

MOOSAJEES LTD
v.
ARTHUR & OTHERS

COURT OF APPEAL.
J.A.N. de SILVA, J.
C.A. 1354/98.
3rd AUGUST, 2000.
6th SEPTEMBER, 2000.
17TH OCTOBER, 2000.
6TH DECEMBER, 2000.

*Ceiling on Housing Property Law - 1 of 1973 - S. 13, S. 39(3), S. 47-S. 13
Application - Business premises or residential premises - What is a House?
- User test and construction test - order of the Board of Review Final and
Conclusive - Constitution Article 140 - Interpretation Ordinance S.22 -
Judicial review.*

The Respondent made an application under S. 13 of Law 1 of 1973 to the Commissioner of National Housing to purchase the premises in question. The Commissioner dismissed the application holding that the premises were business premises. The Board of Review reversed the finding, holding that the premises in question is residential.

Held :

(i) It is apparent that the Board of Review has been guided by the 'User Test'.

(ii) The decision of the Board of Review is not unreasonable and nor can it be said that it is unsupported by the evidence on record. The non production of the building plan would necessarily raise the presumption that it was not produced as it would have been unfavourable to the Petitioner if it was produced.

(iii) In applying the 'User Test' the Board of Review had considered the receipts issued by the Petitioner, extracts from the Electoral Register, Birth certificates of children. The Board was of the firm view that the premises in question were residential.

APPLICATION for a Writ of Certiorari

Cases referred to :

1. *Abeysekera vs Wijetunga* - 1982 - 2SLR - 737
2. *Agnes vs Commissioner of National Housing* - 4 Sri Kantha Law Reports 72
3. *Ismail vs Hussain* - 1993 - 2 SLR 380 (SC)
4. *Magi Nona vs Commissioner of National Housing* - 1997 3 SLR 131 (SC)
5. *Vaidyanathan vs Board of Review C.H.P* - 1998 - 1 SLR 275(SC)
6. *Aloysious vs Pillaipody* - 1982 - 2 SLLR 762
7. *Withanaratchchi vs Gunasekera* - 1996 - 1 SLLR 253
8. *Wijewardena vs Peoples Bank* - SC Appeal 3/80 - SCM 20. 5. 1981
9. *Perera vs Lokuge* - 1996 2 SLR 282 (SC)
10. *Sittamparanathan vs Premaratne* - SC Appeal 53/95 SCM 6. 2. 96
11. *Edmond vs D.S. Fernando* - 1995 SLR 407

Dr. Jayantha de Almeida Gunaratne with P. Agalawatta for Petitioner.

Rohan Sahabandu for Respondents.

Cur. adv. vult.

February 09, 2001.

J. A. N. de SILVA, J.

This is an application for a writ of certiorari to quash the order made by the Board of Review of the Ceiling on Housing Property dated 23.10.1998 (P59) allowing the appeal made to it by the 1st respondent from the order of the Commissioner of National Housing dismissing the 1st respondent's application to purchase the premises bearing No. 17, Hunupitiya Road, Colombo - 02. The facts which have given rise to this application for writ of certiorari may be briefly stated as follows.

The petitioner is the landlord/owner of the premises in question and the first respondent is the tenant from around 1940. The 1st respondent made an application under Section 13 of the Ceiling on Housing Property Law No. 1 of 1973 to the Commissioner of National Housing to purchase the premises bearing No. 17, Hunupitiya Road, Colombo - 02. The

Commissioner dismissed the said application holding that the premises were business premises. The 1st respondent appealed against the Commissioner's order to the Ceiling on Housing Property Board of Review. A preliminary objection was taken that as the petition of appeal was signed by the Attorney-at-Law there was no proper appeal. The Board of review upheld this objection and subsequently the Court of Appeal rejected the application to quash the said order. The Supreme Court, however, overruled the decision of the Court of Appeal and set aside the order of the Board of Review and directed the Board to try the case on its merits.*

Thereafter the Board of Review went into the question whether the premises in question is business premises as opposed to residential premises and after having considered the evidence and documents placed before it, the Board reversed the Commissioner's finding, allowing the 1st respondent's appeal and held that the premises in question is "residential" and therefore "a house" within the ambit of Section 47 of the Ceiling on Housing Property Act.

At the hearing of this application learned Counsel for the petitioner strongly contended that the Board of Review misdirected itself by formulating the wrong question for determination and erred when it reversed the Commissioner's order. The Board of Review at the very commencement of its order stated that "the only question to be determined in this case is whether the said premises is a business premises or not". It was the contention of learned Counsel that this initial misdirection has affected the whole approach to the matter which was in issue namely whether the 1st respondent tenant could have made the application under Section 13 of the Ceiling on Housing Property Law "for the purchase of house let to him". Counsel submitted that the question that should have been asked for determination was whether the said premises is a house within the meaning of Section 47 of the Ceiling on Housing Property Law for the purpose of an application under Section 13.

It is to be noted that when the Board of Review considered the appeal, the Commissioner of National Housing has already taken a decision on the application of the 1st respondent that the premises in question is business premises and not residential. In the appeal what the Board of review had to do was to consider the correctness of the Commissioner's decision. In these circumstances I disagree with the contention of the learned Counsel for the petitioner that the Board of Review formulated the wrong question for determination. Implicit in this question is whether the premises in question is residential or business. The only issue before the Court of Appeal is whether the Board of Review erred in holding that the premises is residential when the contention of the applicant was that it was business premises.

Learned Counsel for the petitioner further submitted that the Board of Review misdirected itself in holding that "no cogent evidence before the Board to prove the contention of the respondents when infact there was assessment extracts pertaining to the premises from the year 1942 to 1979 which clearly described the premises as a "eating house". These extracts were produced as P43-P53. It was submitted that the Board of Review completely ignored this evidence and applied the wrong test in determining the question whether the premises constituted a house within the purview of Ceiling on Housing Property Law No 1 of 1973.

The Supreme Court and Court of Appeal of Sri Lanka have adopted both tests viz the "construction" test and the "User" test in determining what constitutes "a house" in terms of the Ceiling on Housing Property Law. In *Abeyasekara vs. Wijetunga*⁽¹⁾ the Supreme Court applied the construction test and came to the conclusion that the premises were a wayside boutique constructed for the purpose of business. It was not a house within the meaning of Section 47. Again in *Agnes vs. Commissioner of National Housing*⁽²⁾ Court of Appeal adopted the construction test and held that the building was

constructed for storage of goods and not for the purpose of residence.

There are several other decisions where the user test had been applied viz *Ismail vs. Hussain*⁽³⁾, *Magi Nona vs. C. N. H.*⁽⁴⁾, *Vaidyanathan vs. Board of Review C. H. P.*⁽⁵⁾, *Aloystious vs. Pillaipody*⁽⁶⁾ and *Withanaratchi vs. Gunasekara*⁽⁷⁾.

In the instant case the Board of Review had applied the user test and having considered the rent receipts, extracts of Electoral Registers, the birth certificates of children, have come to the conclusion that the premises is a house. The sketch that was produced showed, number of rooms, kitchen, toilets which indicated that it was used mainly for the purpose of residence by the tenant and his family members. The Board had been guided by the fact that **dominant use** of the premises was for residence. Even though the petitioner contended that the proper test should have been the construction test no building plans have been produced by him. The non production of the building plan would necessarily raise the presumption that it was not produced as it would have been unfavourable to the petitioner if it was produced.

Learned Counsel for the first respondent submitted that the order of the Board of Review is final and conclusive and cannot be impeached on the material. Counsel based his argument relying on Section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972. Learned Counsel submitted without conceding that even if there is an error in the decision of the Board of Review it is an "intra jurisdictional" error which precludes judicial review. Generally speaking preclusive clauses are strictly construed and there is a presumption in favour of Judicial Review. As professor Wade in his book Administration Law states that there is a firm judicial policy against allowing the rule of law to be undermined by weakening the power of Court. Our Courts too have adopted this policy. In *Wijewardena vs. Peoples Bank*⁽⁸⁾

Justice Sharvananda (as he was then) considered the scope of Section 22 of the Interpretation Ordinance as amended and stated that "in my view Section 22 of the Interpretation Ordinance 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 jurisdiction of the tribunal." However a more liberal view has been expressed in *Perera vs Lokuge*⁽⁹⁾ and *Sittamparanathan vs Premaratne*⁽¹⁰⁾ where it had been stated that mere excess of jurisdiction is not sufficient to succeed but there must be patent lack of jurisdiction. Again in *Edmond vs D. S. Fernando*⁽¹¹⁾ the Supreme Court at 413 held as follows "The Court of Appeal could have granted the writ only if it was permissible for that Court to act under the 1st proviso to Section 22 of the Interpretation Ordinance which is as follows.

Provided however that the preceding provisions of this Section shall not apply to the Court of Appeal in exercise of its powers under Article 140 of the Constitution in respect of the following matters and the following matters only. That is to say;

- (a) Where such determination . . . is ex facie not within the power conferred on such person, authority or tribunal making or issuing such determination and
- (b) Where such person, authority or tribunal upon whom the power to make or issue such determination is conferred, is bound to conform to the rules of natural justice,
- (c) Or where compliance with any mandatory provision of law is a condition precedent to the making or issuing of any such determination and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or non compliance with such mandatory provision of such law."

In the instant case it was not the contention of the Counsel for the petitioner that the determination of the Board of Review which was sought to be quashed was "ex facie" not within the power conferred on the Board of Review under Section 39 of the said law nor did the petitioner contend that the Board of Review failed to conform to the rules of natural justice.

The Board of Review came to a firm conclusion that the premises in question were residential. The question is whether they misinterpreted the legal meaning given to a house. It is apparent that the Board of review has been guided by "user test" which test was adopted by the Supreme Court in some of the cases mentioned above. As stated earlier in applying the user test the Board of Review had considered the rent receipts issued by the petitioner, extracts from the Electoral Register, birth certificates of children etc.

On a consideration of the entirety of the facts and circumstances in 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. In the circumstances I refuse this application and dismiss same with costs. Commissioner of National Housing is directed to take action according to law.

Application dismissed.