WITHANARATCHI
V.
GUNAWARDENA AND OTHERS

SUPREME COURT.
G.P.S DE SILVA, C.J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 64/94.
C.A. (WRIT) APPLICATION NO. 377/88.
CHP BOARD OF REVIEW NO. 1713.
03 AND 07 JUNE, 1996.

Ceiling on Housing Property Law No. 1 of 1973-Application by tenant to purchase tenement-Definition of house in section 47 of the Law- Application of section 39 (3) of the Law read with section 22 of the Interpretation Ordinance as amended by Interpretation (Amendment) Act, No. 18 of 1972 - Error on "Jurisdictional Fact".

The respondent made an application to purchase her residing tenement under the Ceiling of Housing Property Law. The definition of house in section 47 of the Ceiling on Housing Property Law, No. 1 of 1973 includes a tenement. Here there was a connecting door which was kept closed for 32 years. This interconnecting door served as access from the tenement to a book depot and not to a living accommodation though no doubt there was an attic in the book depot which however provided living accommodation. The Board of Review held this tenement was a house within the definition of the expression "house" in section 47 of the Ceiling on Housing Property Law.

Held :

The Board of Review in holding in favour of the Respondent did not err in respect of a jurisdictional fact but the error if at all, is one made within the area of the jurisdiction of the Board of Review.

An ouster clause must be strictly construed and there is a presumption in favour of judicial review.

Section 22 of the Interpretation Ordinance does not exclude review of jurisdictional questions. The bar applies only to erroneous decisions made within the area of the tribunal's jurisdiction. The error of the Board of Review is at most an error made within jurisdiction and the ouster clause would accordingly apply.

Case referred to :

Chandralatha Wijewardena v. People's Bank and others. (S.C. Appeal No. 3/80 S.C. Minutes of 20.5.1981.

APPEAL from Judgment of the Court of Appeal.

T. B. Dilimuni with Miss S.Moragoda and *Miss. N. Jayawardena* for the Petitioner-Appellant.

E.D. Wikremanayake with *Miss Anandi Cooray* for 5th Respondent.

Cur. adv. vult.

20 June, 1996.
G. P. S. DE SILVA, C. J.

The Petitioner-Appellant (hereinafter referred to as the Appellant) is the owner of premises Nos. 45 and 45/6, Maligakanda Road, Colombo 10,. The 5th Respondent is the tenant under the Appellant of premises No. 45/6, which are the premises in suit.

The 5th Respondent made an application dated 8.11.82 under the provisions of section 13 of the Ceiling on Housing Property Law No. 1 of 1973 (hereinafter referred to as the Law) for the purchase of premises No. 45/6. The Appellant sought to resist the application on the ground that premises No. 45/6 was not a "house" within the meaning of section 47 of the Law. After inquiry, the Commissioner of National Housing upheld the objection and rejected the 5th Respondent's application to purchase the house. The decision of the Commissioner was notified to the 5th Respondent by letter dated 15.9.84. The 5th Respondent thereupon preferred an appeal to the Board of Review seeking to set aside the decision of the Commissioner and for a declaration that the premises No. 45/6 was a "house" within the meaning of section 47 of the law. After inquiry, the Board of Review allowed the appeal of the 5th Respondent and set aside the decision of the Commissioner and directed the Commissioner to take steps under section 17 (1) of the law to "vest" the premises. Thereupon the Appellant filed an application in the Court of Appeal seeking a writ of Certiorari to quash the order of the Board of Review on the ground that the order has been made without and/or in excess of jurisdiction.

At the hearing before the Court of Appeal, Counsel for the 5th Respondent took the preliminary objection that the application cannot be maintained in view of the **provisions of section 39 (3) of the law read with section 22 of the Interpretation Ordinance as amended by Interpretation (Amendment) Act No. 18 of 1972.** The principle submission of Mr. Dilimuni, Counsel for the Appellant, was that the Board of Review has erred on a "jurisdictional fact" in reaching the conclusion that premises No. 45/6 is a "house" within the meaning of that expression in the law. Counsel urged that the Board of Review has failed to take into consideration (a) the evidence of the 5th Respondent given before the Commissioner on 9.3.83; (b) the observations made by the Assistant Commissioner who inspected the premises in suit with a view to ascertaining whether the premises fell within the definition of "house", (c) the complaint made by the Appellant to the Police on 22.9.84 and also the statement made by the 5th Respondent to the police on the same day.

Mr. Dilimuni drew our attention to the evidence given on 9.3.83 by the 5th Respondent before the Commissioner. The gist of her evidence was that between the premises No. 45/6 where she resides and premises No. 45 which is a book depot, there is a door and that this door provided access to premises No. 45. While admitting the existence of the door, she further stated that the door had been closed for the last 32 years. It was her position that she was in occupation of the premises for 32 years.

The next item of evidence relied on by Mr. Dilimuni is the record of the observations made by the Assistant Commissioner who inspected the premises. This officer has stated that premises No. 45/6 is situated behind the premises No. 45. It is a room attached to premises No. 45. She has specifically stated that there is an "inter connecting door" between the two premises and she had concluded that the premises No. 45/6 cannot be considered as an "independent unit" as it is connected by a door to premises No. 45. This is a minute made in the relevant file of the Commissioner and is dated 27.8.84.

The other item of evidence relied on by the Appellant is the complaint made to the police on 22.9.84. In this complaint the Appellant has stated that the 5th Respondent is preparing to construct a wall on

her side in order to close the door. The 5th Respondent who made a statement to the police on the same day admitted "the construction of the wall" and further stated that it was done for "her protection".

In short, Mr. Dillimuni submitted that the Board of Review has failed to take into account evidence which is intensely relevant on the issue whether the premises in suit is a "house" within the meaning of the law. By such failure, Counsel contended, the Board of Review has seriously erred on a "jurisdictional fact" and thereby acted in excess of its jurisdiction. It was the contention of Mr. Dillimuni that the preclusive clause contained in section 39 (3) of the law read with section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972, has no application when the impugned order is one made outside or in excess of jurisdiction.

I now turn to the definition of the expression "house" in section 47 of the law. It reads as follows :-

"House" means 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 extensions 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.

Mr. Dillimuni drew our attention to the words "through which unit access cannot be had to any other living accommodation" and stressed that the existence of the "inter-connecting door" provided access from the premises No. 45/6 to premises No. 45. Therefore, Counsel urged that the premises in suit did not fall within the meaning of the expression "house" in the law. In short, the existence of the "inter-connecting door" takes the premises in suit out of the definition.

Mr. E.D. Wikremanayake for the 5th Respondent presented his case before us on the assumption that there was an "inter connecting door" between the two premises. Mr. Wikremanayake submitted that having regard to the evidence and the terms of the definition of the expression "house", the existence of an inter connecting door does not take the premises out of the definition. The assessment registers show that from 1941 to 1948 there was one assessment number given for the entire building, namely No. 45. The assessment registers further show that in 1949 there was a sub-division of the premises, namely, assessment Nos. 45 and 45/6.

Premises No. 45 is described as a "book depot", while premises No. 45/6 has been described as a "tenement" in the assessment register for 1949. Mr. Wikremanayake first submitted that the inter-connecting door therefore provided access from the "tenement" to the "book depot" and not into any "living accommodation" as contemplated in the definition of a "house". It is right to state here that Mr. Dillimuni's submission was that in premises No. 45 there is an attic which provided "living accommodation".

Mr. Wikremanayake next submitted that the words "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" qualify only the preceding words "an independent living unit." Mr. Wikremanayake emphasized that the definition expressly includes a "tenement" and the assessment register of 1949 described the premises in suit as a "tenement". Counsel further pointed out that the unchallenged evidence is that the door was closed for the past 32 years. It is not disputed that the 5th Respondent was residing in these premises long before the Appellant purchased the premises in 1979. I am inclined to the view that there is force in these submissions made by Mr. Wikremanayake.

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. I find myself unable to agree with Mr. Dilimuni for the Appellant that the Board of Review has erred in respect of a "jurisdictional fact." The error, if at all, is one made within the area of the jurisdiction of the Board of Review.

In this view of the matter, it is necessary to consider whether the provisions of section 39 (3) of the law read with section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972 preclude judicial review of the decision of the Board of Review.

I think it would be correct to say that generally speaking an ouster clause is strictly construed and that there is a presumption in favour of judicial review. As observed by H.W.R. Wade "..... there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the Court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will (at page 720 of the 6th Edition on Administrative Law. At page 722 of the same edition Wade states "An even bolder, though equally justifiable, judicial policy was that Certiorari would be granted to quash an act or decision which was *ultra vires* even in the face of a statute saying expressly that no Certiorari should issue in such a case."

Mr. Dillimuni relevantly cited the case of *Chandralatha Wijewardena v People's Bank and Others*[1]. This was a case where Sharvananda, J. (as he then was) considered the scope of section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972. Said the learned Judge, "In my view, section 22 of the Interpretation Ordinance as amended by the Interpretation (Amendment) Act No. 18 of 1972, has no application when the question of jurisdiction to make the impugned order is in issue, when the order or determination is outside or in excess of the jurisdiction of the tribunal. Section 22 deals with decisions and orders which any person, authority or tribunal is **empowered to make or issue**, The court's jurisdiction to pronounce on the authority of the tribunal to make an order is not ousted by any such exclusionary clause "shall not be called in question in any court" if the tribunal was not empowered to make the order. The question of the tribunal's juris-

diction to make the order or decision can always be agitated. Section 22 of the Interpretation Ordinance does not exclude review of jurisdictional questions. The bar applies only to erroneous decisions made within the area of the tribunal's jurisdiction ....." I am in entire agreement with the view of the learned Judge that the section does not shut out judicial review on jurisdictional grounds; it is a bar to the review of erroneous decisions made within the area of the jurisdiction of the tribunal. As stated earlier, the error of the Board of review is at most an error made within jurisdiction, and the ouster clause would accordingly apply.

For these reasons the appeal fails and is dismissed, but in all the circumstances, without costs.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.