FAZRUL HEFEERA AND ANOTHER
v.
SOKKALINGAMPILLAI AND OTHERS

COURT OF APPEAL
RANARAJA, J.,
C.A. NO. 172/97
SEPTEMBER 23TH, 1997

Ceiling on Housing Property Law, No. 1 of 1973, s. 9, s. 13 s. 17 (1), s. 39 (3), s. 47 (1), (2) – Application to purchase – Substitution of new landlord – Landlord – What is a House? Final and conclusive – Applicability of the Interpretation Ordinance s. 22 – Equities – Wednesbury unreasonableness.

The 1st respondent was the tenant under one 'S' after a series of transactions 'H' and 'F' became the owners of the premises in suit on 22.11.85. On 22.5.75 the 1st respondent made an application under s. 9/13 CHP Law to purchase the House, the Commissioner decided to vest the House, and the Board of Review dismissed the appeal of the petitioners.

Held:

1. The father of the petitioners, who became owner in 1974 has represented his daughter at the inquiries before the Commissioner as well as the Board of Review. The 1st respondent had not objected to such conduct. He has not suffered any prejudice as a result. Technicalities should not stand in the way of construing the provisions of the CHP Law.

Per Ranaraja, J.

> "The CHP Law requires that eligibility to purchase a house from the Commissioner be founded on a tenancy with the owner".

2. The petitioners have not seriously contested that the building was originally constructed for residential premises (s. 47). Therefore, it was their duty then to establish that the premises was used mainly or solely for a purpose other than a residential purpose for a period of 10 years prior to 1.3.1972.

3. In the face of the uncontradicted evidence of physical occupation by the 1st respondent and his family of the premises 10 years prior to 1.3.1972, the Commissioner had the jurisdiction to entertain the application and make an order thereon.

4. Where there is clear evidence that the building was constructed mainly or solely for residential purposes, the exceptions set out in the subsections s. 47 (1) and (2) have no application, unless a house which has been originally constructed for residential purposes was used mainly or solely subsequently for a purpose other than residence, for an uninterrupted period of 10 years prior to 1.3.1972.

Per Ranaraja, J.

"It would therefore be unwise to consider the definitions of 'business premises' or 'residential premises' in the context of the Rent Act in interpreting the term 'House' in CHP Law.

5. The policy involves the vesting of such House without the consent of the landlord. Therefore the tenant had a pre-emptive right or a preponderant right to purchase the House. In considering what is fair and reasonable the Commissioner had to attach due weight to this right on the part of the tenant entitled to make an application under section 13.

6. S. 39 (3) CHP Law read with S. 22 Interpretation (Amendment) Act bars the review of the impugned order.

APPLICATION for a writ of Certiorari.

Cases referred to:

1. *Teyabally v. Hon. R. Premadasa and others* – SC 69/92 SCM 5.11.93.
2. *Thurairajah v. Bibile and others* – 1992 1 SLR 116.
3. *Anisminic v. Foreign Compensation Tribunal* – 1969 2 AC 147.
4. *Edmund v. Fernando* – 1995 1 SLR 407.
5. *Withanaratchchi v. Gunawardena and others* – 1996 1 SLR 253.
6. *Abeysekera v. Wijetunga* – 1982 – 2 SLR 737.
7. *Mohamed Ismail and others v. Hussain and others* – 1993 2 SLR 380.
8. *Caderamanpulle v. Pieter Keuneman* – SC 15/79 SCM 19.9.80.
9. *Kathiresan v. Bibile and others* – 1992 1 SLR 275.
10. *Council of Civil Service Unions v. Minister for Civil Service* – 1985 AC 374.

Faiz Musthapha PC for the petitioner.

S. Mahenthiran for 1st respondent.

P. G. Dep. DSG, for Attorney-General.

Cur. adv. vult.

September 23, 1997.

DR. RANARAJA, J.

The 1st respondent K. P. Sokkalingam became the tenant of premises bearing assessment number 358, Trincomalee Street, Matale, under one P. H. Bawa Shakeep, in 1952. The said Shakeep transferred the said property to one Seiyadu Mohamed by Deed No. 2768 dated 19.8.57, who by Deed No. 651 dated 19.4.74. (P2) transferred the same to one Peer Mohamed. The said Peer Mohamed in turn transferred the property to his two daughters Fazrul Hafeera and Pathuma Fazeena, the 1st and 2nd petitioners respectivley, by Deed No. 1788 dated 22.11.85 (P3).

On 22.5.75, the 1st respondent made an application (P1) under the provisions of sections 9/13 of the Ceiling on Housing Property Law to purchase the said premises, naming one M. K. N. S. Mohamed as the owner. Learned counsel for the 1st respondent has submitted that the petitioners cannot maintain this application without a legitimate order for substitution in the proceedings before the 2nd respondent Commissioner for National Housing or the Ceiling on Housing Property Board of Review.

A similar objection was considered by His Lordship G.P.S. de Silva CJ in *Teyabally v. Hon. R. Premadasa and others*[1]. There it was observed that "in making the application (under sections 9/13) all that the tenant does is to notify the Commissioner of National Housing of his claim to purchase the house. The relevant point of time at which the validity of the claim has to be determined is the stage at which the Commissioner of National Housing holding the inquiry, "notifies the Minister, and the Minister makes the "vesting order" under section 17 of Law No. 1 of 1973. This is the decisive point of time at which the rights of parties are affected. Thus, the applicant is entitled to pursue his application against the "landlord", ie "the person for the time being entitled to receive the rent" of the premises let (section 48 of the Rent Act). If such person has become the landlord by purchasing the house over the head of the tenant, such house is liable to be vested for the purpose of sale to the applicant. The submission of Mr. de Silva, that the tenant must make a fresh application every time there is a change of ownership is not well-founded. It is not in accord with the statutory scheme. Law No. 1 of 1973 is a piece of

social legislation which should be construed with as little technicality as possible".

With respect, the object of the Rent Act being to amend and consolidate the law relating to rent restriction, and the Ceiling on Housing Property Law that is being an enactment to regulate the **ownership,** size and cost of construction of houses and to provide for matters incidental thereto or connected therewith, it would be inappropriate to import the definition of 'landlord' in the former Act to the latter. The Ceiling on Housing Property Law requires that eligibility to purchase a house from the Commissioner be founded on a tenancy with the **owner.** – See *Thurairajah v. Bibile and others*[2]. However, in the present case we are concerned with the principle that technicalities should not stand in the way of construing the provisions of the Ceiling on Housing Property Law.

The father of the petitioners who became owner of the premises in 1974, has represented his daughters at the inquiries before the 2nd respondent as well as the Board of Review. The 1st respondent has not objected to such conduct. He has not suffered any prejudice as a result. The objection taken by learned counsel is one of technicality and therefore should be considered as being of no serious consequence.

After a lengthy inquiry, the 2nd respondent, by his order dated 31.12.94, recommended to the Hon. Minister of Housing to vest the premises (P7A). His decision was conveyed to the 1st respondent by letter (P7B),. The petitioners appealed from that order on 26.1.95 to the Board of Review (P8), which, after inquiry, dismissed the appeal by order dated 27.11.96 (P10). This application by the petitioners is *inter alia,* for writs of certiorari to quash the orders P7A and P10.

In their written submissions the petitioners have sought relief of this court on three main grounds.

(1) There is no evidence to establish that the premises is a "house" within the meaning of section 47 of the Ceiling on Housing Property Law, as such the order has been made without jurisdiction.

(2) The order P7A has been made in violation of the principles of natural justice.

(3) The Commissioner and the Board of Review have not properly considered and thereby misdirected themselves on the equities.

"Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e deprived of legal effect. That is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The court will then quash it or declare it to be unlawful or prohibit any action to enforce it". *Wade & Forsyth Administrative Law* (7th ed) p. 43. *Anisiminic v. Foreign Compensation Commission*[3].

Learned counsel for the 1st respondent has submitted that section 39 (3) read with section 22 of the Interpretation (Amendment) Act, bars the review of the impugned decisions by this court, since the grounds, on which review is permitted under section 22, is restircted to situations where, (*a*) the determination is ex facie not within the power conferred on the 2nd respondent and the Board of Review, (*b*) the 2nd respondent or the Board of Review failed to observe rules of natural justice, (*c*) the 2nd respondent or the Board of Review failed to comply with a mandatory provision of law, and those conditions cannot be established by the petitioner on the pleadings.

Learned counsel has relied on the decisions of the Supreme Court in *Edmund v. Fernando*[4] and *Withanaratchi v. Gunawardene*[5] *and others*. In the former case the Commissioner had decided not to recommend the vesting of a house in terms of the provisions of the Ceiling on Housing Property Law on grounds of equity. That decision was reversed by the Board of Review on appeal. The owner then made an application to this court to have the order of the Board quashed. This court affirmed the order of the Board and dismissed the owner's application *inter alia*, holding that the provisions of section 39 (3) of the Ceiling on Housing Property Law read with section 22 of the Interpretation Ordinance, as amended, constituted a bar to the issue of a writ of certiorari. His Lordship Perera, J. having observed that the appellant did not rely on grounds (*a*) and (*b*) in section 22 of the Interpretation Ordinance, held that the appellant also failed to establish a non-compliance of a mandatory provision of law, which the Board of Review failed to observe, and dismissed the appeal.

In Withanaratchi (*supra*) the facts were somewhat similar to those in the present case. There the decision of the Commissioner for National Housing that the relevant premises was not a "house" was reversed by the Board of Review on appeal. An application was made to this court by the owner to have the determination of the Board quashed on the ground that it was made without and/or in excess of jurisdiction. It appears that this court dismissed the application. On appeal to the Supreme Court, His Lordship G.P.S. de Silva CJ,stated "on a consideration of the entirety of the facts and circumstances of this case, it seems to me that it cannot be said that the decision of the Board of Review is unreasonable; nor can it be said that it is unsupported by the evidence on record. At most, the alleged error of the Board of Review lies in the evaluation and the assessment of the oral and documentary evidence . . . The error if at all, is one made within the area of the jurisdiction of the Board of Review . . . (Section 22 of the Interpretation Ordinance) is a bar to the review of erroneous decisions made within the area of the jurisdiction of the Tribunal . . . and the ouster clause would accordingly apply".

Learned counsel for the petitioner however has sought a review of the impugned orders on the ground that both the 2nd respondent and the Board of Review committed mistakes of fact, which carried them outside their jurisdiction. It is submitted that they both misapplied the definition of the word "house" in section 47 of the Law and the finding that the relevant premises is a "house" is unsupported by evidence. In other words, the 2nd respondent and the Board of Review had clothed themselves with jurisdiction on facts that did not exist and therefore their decisions cannot have the finality, as Parliament did not intend to confer jurisdiction to decide on matters where the facts do not justify their holding that the relevant premises was a house. It is learned counsel's contention that the evidence proved that the subject matter was a "business premises", over which neither the 2nd respondent nor the Board of Review had jurisdiction.

Section 47 of the Law defines "House" as : "an independent living unit, whether assessed or not for the purpose of levying rates, constructed mainly or solely for residential purposes, and having a separate access, and through which unit access cannot be had to any other living accommodation, and includes a flat or tenement but shall not include –

(1) subdivisions of, or extentions to, a house which was first occupied as a single unit of residence; and

(2) a house used mainly or solely for a purpose other than a residential purpose, for an uninterrupted period of ten years prior to March 1, 1972".

His Lordship Samarakoon, C.J. in *Abeysekera v. Wijetunga*[6] stated, the "test" is whether a premises is an independent living unit, "constructed mainly or solely for residential purposes". The test must be an objective one and not a subjective one. It's construction and the purpose of the construction is what matters. Subsection (1) and (2) to section 47 set out 2 exceptions. See His Lordship Bandaranayaka, J's observations in *Mohamed Ismail and others v. Hussain and others*[7]. Thus where there is clear evidence that the building was constructed mainly or solely for residential purposes, the exceptions set out in the subsections have no application, unless a "house" which has been originally constructed for residential purposes was used mainly or solely subsequently, for a purpose other than residence, for an uninterrupted period of 10 years prior to March 1, 1972. It would therefore be unwise to consider the definitions of "business premises" or "residential premises" in the context of the Rent Act in interpreting the term "House" in the Ceiling on Housing Property Law.

The extract from the assessment register (R2) describes the premises, which bore the number 179 in 1941, as a "tiled upstair house and garden". The petitioners have not seriously contested that the building was originally constructed for residential purposes. They have therefore sought to bring the premises under exception to section 47. It was their duty then to establish that the premises was used mainly or solely for a purpose other than a residential purpose for a period of 10 years prior to March 1, 1972. The 1st respondent obtained a lease of the premises for 5 years on bond No. 54 dated 13.9.52. (R20). That document describes the premises as a house and building. The lessee has undertaken to construct a latrine and obtain water service at his expense. The 1st respondent giving evidence before the Commissioner has produced extracts from the electoral register A13 to A15 where his name, his wife's name and the name of one of his sons were registered as voters residing in the premises from 1962. The 1st respondent has used the premises mainly for the purpose of residence of his family, using only a small portion outlined

in red in plan A21, which is about 82 square feet in area, for a pawnbrokering business. The balance area of 2,750 square feet on the ground floor and 2,000 square feet in the upper floor was used for residential purposes. In the face of the uncontradicted evidence of physical occupation by the 1st respondent and his family of the premises 10 years prior to 1st March, 1972, the Commissioner had the jurisdiction to entertain application P1 and make an order thereon. The Board was not in error in holding that the Commissioner had rightly entertained the application.

Learned counsel for the petitioner has alleged that the Inquiry officer had violated the principles of natural justice in departing from his earlier finding R33, that the premises was a business premises dated 24.6.92 without giving the petitioner's a hearing. The Inquiry officer S. A. Karunaratne has given evidence before the 2nd respondent. As seen above, his evidence is of little or no relevance in applying the test in section 47 of the law to decide whether the premises is a "house" or to bring the premises within subsection (2) of that section.

Finally, learned counsel complained that both the 2nd respondent and the Board of Review have misdirected themselves on the question of "equities".

Section 17 (1) of the Ceiling on Housing Property Law provides:

Where an application has been made under this law for the purchase of a house, and the Commissioner is satisfied –

(*a*) that such house is situated in an area which in his opinion will not be required for slum clearance, development or redevelopment or for any other public purpose;

(*b*) that it is possible to alienate such house as a separate entity; and

(*c*) that the applicant is in a position to make the purchase,

the Minister may, on being so notified by the Commissioner, by order (hereinafter referred to as a "vesting order") published in the *Gazette,* vest such house in the Commissioner with effect from such date as may be specified therein".

It is not disputed that these three requirements were considered by the 2nd respondent and he was satisfied they were fulfilled before making orders P7A and P7B. In other words, he has complied with the requirements of section 17 of the law.

His Lordship Thamotheram, J. in *Caderamanpulle v. Pieter Kenueman and others*[8] introduced the further element of "equities" that the Commissioner had to consider in deciding whether an application under section 13 of the law should be entertained. He was of the view that the Commissioner is not a mere conduit pipe through whom an application of a tenant under section 13 goes to the Minister, even if conditions band (in section 17) are satisfied. There was a duty cast on the Commissioner to act fairly. While conceding that Caderamanpulle *(supra)* did not elaborate as to what is meant by the word "equities", His Lordship S. N. Silva, J. in *Kathiresan v. Bibile and others*[9] expressed the view that it was clear from the context that there was a requirement on the part of the Commissioner to consider the respective interests of parties and in doing so he must act reasonably. Section 13 of the law he stated, was introduced as a measure of regulating ownership. The policy was that a tenant who was in occupation of a house let to him at the time the present landlord became owner and who continues as tenant under the present landlord, is entitled to apply for the purchase of that house. This policy also involves the vesting of such house without the consent of the landlord. Therefore the tenant had a "pre-emptive right" or a "preponderent right" to purchase the house. In considering what is fair and reasonable the Commissioner had to attach due weight to this right on the part of the tenant entitled to make an application under section 13.

The decision on "equities" is a matter where the Commissioner could exercise his discretion. Such a decision could be reviewed on the ground of "irrationality". As Lord Diplock in GCHQ Case*Council of Civil Service Unions v. Minister for the Civil Service*[10] explained "Wednesbury Unreasonableness" applies to a "decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Unless "unreasonableness" or "irrationality" could be treated as an extenion of the principle of ultra vires, the petitioner is faced with the obstacle of section 39 (3) read with section 22 of the Interpretation Ordinance.

Both Caderamanpulle and Kathiresan *(supra)* did not deal with "equities" in that light. The petitioners have in their pleadings only alleged that the Commissioner and the Board of Review failed to consider equities of parties. They have endeavoured in their written submissions to expand on it by referring to factual matters presented by both parties, which have in fact been considered by both the 2nd respondent and the Board of Review. Nowhere have the petitioners alleged that the 2nd respondent or the Board of Review acted unreasonably or irrationally. In any event, both bodies have not erred on facts of a decisive nature which goes to the root of their jurisdiction. See Withanaratchi *(supra)*. On the contrary, they have followed the policy of the CHP Law as set out in Kathiresan *(supra)*. In the circumstances the petitioners are not entitled to the relief claimed. Their application is dismissed with costs fixed at Rs. 1,500 payable to the 1st respondent.

Appeal dismissed.