1942 *Present* : **Moseley S.P.J. and Jayetileke J.**

THE MUNICIPAL COUNCIL OF COLOMBO *v.* THENUWARA.

44—D. C. (Inty.) Colombo, No. 3,062.

Land Acquisition—Premises forming part of building—Question of separation for purposes of Acquisition—Structure and user—Building within street line—Depreciation in value—Land Acquisition Ordinance (Cap. 203), s. 44.

The Municipal Council acquired one of five premises, which were described "as a set of outhouses lying under one common roof", and which appeared to consist each of one room, the rooms being in a continuous line, with a verandah running the full length in front.

Held, that the question whether each of the premises formed one house or whether they formed part of a larger building for the purposes of section 44 of the Land Acquisition Ordinance depended upon whether from the point of view of structure and user they constituted one house or a number of houses.

Held, further, that the premises in question could be separated from the rest of the building for the purpose of acquisition.

Where a building, which is acquired, lies within a street line, the depreciation of value caused to the building, which would require repairs of a nature, which would be prohibited by The Housing and Town Improvement Ordinance, may be taken into consideration.

Newnham v. Gomis (35 *N. L. R. 119*) *applied.*

THIS was an appeal from an order of the District Judge of Colombo determining the amount of compensation payable to the respondent in respect of certain prmises acquired under the Land Acquisition Ordinance. The question was whether premises No. 528/8 could be separated from premises No. 528/5, 528/6, 528/7 and 528/11 for purposes of acquisition. The learned District Judge held that No. 528/8 together with the other premises formed part of one house.

H. V. Perera, K.C. (with him *N. K. Choksy, B. G. S. David,* and *S. J. Kadiragamer*) for plaintiff, appellant.—The first question that arises in this case is whether, in view of section 44 of the Land Acquisition Ordinance (Cap. 203) the defendant can compel plaintiff to acquire the whole of the building of which premises No. 528/8 are alleged to be only a part. In other words, defendant wants premises No. 528/8 to be treated as part of a larger building. On this question it is submitted that premises No. 528/8 constitute one house and are not a part of a house. As to the meaning of house, see *Harvie v. The South Devon Railway Co.*[1], where it was held that two semi-detached villas under one roof did not constitute one house within the meaning of the *Land Clauses Consolidation Act* (*8 & 9 Vict. Cap. 18*). In *Goodchild v. Romford Borough Council*[2] the decision was that an arcade consisting of thirty shops constituted not one building, within the meaning of the Civil Defence Act, 1939, but a number of buildings. In the present case though the tenements were small they were separately occupied, and what makes them separate is separate occupation.

[JAYATILEKE J.—In the Indian case, *Venkataraman Naidu v. The Collector of Godaveri*[3], it was held that a house included all that was necessary to the enjoyment of the house, whether attached to the main building or not.]

Yes. Structural unity is not the deciding factor but enjoyment and user. The test is actual enjoyment not hypothetical enjoyment; not the original user but user at the time of the acquisition—*Richards v. Swansea Improvement and Tramways Co.*[4]

The next question is whether the judge was correct in ignoring the existence of street lines when he assessed the amount of compensation. In previous cases—*Newnham v. Gomis*[5] and *The Chairman, Municipal Council, Colombo v. Fonseka*[6]—it was held that, in awarding compensation

[1] *32 L. T. R. 1.*
[2] *56 T. L. R. 548.*
[3] *(1904) 27 I. L. R. Mad. 350.*
[4] *(1878) 9 Ch. D. 425.*
[5] *35 N. L. R. 119.*
[6] *38 N. L. R. 145.*

for land acquired, the depreciation in value caused by the laying down of street lines must be considered. It is submitted that the principle enunciated in these cases for land not built upon applies equally in the case of land upon which is erected a building. The true test in assessing compensation is not the actual rent received but the rent receivable, taking into consideration the prohibition against repairs imposed by section 19 of the Housing and Town Improvement Ordinance (Cap. 199).

J. E. M. Obeyesekere (with him *G. Thomàs*), for defendant, respondent.—If in point of fact the structure would be affected the appellant must take the whole building. *Harvie v. The South Devon Railway Co.* (*supra*) is distinguishable on the facts. The cases show that while user is one test structure must also be taken into account. The case nearest to the present case is *Greswolde-Williams v. New Castle-Upon-Tyne Corporation*[1].

The reason why the whole building should be taken is that the effect of taking No. 528/8 would affect the stability of the remainder. In structure this is one building. The divisions were made without regard to structure. There is not here a row of tenements built as such but one building separately occupied. Separate occupancy of rooms does not convert the structure into separate buildings. See the remarks of Brett L.J. in *Richard v. Swansea Improvement and Tramways Co.* (*supra*) at *p. 434*, where the test laid is partly structure and partly user; see also *Halsbury* (*Hailsham ed.*) *Vol. 6, s. 86*, for the meaning of the word house as used in the Land Clauses Consolidation Act; *Lord Robert Grosvenor v. The Hampstead Junction Railway Co.*[2]: *Regent's Canal and Dock Co. v. London County Council*[3]: *Genders v. London County Council*[4]. It is submitted that structurally this row of tenements constitute one unit, and structure must be taken into account. The *Madras Case* (*supra*) cited has no application as it proceeded upon the particular provision of the Indian Act. The correct principle is that laid down in the *Greswolde-Williams case* (*supra*).

H. V. Perera, K.C., replied.

Cur. adv. vult.

September 4, 1942. MOSELEY S.P.J.—

This is an appeal by the Municipal Council of Colombo from an award of the District Court of Colombo determining the amount of compensation payable to the claimant, respondent in respect of certain land acquired by the appellant under the provisions of the Land Acquisition Ordinance (Cap. 203 of the Legislative Enactments).

The respondent was the owner of what is known as Lot 6 on Preliminary Plan No. A 942. The eastern boundary of lot 6 is Maradana road; the western is the "street line" which had been laid down in connection with the widening of Maradana road. The respondent's property comprises premises bearing assessment Nos. 528, 528/1, 528/2, 528/3, 528/4, 530, 532, 534, all of which lay within the street line 528/8, which street line bisects 528/7, 528/6, 528/5, and 528/11, all of which lie to the west of the street line. The premises which the Council sought to acquire comprised all those which lay within the street line and No. 528/8

[1] *(1927) W. N. 325.*
[2] *1 De Gex & Jones 446.*
[3] *(1912) 1 Ch. 583.*
[4] *(1915) 1 Ch. 1.*

which the line bisects. For those premises the Council offered by way of compensation the sum of Rs. 16,550. This sum includes the 10 per cent. on the market value, provision for the payment of which is made by section 38 of the Ordinance. The claimant, however, assessed the value of the premises within the street line at Rs. 19,422, and in regard to lot 528/8 he alleged that it was part of a larger building, and invoked the aid of section 44 of the Ordinance, which is as follows:—

"44. The provisions of this Ordinance shall not be put in force for the purpose of acquiring a part only of any house, manufactory, or other building, if the owner desire that the whole of such house, manufactory, or building shall be so acquired."

He desired that the whole of that building be acquired, and assessed its value at Rs. 4,320. That is to say, for the entire property he claimed Rs. 23,742, and in addition the 10 per cent. above mentioned.

The learned District Judge held that No. 528/8, together with the other premises lying without the street line, must necessarily be regarded as one house (which I shall hereinafter refer to as "the rear portion") and awarded Rs. 17,943.75 (including 10 per cent. for compulsory acquisition) in respect of the portion already acquired, and assessed the value of the other buildings at Rs. 2,812.50. Since, however, the claimant was "willing to pay for and take back the land on which those buildings stand," the District Judge assessed its value at Rs. 1,031.25, and awarded in respect of the buildings Rs. 1,781. He held that the 10 per cent. for compulsory acqusition could not be claimed in respect of this sum. The total sum, therefore, awarded to the claimant was Rs. 19,724.75. Each party was ordered to pay its own costs.

The first question that arises in appeal is in regard to the applicability of section 44 of the Ordinance. Do the premises No. 528/8 constitute one house, or are they only a part of a house, *i.e.*, of the rear portion? This portion was described by the learned District Judge as a "set of outhouses lying under one common roof." This may well be an apt description. It will be noted that the premises are five in number. Those numbered 528/5, 528/6, 528/11, and 528/8 would appear to have consisted each of one room, the rooms being in a continuous line, with a verandah running the full length in front. That portion of the verandah in front of 528/11 has in some way become 528/7. Each of the five is occupied by a different tenant. The common roof rests on a ridge plate, or beam, which runs the entire length of the building. That beam consists of several parts joined together without any relation to the partitions. There is evidence that in one of the partitions there is a door which is not, however, in use. Counsel for the respondent has stressed the opinion of witnesses that not only was the rear portion originally one building but was even connected with the front portion and that the whole formed one residence. That may have been so, but is that a matter which need be considered? In *Richards v. Swansea Improvement and Tramways Co.* (*supra*), Brett L.J., at page 434, said:—

"I cannot help feeling that the period of time to which alone you must look is the moment before the notice to treat is given; and what

you have to consider in all these cases is the state or nature of the premises to be dealt with at that moment, and that it does not signify when or how that state of the premises was brought about."

That was an action brought under the provisions of the *Lands Clauses Consolidation Act 8 & 9 Vit. Cap. 18*) section 92 of which corresponds closely with section 44 of our Cap. 203. Assuming that the date of the "notice to treat" corresponds with the date of acquisition here, it is clear to me that we need not consider the premises in the light of their original structural character or user. What is relevant is whether, from the point of view of structure and user, they constitute one house or a number of houses. "You must have", continued Brett L.J., at page 435, "the premises so structurally made or placed that they may be one house, ... and, secondly, you must have them enjoyed as one house, or held as one house."

Counsel for the appellant relied largely upon the case of *Harvie v. The South Devon Railway Co.* (*supra*) in which the plaintiff was the lessee of two semi-detached villas under one continuous roof. The party wall between them was only carried up to the ceilings, so that there was continuous space between the ceilings and the roof. There was no internal communication between the villas. The party wall was so ineffective that if one of the villas were to be pulled down, the other would become uninhabitable. The question was whether the two villas were one house within the meaning of section 92 of the Lands Clauses Consolidation Act (*supra*). The two vilas were in fact held under separate leases, but that was a fact which Cairns L.C. put altogether out of the case. "They were", he said, "separately occupied by separate families, they have separate hall doors, and they have no internal communication in the ordinary sense of the term, that is to say, no internal communication by which it is intended, or by which it is the practice that the inmates of one villa should pass into the other villa; in point of fact, as regards all the parts of the villas which are occupied, namely, the ground and the first floors, there is no communication of any kind whatever between the two . . . . For all practical and real purposes the two villas appear to be . . . . two separate houses." The fact that the two houses could not be safely separated was held to be immaterial, and the defendant company, who had given notice to treat for a strip of the garden of one, were not compelled to take the two villas as constituting one house. With all respect to the learned District Judge, to whom the above-mentioned case was cited and who did not regard it as analogous, it seems to me that this decision, to put it no higher, provides a useful formula. In *Goodchild v. Romford Borough Council* (*supra*) the question for decision was whether an arcade consisting of thirty shops constituted a commercial building within the meaning of the Civil Defence Act, 1939. It was held that the arcade was not one building, but a number of buildings.

The Indian Act corresponding to our Land Acquisition Ordinance contains upon this point a provision that the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building

There is no such provision in the Local Ordinance, but it seems to me that the Indian Legislature has done no more than codify what is obviously a piece of sound common-sense.

Counsel for the claimant-respondent relied upon *Greswolde-Williams v. Newcastle-Upon-Tyne Corporation* (*supra*), in which the plaintiff was the owner of "Princess Buildings", which structure, from the architectural aspect of its exterior, appeared to form one whole. It was divided into thirteen or fourteen divisions or houses (using the term "houses" not in the sense of section 92 of the Lands Clauses Consolidation Act), by walls of the character properly and usually built as party walls to divide the properties of adjoining owners. In some cases a house had its own staircase, in other cases a common staircase gave access to the upper floors of more than one house. The defendant-corporation had given notice to treat for the acquisition of a piece of land numbered 130, and on this land stood the two western most houses. In the case of these two houses access to the upper floors of No. 1 was only gained by means of the staircase in house No. 2. The plaintiff owned the whole building and was in possession of all the staircases and lavatories and rooms for purposes of management and for accomodation for porters. There was one system of water supply for the whole building. There was intercommunication between all the ten eastern-most houses, but between those and the four western-most there was none. It was held that the corporation was bound to take the whole building. I need only say that the facts appear to me to be so different from those in the present case that the decision is of no avail to the respondent. The judgment, however, affirms the proposition that the factors to be taken into consideration are the structure and user. Again, the case of *Lord Robert Grosvenor v. The Hampstead Junction Railway Co.* (*supra*), in which it was held that the land, which would ultimately be part of the garden in front of one of a number of intended almshouses, formed part of a house, was decided upon the footing that the conveyance of "the house" would pass the open space in front, and that, in the words of Turner L.J., "it was in vain to argue that these (*i.e.*, the individual almshouses) can be considered as separate tenements." That this was so is clear when it is realised that there was a common centre part, which was to be a hall with proper offices attached, and the abstraction of one or more of the almshouses piecemeal might render the centre part out of all proportion to requirements. The case of *Regent's Canal and Dock Co. v. London County council* (*supra*) was, if I understood counsel's argument aright, cited merely because it followed *Richards v. Swansea Improvement and Tramways Company* (*supra*) and affirmed the opinion of Brett L.J. that a manufactory might be a house, or a building or might be more than one house or more than one building. This case does not seem to me to be of any more assistance to the case for the respondent than is *Genders v. London Co. Council* (*supra*) where there was a special provision in the Act under consideration that where the Council took part of a property it was not entitled to interfere with the main structure of any house, building or manufactory.

Having considered all these authorities it seems to me that having regard to the structure and user of the premises in this case, and to the

fact that without structural alteration the user as one house would be, to say the least, highly inconvenient, I find it difficult to avoid the conclusion that the rear portion consists of five separate houses. In these circumstances the appellant cannot be required to acquire any part of the rear portion other than No. 528/8.

The question then arises whether, in assessing the amount of compensation to which the claimant is entitled, there should be taken into consideration the restrictions imposed by section 19 of the Housing and Town Improvement Ordinance (Cap. 199) in regard to erection and re-erection of buildings beyond any defined street line. The learned District Judge after consideration of the evidence of the Municipal Assessor that, owing to the fact that the property acquired was situated within the street lines, the rentals of those premises would have a tendency to decline, held that the Court was concerned to value the premises at the date of acquisition and that there was no satisfactory ground upon which the actual rent received should not be regarded as the basis upon which the value should be capitalised. It was, I think, admitted that the actual rents received in respect of the whole of the premises acquired was Rs. 145. Three months' rental was allowed, the parties acquiescing, on account of rates, taxes and repairs. The nett annual rent was thus found to be Rs. 1,305 which, capitalised on the basis of 12½ years' purchase gave the capital value as Rs. 16,312.50. The Municipal Assessor, taking into consideration the existence of the street lines, assessed the rental which might be expected at Rs. 135 which, making the allowance in respect of rates, taxes and repairs, gives a nett annual rental of Rs. 1,215. This figue, on the same basis, gives a capital value of Rs. 15,187.50.

In *Newnham v. Gomis* (*supra*), it was held that in awarding compensation for land acquired in similar circumstances the depreciation in value caused by the laying down of street lines might be taken into consideration. The land in question was not built upon, as was the case in *The Chairman, Municipal Council, Colombo v. Fonseka et al.* (*supra*), which affirmed the principle. At the trial it was argued on behalf of the claimant that these authorities only concerned land which was not built upon, and the learned District Judge does not, in his judgment, refer to them. It is clear that the value of vacant land must necessarily depreciate when the area is curtailed by the definition of a street line which imposes a restriction upon building. I am quite unable to see that the same principle does not apply in the case of land upon which is erected a building which must, sooner or later, require repairs of a nature which would be prohibited by the section of The Housing and Town Improvement Ordinance to which I have referred. The extent to which the value of such land and buildings would be affected would vary accordingly to the substantial nature and state of repair of such buildings. I think that the evidence of Mr. Orr, the Municipal Assessor, may safely be accepted on this point. In his opinion they were very old boutiques, in very poor condition, at least fifty years old. No doubt he had this in mind when he gave his estimate of a fair rental as Rs. 135 per month. In my view, his estimate should be accepted. It follows that, in my opinion, the capital value of the buildings acquired is Rs. 15,187.50. That seems to me to be the market value mentioned in section 21 of the Ordinance. To this must be

added the ten per centum of the market value mentioned in section 38, which brings the amount of compensation which I would award to Rs. 16,706.25. It will be noted that the sum offered by the appellant was Rs. 16,500. This sum was arrived at by deducting from the total the sum of Rs. 250 in respect of about one perch of the land which forms part of No. 528/8 and which falls without the street line, since it was thought that the claimant might wish to retain it. The result of my findings is that the appeal is allowed with costs here and in the Court below. The award of the District Court is set aside and the claimant is awarded Rs. 16,706.25, or, in the alternative, if he wishes to retain that part of No. 528/8 which lies without the street line, Rs. 16,431.25.

JAYETILEKE J.—I entirely agree.

Appeal allowed.