

WIJETUNGE

v.

WICKREMANAYAKE AND OTHERS

COURT OF APPEAL

RATWATTE, J (PRESIDENT) AND ATUKORALE, J.

C. A. 1575/79

DECEMBER 16, 1980.

Certiorari - SS 8, 11, 15(2) and 39 of Ceiling on Housing Property Law No. 1 of 1973 - Appeal to the Board of Review - vesting of excess house - "House" within the meaning of s.47 of Law No. 1 of 1973 - cancellation of vesting order - jurisdiction of Board of Review.

After an excess house tenanted by the petitioner and belonging to the 4th respondent was vested in the Commissioner of National Housing, on an appeal preferred by the 4th respondent the vesting was ordered by the Board of Review to be cancelled and the Commissioner took steps to divest the premises.

Held

The vesting of the excess house of the 4th respondent was in terms of s. 11 of the Ceiling on Housing Property Law No. 1 of 1973. Hence the vesting is by operation of law. As the vesting was by operation of law no appeal lies under s.39 of the said Law. Further in terms of section 15(2) of the said Law where a house is vested in the Commissioner under this law such vesting is final and conclusive except in the three instances set out in the proviso to section 15(2).

The Board of Review acted without jurisdiction in entertaining the appeal of the 4th respondent. The fact of the participation of the parties in the appeal will not by acquiescence confer jurisdiction as here the want of jurisdiction is total and patent and not contingent.

Application for writ of *Certiorari* to quash the order of the Board of Review.

J. C. T. Kotalawela with M. Singaravelu for petitioner

M. Sivarajasingham for 4th respondent

Other respondents absent and unrepresented.

Cur. adv. vult.

February 6, 1981.

RATWATTE, J. (President C/A)

The 4th Respondent was the owner of premises No. 294, Kehelpandura Junction, Udupila, Makola North at the time the Ceiling on Housing Property Law No. 1 of 1973 (hereinafter referred to as the Law) came into operation. The Petitioner was the tenant of the said premises. The 5th Respondent, the Commissioner of

National Housing by his letter dated 30. 06. 1975, which has been annexed to the amended Petition marked X4, informed the 4th Respondent that the premises No. 294, Kehelpandura Junction have vested in the Commissioner from 13. 01. 1974. The 5th Respondent also informed the Petitioner by his letter X5 dated 23. 07. 1975 that the premises in question have been vested in the 5th Respondent from 13. 01. 1974. The 5th Respondent further informed the Petitioner that the Petitioner's application to purchase the said premises is being considered by the 5th Respondent and that steps are being taken to have the premises valued. The Petitioner was directed to pay a sum of Rs. 30/- per month to the 5th Respondent till the Petitioner was informed of the value of the premises. The 4th Respondent appealed to the Board of Review comprising the 1st, 2nd and 3rd Respondents and constituted under the provisions of the said Law. After inquiry at which the Petitioner was also present, the Board by its order X1 dated 27.06.1979 held that the premises in question was not a "house" within the meaning of Section 47 of the Law. The Board of Review further directed the 5th Respondent that the vesting of the said premises be cancelled and that the premises be divested. Accordingly the 5th Respondent by his notice X7 dated 11.01.1980 informed the Petitioner that in pursuance of the Order made by the Board of Review he has cancelled the letter X5 sent to the Petitioner and further that the vesting of the premises No. 294 has been cancelled by him.

The Petitioner by his original Petition dated 18.07.1979 sought to have the Order XI of the Board of Review quashed for the reasons set out in the said Petition. The 4th Respondent filed his Statement of Objections dated 09.11.1979. After the receipt by the Petitioner of the Notice X7, the Petitioner filed the amended petition dated 20.11.1980 seeking to quash both the Order made by the Board of Review and the Order made by the 5th Respondent to cancel the vesting of premises No. 294. The Petitioner has pleaded that the Board of Review had no jurisdiction to inquire into the Appeal of the 4th Respondent and to make the Order X1. The Petitioner further pleaded that the Board of Review had erred both in law and on the facts in holding that the premises No. 294 is not a house within the meaning of Section 47 of the Law. The Petitioner also pleaded that the 5th Respondent had no power or authority under the provisions of the law to cancel the vesting of the premises in question. The Petitioner averred in his amended Petition that he was originally the owner of the premises in question and that due to financial difficulties he had transferred the premises to the 4th Respondent but he continued to occupy the premises as the tenant of the 4th

Respondent. This was not denied by the 4th Respondent. The Petitioner in paragraph 5 (a) of his affidavit to the original petition stated that he had been in occupation of the premises since his childhood and continued to occupy it as his residence after his marriage. This averment too has not been denied by the 4th Respondent.

The main submission of learned Counsel for the Petitioner at the argument before us was that the 4th Respondent had no right of appeal to the Board of Review against the vesting of the premises in question in the 5th Respondent. The contention of learned Counsel was that the vesting of the premises in the 5th Respondent was by operation of Law in terms of Section 11 (1) of the Law as amended by Law 34 of 1974. He argued that the vesting was not as a result of any decision or determination made by the Commissioner. Section 11 (1) provides for the vesting of houses in excess of the permitted number of houses. In the notice X4 sent by the 5th Respondent to the 4th Respondent, the former has informed the latter that in terms of the declaration made by the 4th Respondent the premises in question, the ownership of which the 4th Respondent has not opted to retain, has vested in the 5th Respondent in terms of Sections 11 and 16 of the Law from 13.01.1974. The 5th Respondent has further stated that the Petitioner will be informed of these facts. Thereafter by the notice X5 the 4th Respondent has informed the Petitioner that the premises in question which has been declared as an excess house by the 4th Respondent, has vested in the 5th Respondent by the operation of Law No. 1 of 1973. Learned Counsel for the 4th Respondent conceded before us that if the vesting of the premises was an automatic vesting, i.e., a vesting by operation of law, the 4th Respondent had no right of appeal to the Board of Review. But his submission was that this vesting was not by operation of law. He submitted that under this law there are three ways by which houses become vested in the Commissioner: Firstly, under Section 8 (4), secondly, under Section 11 (1) and thirdly, under Section 13. He conceded that if the vesting is under Section 11 (1), then the vesting is by operation of law, but only if the conditions in Section 10 have been satisfied.

The contention on behalf of the 4th Respondent was that the vesting in this case could not have been under Section 11(1) as the 4th Respondent did not send a declaration under Section 8 to the 5th Respondent. It was further contended that the vesting of the premises in question was under Section 8 (4) on a determination made by the Commissioner, as the 4th Respondent had not sent a declaration. The submission of learned Counsel for the 4th

Respondent therefore was that the notice X4 had no validity. I do not think that we can decide on the validity of X4. The 4th Respondent when he received X4 did not protest to the 5th Respondent and challenge the correctness of the contents of X4. Instead he appealed to the Board of Review. In the Objections filed by the 4th Respondent in this Court he has not specifically denied that he sent a declaration under Section 8 to the 5th Respondent. In the notice X4 the 5th Respondent specifically refers to the declaration made by the 4th Respondent and has stated that the 4th Respondent has not opted to retain the ownership of the premises in question. In the notice X5 the 5th Respondent states that the premises in question have been declared to be an excess house. In paragraph 1 of the Petitioner's original petition, the Petitioner has stated that the vesting of the premises was in terms of Section 11 and 16 of the Law. In paragraph 3 of his affidavit, the 4th Respondent has admitted the averments in paragraph 1 of the Petitioner's original Petition, but states that the determination and vesting were in excess of the powers conferred on the 5th Respondent. Taking all these matters into consideration I am of the view that the vesting in question was in terms of Section 11 (1) of the Law and was therefore a vesting by operation of Law.

The question then arises whether the Board of Review had jurisdiction to entertain the appeal of the 4th Respondent in this case. The provisions regarding appeals to the Board are contained in Section 39 of the Law. Section 39 (1) reads as follows:

"Any person aggrieved by any decision or determination made by the Commissioner under this Law may, within one month of the date on which such determination is communicated to such person, appeal against such decision or determination to the Board, stating the grounds of such appeal."

So that it is clear from the provisions of Section 39 (1) that the Board had no jurisdiction to entertain this appeal as the vesting was by operation of Law and not as a result of a decision or determination made by the 5th Respondent. Further in terms of Section 15 (2) of the Law, where any house is vested in the Commissioner under this Law, such vesting is final and conclusive except in the three instances set out in the proviso to Section 15 (2). The Proviso has no application to the instant case. As stated earlier learned Counsel for the 4th Respondent conceded that if the vesting was by operation of Law, the 4th Respondent could not have appealed to the Board. I am of the view that the Board had no jurisdiction to entertain the appeal of the 4th Respondent. Learned Counsel for the 4th Respondent submitted

that even if the Board had no jurisdiction, the Petitioner was not entitled to the relief asked for by him as he had participated in the proceedings before the Board and therefore acquiesced in the proceedings. I do not think there is any substance in this submission, because in this case, there was a total and patent want of jurisdiction and not merely a contingent want of jurisdiction. The Petitioner is therefore not disentitled to object later to the Order made by the Board, in spite of the fact that he had taken part in the proceedings before the Board. I am accordingly of the view that the Order of the Board of Review dated 27.06.1979 has to be quashed and consequently the Order of the 5th Respondent divesting the premises in question has also to be quashed. In view of this finding it is not necessary to consider the two other grounds urged by the Counsel for the Petitioner. Firstly, that in any event the Order of the Board of Review should not be allowed to stand as the Board was differently constituted on the several dates of inquiry before the Board; and secondly that on the evidence led before the Board, the Board had committed an error in coming to the conclusion that the premises in question was not a house within the meaning of Section 47 of the Law.

For the above reasons I would quash the Order made by the Board of Review dated 27.06.1979 and the Order made by the 5th Respondent which is contained in the document X7 dated 11.01.1980. The Petitioner will be entitled to the costs of this Application.

ATUKORALE, J I agree.

Order of Board of Review and order of 5th respondent quashed.