule for weighing the preponderance of evidence in a civil matter to discuss the evidence but it has to be used in corroboration of material facts alleged by a party but when a party does not appear in Court as a witness not only that a presumption could be drawn against him within the contemplation of Article 129(g) of the Qanun-e-Shahadat Order, 1984 but it has to be

accepted that the case is based on no evidence. The pleadings in objection petition and statements of officials could not be considered as evidence in the instant case when the respondents/objectors have opted not to appear as witnesses in support of their objection petitions perhaps to avoid facing the cross examination in Court. Nevertheless, pleadings of parties in any civil litigation are not the evidence unless the party appears in Court in support thereof. In this regard, wisdom is derived from the judgment of august Supreme Court titled “Abdul Majid .Vs. Syed Muhammad Ali Shamim and 10 others” reported as 2000 SCMR 1391, wherein it was held as under:-

“It is not denied that Exhs.P.4 and P.5, being copy of order, dated 20-11-1983 whereby Writ Petition No.7008-R of 1979 was disposed of as withdrawn and certified copy of memo. of Writ Petition No.707-R of 1979 respectively, as also the written statement of deceased Muhammad Akbar Khan, are the 'pleadings' of the parties respectively, in writ jurisdiction of the High Court and in the instant litigation before the trial Court. It is trite law that pleadings are not evidence by themselves and that statements of a defendant in written statement could not be used as evidence when amounting to admission of plaintiff's pleas, without the examination of the concerned party in its support. See, Khairul Nisa v. Muhammad Ishaque and 2 others (PLD 1972 SC 25) and Muhammad Ishaq v. Erore Theatre and others (PLD 1997 SC 109)”.

17. In order to arrive at a conclusion on issues No.1,3,4 and additional issues, it could be safely held that since respondents do not fall within the domain of '*interested person*' so they had no cause of action and the objection petitions were filed with malafide purpose to get undue benefits and protect ill-gotten gain if received the amount. These issues are decided in the affirmative.

Issues Nos.5 & 6

18. As regards issues No.5 and 6, it is held that since none of the land owners have filed any objection petition to object the award and claim enhancement of compensation made in the subject two Awards No.8 & 9, therefore, assessment of the value by the Collector to be adequate or not or in accordance with the prevailing rate in the area, loses its significance. It would be held that the assessment made by the Land Acquisition Collector is correct and no exception could be taken in the instant proceedings.

19. So far as report of local commission is concerned, there was no occasion to appoint a local

commission as it was not the case of landowner seeking compensation but a lessee with no interest in government owned property, who could at best claim any bid money or as mentioned above from the office of Deputy Commissioner that might have been deposited at the time of alleged auction or so-called lease or claim recovery or damages for any violation in retrospect. After two years of the date of lease, the period had to expire. All the proceedings appear to be sham and not based on some lawful considerations. These issues are decided accordingly.

20. In view of the above, we, while allowing the instant appeal No. 371-P/2014 as well as connected RFAs Nos. 372-P and 373-P/2014, set aside the impugned judgment and decree dated 06.05.2014 of learned Referee Judge, Swabi and dismiss the objection petitions of respondents. RFAs Nos. 478, 479 and 480 of 2014, filed by Ghazi Barotha Contractors through Legal Advisor, the same being not maintainable and barred by

time, as discussed hereinabove, are dismissed. A copy of this judgment be sent to the Registrar of this Court for appropriate action.

CHIEF JUSTICE

Announced
17.09.2020

J U D G E

(DB) Hon'ble Mr. Justice Waqar Ahmad Seth, Chief Justice
Hon'ble Mr. Justice Muhammad Nasir Mahfooz

Noor Shah