THOMAS LAMB (*Applicant*) .....APPELLANT;

AND

THE MANITOBA HYDRO-ELECTRIC BOARD (*Respondent*) ..... RESPONDENT.

1965
*Oct. 14, 15
1966
Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Minimum of evidence upon which to fix value—Potentiality of land at time of taking—Compensation payable—The Expropriation Act, R.S.M. 1954, c. 78.

Certain lands and buildings belonging to the appellant and located in an area consisting partly of lowlying land and partly of high land were expropriated by the Manitoba Hydro-Electric Board, pursuant to *The Manitoba Hydro Act,* 1961 (Man.), c. 28. The expropriation of the lowlying lands was essential to the carrying out of a major hydro-electric project, and that part of the appellant's property which consisted of high land was acquired as a townsite for people who were displaced by the flooding of the lowlands. The appellant was not satisfied with the amount offered as compensation and arbitration proceedings followed. The parties having reached an agreement as to the compensation payable for injurious affection, the arbitrator had to concern himself only with fixing compensation for the value of the lands and buildings. He awarded $8,350 for the lands together with compensation for the buildings. On appeal to the Court of Appeal the Court affirmed the values allowed on the land and allowed the respondent's cross-appeal excluding any allowance for two of the buildings.

Held (Fauteux and Judson JJ. dissenting): The appeal should be allowed in part.

Per Martland, Hall and Spence JJ.: The fact that there was, from the very nature of things in a case of this kind where lands in a remote area were being valued, a minimum of evidence upon which the arbitrator could fix values did not relieve him of the responsibility of determining the value to be placed on the lands taken, having regard to the evidence that was actually before him and all the circumstances surrounding the taking of the lands and the potentialities of the land at the time of taking. *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam,* [1939] A.C. 302, applied.

Accordingly, taking into consideration the potentiality of the appellant's high ground as a townsite along with the other evidence that was before the arbitrator, it was concluded that the values fixed by him and approved by the Court of Appeal were much too low. The highlands should be valued at $1,800 an acre and the lowlands at $600 an acre, making a total of $26,484.

Per curiam: The appeal as to the buildings, which were located on a road allowance and not on property owned by the appellant or expropriated from him, should be dismissed.

Per Fauteux and Judson JJ., *dissenting*: The appellant's high land was taken to resettle a local population that could not help itself. There

* PRESENT: Fauteux, Martland, Judson, Hall and Spence JJ.

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was no market for this land in the locality, and there was no evidence that any outsider would come in to develop it. A reasonable value was attributed to it in the assessments of the arbitrator and the Court of Appeal for the purpose of the proposed townsite.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal and allowing a cross-appeal from an arbitration award in expropriation proceedings. Appeal allowed in part, Fauteux and Judson JJ. dissenting.

W. C. Newman, Q.C., and *L. Baird*, for the appellant.

A. S. Dewar, Q.C., and *J. P. Funnell*, for the respondent.

The judgment of Fauteux and Judson JJ. was delivered by

JUDSON J. (*dissenting in part*):—Both the learned arbitrator and a unanimous Court of Appeal[1] are in agreement on the compensation to be awarded for the high land in this expropriation. The figures are:

Parcel No. 1, 11.22 acres	$ 5,800.00
Parcel No. 3, 1.44 acres	750.00
Total	$ 6,550.00

The land was taken to resettle a local population that could not help itself. Their modest dwellings had been taken for the purpose of flooding and they were in no position to purchase lots on the high land and to build on them. There was no market among them for land of any kind. The claimant asked to have applied a novel principle of valuation,—what it would cost the Manitoba Hydro-Electric Board to develop a townsite at some other location to accommodate the displaced persons.

As the Manitoba Court of Appeal pointed out, we are concerned here only with waste land or virgin farm land. There was no market for it in the locality. There was no evidence that any outsider would come in to develop it. A reasonable value was attributed to it for the purpose of the proposed townsite. It was not expropriated as waste land or virgin land. The Court of Appeal said:

So far as the high land of the applicant here is concerned it, in itself, has no physical value or special adaptability or potentiality such as had the land with the spring or the land with the rock. Indeed it seems obvious

[1] (1965), 50 W.W.R. 231, 48 D.L.R. (2d) 229.

that in the *Indian* case and the *Fraser* case the primary objective of the expropriations was in the one case to acquire the rock and the other the spring. The taking of the land was incidental. Here we have simply waste land or virgin farm land, but increased to the value attributed to it by the learned County Court Judge by reason of the proposed townsite development.

I can see no error either in principle or in amount in the assessments of the arbitrator and the Court of Appeal. There is no ground for interference. I would dismiss the appeal with costs and affirm the disallowance in the Court of Appeal of the compensation of $3,250 for a garage, boat-shed and storage-shed which were not on land owned by the claimant.

The judgment of Martland, Hall and Spence JJ. was delivered by

HALL J.:—Early in the year 1960 the Government of Manitoba decided to build a major hydro-electric project at Grand Rapids where the Saskatchewan River empties into Lake Winnipeg some 15 miles north of Latitude 53°. The project was to be executed by the respondent, the Manitoba Hydro-Electric Board, a public body exercising the powers conferred on it by *The Manitoba Hydro Act*, 1961 (Man.), c. 28.

Completion of the project would involve flooding a considerable area of land to the west and northwest of Grand Rapids. The water level of the area to be flooded would cover all land below the 848-feet contour level.

The area or location involved in this appeal lies some 60 miles northwest of Grand Rapids in a settlement known as Moose Lake located on the southwest shore of Moose Lake which is a part of the Saskatchewan River watershed. It is a settlement 40 miles east of The Pas, Manitoba, accessible only by air or by water. It is of some local importance with educational and religious amenities and a population of approximately 600, consisting principally of Métis, Treaty Indians and some whites. It was originally a Hudson's Bay Company trading post. The two most important industries in the area are fishing and trapping.

The appellant Lamb is the son of a pioneer trader in the district. He grew up and remained in Moose Lake to be, in succession, the operator of a saw mill, a muskrat ranch and a cattle ranch. At the time in question in this action, he was carrying on a freighting business by air and tractor

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(winter) and by boat and barge as well as a general store. In 1916 appellant's father acquired the land in question in this action from the Hudson's Bay Company. Appellant bought it from his father in 1926 or 1927. The Moose Lake settlement site consists of a lowlying area adjacent to the lake and an area of high ground unaffected by the level of the lake and well above the 848-feet contour level.

Completion of the Grand Rapids project necessarily involved raising the level of Moose Lake and flooding the lowlying lands of the settlement adjacent thereto. These lowlying lands were occupied mainly by Métis and Treaty Indians, who, on being flooded out or on being advised that they would be flooded out, had to find other lands to move to or leave the settlement. The respondent Board had the right to expropriate these lands and did so by means of registration of a plan that was filed in Neepawa Land Titles Office on October 17, 1962, at 9:35 a.m. as Plan No. 4799.

The respondent had no legal responsibility towards those displaced by the flooding of the lowlying lands other than to compensate them for any loss occasioned to them. However, instead of leaving them to fend for themselves, a humane and enlightened approach was adopted towards the Métis and Indians so displaced. The Government of Manitoba, acting through the respondent and by virtue of the power contained in s. 16(*b*) of *The Manitoba Hydro Act*, decided to acquire the high ground in the Moose Lake settlement as a townsite for these displaced people and it proceeded to expropriate lands belonging to the appellant Lamb by a Notice of Expropriation filed in the Neepawa Land Titles Office on October 12, 1962, at 9:25 a.m. as No. 129044. Notice of the expropriation was given to the appellant by a notice dated November 14, 1962. Subsequently a second Notice of Expropriation dated January 24, 1963, was served upon the appellant in which compensation was offered in the sum of $18,725 made up as follows:

Lot B and Lots 1 to 3 both inclusive, 10 to 13 both inclusive, 18, 19 and 27 of Parcel 1	$ 2,150.00
Parcel 2	725.00
Parcel 3	75.00
Parcel 4	250.00
Cost of re-locating sewage disposal field	525.00
Injurious affection or consequential damage	15,000.00
	$18,725.00

The appellant notified the respondent that he was not satisfied with the amount offered, thus bringing into operation the provisions of *The Expropriation Act*, R.S.M. 1954, c. 78. His Honour Frank W. Newman, County Court Judge, was appointed arbitrator to fix the compensation payable to the appellant. Meanwhile, as a result of negotiations between the parties, an agreement had been reached whereby compensation payable under the heading of injurious affection or consequential damage and the cost of relocating the sewage disposal field was agreed upon in the sum of $18,000. The arbitrator had, therefore, to concern himself only with fixing compensation for the value of the lands taken and for certain buildings belonging to the appellant. Section 65 of *The Expropriation Act* under which the arbitrator had to proceed reads as follows:

65. (1) In estimating the amount to which the claimant is entitled, the arbitrator shall consider and find separately as to the following,

(*a*) the value of the land and all improvements thereon;

(*b*) the damage, if any, to the remaining property of the claimant; and

(*c*) the original cost only of any extra fencing that may be necessary by reason of the taking of the land.

(2) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance.

(3) Where the value of the remaining land of the claimant is increased by the construction of the works through his land, by the extension of the same in any direction, or by the construction of any other works in connection therewith, the increase in value shall be deducted from the amount to which the claimant would otherwise be entitled, and the balance, if any, shall be the amount awarded to him.

The area of lowlying land was 6.16 acres and the highland contained 11.22 acres. In addition, the appellant claimed an interest in 36 lots of an area of 4.3 acres, being lots which he had sold and agreed to transfer to employees for a nominal sum under a special form of agreement, Exhibit 7. This claim and the appellant's claim for buildings will be dealt with separately.

The appellant Lamb asked for compensation in the sum of $150,000 for the 17.38 acres of high and low land in addition to the agreed compensation of $18,000 for injurious affection as stated above. The basis upon which the appellant arrived at this figure was that it would cost the expropriating authority $150,000 to develop a similar townsite elsewhere on the assumption that there would be a comparable townsite available. There is, of course, no basis

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in law for estimating the value of the lands in this way. The arbitrator had evidence from a Mr. Farstad, a qualified appraiser called on behalf of the appellant, who testified that $34,580 would be a fair and reasonable valuation to place upon the lands taken and $5,000 for the buildings. For the respondent, Mr. Townsend, who was also a qualified appraiser, testified that in his opinion the lands should be valued at $3,950 and the buildings at $3,250. Jock McAree, the appellant's son-in-law, valued the lands at $74,050 and the buildings at $8,600. The arbitrator properly disregarded McAree's valuation of the lands as unrealistic.

There was a dearth of evidence as to values obtainable from sales of land in the area in question. There was evidence of one sale in April 1956, of .89 acres by the appellant to the Government of Canada shown as Lot "R" on Plan 4413 at a price of $400 or about $480 an acre. There was also evidence of a sale by one Alex Knight to John Bodnar, a storekeeper and business rival of the appellant whose property had also been expropriated and who needed a new storesite in January 1964, of part of Lot 14, Plan 522, being about one-quarter acre in area for $1,500 or at the rate of $6,000 an acre. This sale was more than a year after the appellant's land had been taken, but it was a *bona fide* sale from one business man to another in the Moose Lake settlement. The arbitrator gave no weight to this sale, saying he "assumed that Lamb would not sell him (Bodnar) a site at any price." There was no evidence to this effect. This Knight-Bodnar sale cannot be taken as being any more decisive in fixing land values at the relevant time than the sale to the Government in 1956, but neither should it have been ignored by the arbitrator, and in my view he was in error in so doing.

The arbitrator awarded the appellant the sum of $8,350 for the lands.

The fact that there is, from the very nature of things in a case of this kind where lands in a remote area are being valued, a minimum of evidence upon which the arbitrator can fix values does not relieve him of the responsibility of determining the value to be placed on the lands taken, having regard to the evidence that is actually before him and all the circumstances surrounding the taking of the lands and the potentialities of the land at the time of the taking.

The official announcement of the decision to undertake the Grand Rapids project that inevitably involved the flooding of the lowlying land in question was announced by the Premier of Manitoba in the Speech from the Throne in the Manitoba Legislature on January 19, 1960, some 2½ years before the actual expropriation proceedings were undertaken.

The expropriation of the lowlying lands was essential to the carrying out of the Grand Rapids hydro-electric project. However, the expropriation of the high ground was a collateral act arising out of the Grand Rapids project but not necessarily essential thereto.

Once the Grand Rapids project was embarked upon and it was known that the lowlying areas up to the 848-feet level were to be flooded, the appellant's high ground at Moose Lake acquired a potentiality as a townsite, in fact the only one in the Moose Lake settlement area.

In these circumstances, the observations of Lord Romer in *Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam*[1] are relevant here. In that case a harbour was being constructed at Vizagapatam. Land acquired by the harbour authorities on the south of the harbour was allocated by them to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was to the south of this land, contained a spring which yielded a constant and abundant supply of good drinking water which could easily be made available for the oil companies and people engaged in the harbour works. The appellant's land was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of the potentialities of the land as a building site. The Land Acquisition Officer disallowed this claim and awarded compensation on a valuation of the land as partly waste and partly cultivated with an allowance for some buildings and trees.

On the appellant's application, the matter was, under the Act, referred to the Subordinate Judge. Before him the appellant made a further claim on the footing of potentialities as a source of water supply.

The Subordinate Judge held that the water could be sold to the oil companies and others at a profit, that the only

[1] [1939] A.C. 302.

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possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded, even where the only possible buyer is the acquiring authority, and he assessed the value of the potentialities and made his award accordingly. He found against the potentialities of the land as a building site.

On appeal, the High Court set aside the award of the Subordinate Judge and restored that of the Land Acquisition Officer, holding that the supply of drinking water had no value apart from the scheme for which the acquisition was made and the Harbour Authorities were the only possible purchasers, and that the land had no potentialities as a building site.

On a further appeal to the Judicial Committee of the Privy Council, Lord Romer said at p. 313:

> In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. I), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in s. 24, sub-s. 5, of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

and at pp. 329-330:

> It remains to deal with s. 24, sub-s. 5, of the Land Acquisition Act. That sub-section as applied to the present case means no more than this: that in valuing the appellant's land on February 13, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the sub-section does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's* case [1914] 1 K.B. 339, for instance, the house after

being added to the nurses' home was no doubt more valuable than it was before. That, indeed, was the reason why the trustees of the home paid 250£. more than any other purchaser would have paid. The house in that case was held to be of the value of 1000£., not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour Authority and used for anti-malarial purposes, but at the sum that the Authority "in a friendly negotiation" (to use Lord Johnston's words) would be willing to pay on February 13, 1928, in order to acquire it for those purposes.

Accordingly, taking into consideration the potentiality of the appellant's high ground as a townsite along with the other evidence that was before the arbitrator, I conclude that the values fixed by him and approved by the Court of Appeal[1] are much too low. In my opinion the highlands should be valued at $1,800 an acre for an amount of $22,788 for the 12.66 acres, the lowlying lands at $600 an acre for an amount of $3,696 for the 6.16 acres, making a total of $26,484.

The appellant's claim for compensation in respect of an interest in the 36 lots previously sold to employees for a nominal amount under Exhibit 7 previously referred to is too indefinite and speculative. The arbitrator was right in disallowing that claim.

The buildings claimed for remain to be dealt with. The arbitrator awarded $3,250 for them. In the Court of Appeal the respondent cross-appealed against this allowance for the buildings on the ground that the buildings in question were located on a road allowance and not on property owned by the appellant or expropriated from him. The appellant conceded that the buildings were in fact on the road allowance. Miller C.J.M. dealt with the buildings claim as follows:

> The garage and boat-shed valued at $3,000 and the storage-shed valued at $250 by the learned County Court Judge are built almost entirely on a road allowance although encroaching slightly on adjoining parcels, but these adjoining parcels were not expropriated from or owned by Lamb. Therefore, counsel contends, the buildings thereon cannot be considered in these proceedings, or, if they are to be considered, they would come under the heading of a claim for consequential damage or injurious affection, which has already been settled at the sum of $18,000 as above set out. *The Expropriation Act*, s. 12(1), requires the Minister to pay compensation to the *owner* of the *land entered upon*, but as the Manitoba Hydro-Electric Board is not, as against Lamb as owner, entering upon any of the land on which the buildings or any part thereof are located, then the buildings are

[1] (1965), 50 W.W.R. 231, 48 D.L.R. (2d) 229.

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not "land being expropriated" and do not have to be paid for by the Minister. This argument is virtually unanswerable, and, much as I would like to maintain for the owner the value of these buildings as awarded to him by the learned County Court Judge, yet the statute law is against such a finding. I therefore conclude that the cross-appeal must be allowed. As to whether Lamb is entitled to any other relief in respect of these buildings outside these proceedings need not presently be determined.

I agree with this finding. The appeal, therefore, fails as to the buildings. The award of the arbitrator should be varied by substituting an award of $26,484 for the lands taken with interest as provided in *The Expropriation Act* from the date of taking.

The appellant is entitled to his costs in this Court and in the Court of Appeal. The respondent is entitled to its costs of the cross-appeal in the Court of Appeal. The appellant must pay the costs of the arbitration proceedings as ordered by the arbitrator.

Appeal allowed in part with costs, FAUTEUX *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: Newman, MacLean & Associates, Winnipeg.

Solicitors for the respondent: Thompson, Dilts & Co., Winnipeg.