

DAYANANDA
v.
SUJATHA JANAKI AND OTHERS

COURT OF APPEAL

S. N. SILVA, J.

C.A. APPLICATION NO. 1197/88

30 JANUARY AND 13 MARCH , 1992.

Writs – Certiorari – Order of Commissioner of National Housing under s. 20A(1) of the Rent Act No. 7 of 1972 as amended by Act No. 55 of 1980 – Landlord and tenant – Business premises – Application to construct building for residential purposes on a 10 perch block land appurtenant to premises that had been rented out which was an extent of 34 perches – Can, the Commissioner act on a report of a delegate? – Requirement that order should be made only by the Commissioner.

Where an application is made by a landlord in terms of section 20A of the Rent Act No. 7 of 1972 as amended by Act No. 55 of 1980 for authorisation to construct buildings or extensions to existing buildings on appurtenant land (which should exceed 8 perches) of tenanted premises, an order thereon should be made by the Commissioner of National Housing or by a Government Agent or an assistant Government Agent to whom a delegation is made in terms of section 44A. An order cannot be made by a Deputy Commissioner or an Assistant Commissioner nor can the exercise of that power be delegated to such an officer. But, in view of the matters that have to be considered prior to making an order the function of carrying out necessary investigations or inquiries and submitting a report thereon, may be assigned by the Commissioner to a subordinate officer such as a Deputy or an Assistant Commissioner. In such event it is lawful for the Commissioner to make an order on a consideration of the proceedings had and the report that is submitted without re-hearing evidence or calling for further representations. Therefore the fact that the Commissioner agreed with the recommendations of the Asst. Commissioner cannot be the basis of a submission, that the Commissioner failed to exercise his discretion in the matter.

Cases referred to:

1. *Osgood v. Nelson* (1872) The Law Reports p.636.
2. *Allingham v. Minister of Agriculture* (1948) 1 All ER 780.
3. *Jefferies v. New Zealand Dairy Production and Marketing Board* (1967) 1 WLR 136.

APPLICATION for writ of certiorari to quash the order of the Commissioner of National Housing.

Faiz Mustapha, P.C. with *H. Withanachchi* for Petitioner.

T. B. Dillimuni with *Mr. Malalasekera* for 2nd Respondent.

K. Siripavan, S.S.C. for 2nd and 4th Respondents.

Cur. adv. vult.

15th June, 1992.

S. N. SILVA, J.

The Petitioner has filed this application for a Writ of Certiorari to quash the order dated 29.09.1988 (P5) made by the Commissioner of National Housing. The order was made by the Commissioner pursuant to an application of the 1st Respondent in terms of section 20 A(1) of the Rent Act No. 7 of 1972 as amended by Act No. 55 of 1980.

The Petitioner is a tenant of premises No. 19, High Level Road, Kirulapona where he is carrying on the business of a bakery. The premises were leased to the Petitioner's father by the grandmother of the 1st Respondent, the original Owner. There were two leases for periods of five years each, commencing from 02.08.1968. After the expiry of the leases the Petitioner continued as a monthly tenant of the premises paying a rental of Rs. 188/- per month.

The original owner gifted half share of the premises to the 1st Respondent on 03.05.1971. The balance half share was gifted to the brother of the 1st Respondent. Subsequently, on 03.01.1982 the 1st Respondent purchased the balance half share from her brother. In 1988 the 1st Respondent made an application to the Commissioner in terms of section 20 A(1) of the Rent Act as amended by Act No. 55 of 1980, for an order authorising her as landlord to construct a building for residential purposes on the appurtenant land of the premises that had been rented out. It is common ground that the premises are 34 perches in extent and that the application has been made in respect of an extent of 10 perches situated behind the building in which the Petitioner is carrying on his business. An inquiry was held into that application by the 4th Respondent being an Assistant Commissioner of National Housing. Notes of that inquiry

have been produced marked 'P4'. Both parties were represented by Counsel and the 1st Respondent and the Petitioner gave evidence at the inquiry. They also produced several documents. At the conclusion of the inquiry the 4th Respondent recorded that she will visit the premises and the order would be communicated thereafter. By the order 'P5' the Commissioner has authorised the construction of a building for residential purposes on the extent of 10 perches referred to in the application of the Petitioner. The order is subject to two conditions. They are :-

- (1) that in lieu of the well, presently used by the Petitioner and located in the area coming within the 10 perches, the 1st Respondent should construct another well, at her expense in the area that will continue to be tenanted;
- (2) that the 1st Respondent will erect a wall to separate the extent of 10 perches from the area that will continue to be tenanted.

The Petitioner challenged the order on the following grounds :-

- (1) that the 4th Respondent did not inspect the premises as stated at the conclusion of the proceedings;
- (2) that the order is unreasonable since the Petitioner uses the extent of 10 perches to stack firewood and to dump the refuse ash of the bakery;
- (3) that the inquiry has been held by an Assistant Commissioner who was not vested with power to make an order in terms of section 20 A and in any event the Commissioner has blindly "rubber stamped" the recommendations of the 4th Respondent, without effectively exercising his own discretion.

In view of the submissions that were made by learned Counsel for the Petitioner, the departmental file of the Commissioner was produced in Court by learned Senior State Counsel. It was clear from the entries in the file that the 4th Respondent visited the premises and made notes of the inspection carried out by her. In these

circumstances learned Counsel for the Petitioner did not pursue the first ground referred to above. It is common ground that there are no buildings in the area in respect of which the application has been made. According to the averments of the petition, the Petitioner is using this land only to stack firewood and to dump ash. In these circumstances learned Counsel for the Petitioner indicated that he is not pursuing the second ground as well. Submissions were made by learned Counsel and written submissions were tendered only on the last ground stated above.

Section 20 A(1) introduced by the amendment of 1980 reads as follows :-

"The Commissioner of National Housing may on, application made in that behalf and notwithstanding anything in this or any other law, make order authorizing the landlord of any premises where there is within the boundaries of such premises appurtenant land exceeding eight perches in extent, to construct any building for residential purposes on such land or to make such extensions to existing buildings as are capable of being used for residential purposes :

Provided that no such order shall be made by the Commissioner unless he is satisfied :

- (a) that the applicant has the financial capacity to construct the number of residential units within such period or periods as may be determined by the Commissioner; and
- (b) that the building or extension proposed to be constructed or made will not unduly interfere with the amenities and facilities enjoyed by the tenant, or where such amenities or facilities may be interfered with, that the landlord will, before he takes possession of such land, provide to the tenant fresh adequate amenities and facilities.

Every order made under this subsection shall be communicated to the tenant of such premises and it shall be the duty of such tenant to permit the landlord of such premises to

construct such building or to make such extensions as is or are referred to in such order."

The phrase "Commissioner of National Housing" appearing in the section is not defined in the Act. Section 44 A of the Act permits the Commissioner to delegate any power, duty or function assigned to him by the Act to a Government Agent or an Assistant Government Agent. In the course of the submissions attention was drawn to other statutes in which reference is made to the Commissioner of National Housing. Section 47 of the Ceiling on Housing Property Law No. 1 of 1973 defines the term "Commissioner" to mean a Deputy Commissioner or an Assistant Commissioner. Similarly, the National Housing Act No. 37 of 1954 which originally provided for the office of a Commissioner for National Housing (section 8 (1) states in section 100 that Commissioner means the Commissioner for National Housing and includes a Deputy Commissioner or an Assistant Commissioner. In the absence of a similar provision in the Rent Act and the limited delegation provided for in section 44 A, it is clear that the power vested in the Commissioner to make an order in terms of section 20 A cannot be exercised by an Assistant Commissioner nor can it be delegated to an Assistant Commissioner. The order 'P5' is in the name of the Commissioner and is *per se* consistent with the requirements of section 20 A. The question that arises for consideration is whether the Commissioner should directly engage in all the processes that precede the making of a decision.

An examination of the provisions of section 20 A reveals that the Commissioner must satisfy himself as to several matters before granting authority to a landlord to construct a building for residential purposes on the appurtenant land. The matters that have to be considered include the following :-

- (1) whether there is appurtenant land exceeding 8 perches within the boundaries of the tenanted premises;
- (2) whether the applicant landlord has the financial capacity to construct the given number of residential units within period or periods as may be determined by the Commissioner;

- (3) whether the building or the extension proposed to be constructed will unduly interfere with the amenities and facilities enjoyed by the tenant and if so whether the landlord should provide alternative amenities and facilities before he takes possession of the appurtenant land. .

These provisions postulate an inquiry being held at which the applicant landlord and the tenant are afforded an opportunity to adduce material in relation to the matters that have to be considered by the Commissioner. The legislature would not have intended a single individual in the form of the Commissioner of National Housing, to hold such inquiries in every instance. Hence I am of the view that it is consistent with the requirements of section 20A for the Commissioner to assign the function of holding necessary inquiries and making a report thereon to a subordinate officer. This view is supported by a clear line of authority in England that dates back one hundred and twenty years.

In the case of *Osgood v. Nelson*⁽¹⁾, the House of Lords considered the validity of a dismissal ordered by a corporate body having the statutory power to remove an officer from a corporation. The corporate body caused an inquiry to be made by a committee which recorded evidence and made a report. The inculpatd Officer was afforded an opportunity of being heard only before this committee. The corporate body did not re-hear the evidence and it decided to dismiss the officer on the basis of the evidence recorded by the committee and the report that was submitted. It was held that the fact that an inquiry was held by the committee did not amount to a delegation of the power of dismissal to that committee and that the dismissal based upon the report of the committee was a due exercise of the power by the corporate body itself.

In *Halsbury's Laws of England* (4th edition. Vol. 1 at para 32 it is stated as follows :

“Even where a power to make decisions is exercisable by the delegate itself, however, considerations of practical convenience may justify the entrustment to a committee or officers of powers to conduct an investigation and to make recommendations as to the decision to be taken.”

Thus it is well settled in English Law that the authority vested with the power to make a decision or order need not, carry out by itself, the necessary investigations or inquiries that precede the making of the decision or order. The function of carrying out necessary investigations or inquiries and making a report thereon may well be assigned to a subordinate officer or agent of the authority. As noted by Wade (**Administration Law, 6th edition (1988) at p.358**), the vital question to be determined is whether the statutory discretion remains in the hands of the proper authority or whether some other person purports to exercise it.

In the case of *Allingham v. Minister of Agriculture* ⁽²⁾, relied upon by learned Counsel for the Petitioner a Committee which was empowered by war-time legislation to direct farmers to grow specified crops on specified fields, left it to its executive officer to decide the particular fields in respect of which such a direction is given. A farmer who did not comply with a direction of the executive officer was prosecuted for disobedience. It was held that the direction was void since it was made by the executive officer and not the committee. It is clear from a perusal of the judgment of Lord Goddard, C.J. that the proper procedure would have been for the committee to have obtained the officer's recommendations and to have decided the matter of giving a direction on a consideration of that recommendation. It is thus seen that the judgment does not in any way support the submission of learned Counsel. On the contrary, the judgment supports the proposition that an authority having a statutory power to make a decision or an order can act on a recommendation made by an agent who has inquired into the matters to be considered in making such decision or order. The case of *Jeffs v. New Zealand Dairy Production and Marketing Board* ⁽³⁾, relied upon by learned Counsel for the Petitioner relates to a situation where a decision made upon a recommendation of a committee that conducted inquiries, was quashed. However, it is clear on a perusal of the judgment that the decision is based upon certain defects in the procedure adopted by the committee that carried out the inquiry and drawbacks in the recommendations that were made by it. Therefore this judgment too does not support the submission of learned Counsel.

On the foregoing analysis I hold that where an application is made by a landlord in terms of section 20A of the Rent Act No. 7 of 1972 as amended by Act No. 55 of 1980 for authorization to construct a building or extensions to existing buildings, on appurtenant land of tenanted premises, an order thereon should be made by the Commissioner of National Housing or by a Government Agent or an Assistant Government Agent to whom a delegation is made in terms of section 44A. In the absence of an interpretation clause in the Rent Act defining the term "Commissioner" as in the case of the National Housing Act and in the Ceiling on Housing Property Law or, of any other enabling provision to that effect, an order cannot be made by a Deputy Commissioner or an Assistant Commissioner nor can the exercise of that power be delegated to such an officer. But, in view of the matters that have to be considered prior to making an order, the function of carrying out necessary investigations or inquiries and submitting a report thereon, may be assigned by the Commissioner to a subordinate officer such as a Deputy or an Assistant Commissioner. In such event it is lawful for the Commissioner to make an order on a consideration of the proceedings had and the report that is submitted without re-hearing evidence or calling for further representations.

In this case the 4th Respondent who held the inquiry and inspected the premises submitted the record of the proceedings with her report to the Commissioner. At the hearing of this application the report was made available to learned Counsel. On a perusal of the report, it is clear that the 4th Respondent dealt with the matters at issue and took into account relevant evidence. Therefore the fact that the Commissioner agreed with the recommendations of the 4th Respondent cannot be the basis of a submission that the Commissioner failed to exercise his discretion in the matter.

The application is accordingly dismissed. The Petitioner will pay to the 1st Respondent a sum of Rs. 2500/- as costs.

Application dismissed.