

ADAMJEE

v.

BOARD OF REVIEW, CEILING ON HOUSING PROPERTY AND OTHERS

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND G. P. S. DE SILVA, J.

APPLICATION No. 2279/80.

NOVEMBER 6, 7 AND 9, 1984.

Writ of Certiorari – Order of Board of Review constituted under the Ceiling on Housing Property Law No. 1 of 1973 – Application to purchase premises – Letting to boarders and lodgers – Business premises ss. 9, 13, 17 (1) and 47 of Law No. 1 of 1973 – Applicant in a position to purchase premises – Trust Ordinance – Constructive trust under s. 84.

The 5th respondent (Mrs. Issac Nesamany) applied under s. 13 of the Ceiling on Housing Property Law No. 1 of 1973 to 4th respondent the Commissioner of National Housing to purchase premises No. 121, New Moor Street, Colombo. The 4th respondent refused the application as the premises had been used as business premises—being given to boarders and lodgers – from 1964 to 1972. The premises had been purchased in 1964 by Alibhoy Adamjee father of the petitioner. Alibhoy Adamjee who was the original 5th respondent to the petition, died on 14.11.1974 and the present petitioner was substituted in his room. The application was resisted on the ground that these were business premises and the petitioner was not in a position to purchase the premises.

Held –

(1) The conclusion of the Board of Review is correct – there was documentary evidence that the premises were used solely or mainly for a residential purpose though boarders and lodgers had been there, during certain periods.

(2) There was prima facie evidence that the petitioner was in a position to purchase the premises. Though she had not the means her son who was doing a lucrative business would buy them for her. Such a purchase by the son will not result in a constructive trust in favour of the son because this would be a case where the son is providing the consideration for the benefit of the mother.

APPLICATION for Writ of Certiorari.*N. R. M. Datuwatte, P.C.* for the petitioner.*Nihal Singaravelu with J. M. Wanninayake* for the 5th respondent.

February 15, 1985.

H. A. G. DE SILVA, J.

This is an application for the issue of an Order in the nature of a Writ of Certiorari to quash the Order P2 of the Board of Review constituted under the Ceiling on Housing Property Law No. 1 of 1973.

The 5th respondent had made an application under section 13 of the Ceiling on Housing Property Law No. 1 of 1973 to the 4th respondent to purchase premises No. 121, New Moor Street, Colombo. The 4th respondent refused the said application on the basis that the premises were used as business premises from 1964 to 1972.

These premises had been purchased by one Alibhoy Adamjee, the father and the predecessor-in-title of the petitioner in 1964. The said Alibhoy Adamjee was the original respondent to the 5th respondent's application to the 4th respondent, and on his death on 14.11.1974, the petitioner was substituted in his place. The 5th respondent's application was resisted by the petitioner on two grounds viz., (1) the premises being business premises did not come within the purview of the Ceiling on Housing Property Law, and (2) that in any event, the 5th respondent was not in a position to purchase the said premises. The 5th respondent appealed to the 1st respondent Board from the refusal of the application by the 4th respondent and the 1st respondent Board consisting of the 2nd and 3rd respondents by its Order P2 set aside the Order of the 4th respondent.

At the hearing of this application learned Counsel for the petitioner submitted that the premises in question consisted entirely of business premises, in that, all rooms available therein had been let out to boarders or lodgers and therefore did not come within the definition of "house" in Law No. 1 of 1973 and further that the 5th respondent has failed to prove that these premises had been constructed for residential purposes.

Section 2 of the Ceiling on Housing Property Law No. 1 of 1973 regulates the number of houses permitted to be owned by an individual.

Section 9 permits the tenant of a surplus house to apply to the Commissioner of National Housing to purchase such houses. Section 17 (1) enacts *inter alia* that "where an application has been made under this Law for the purchase of a house; and the Commissioner is satisfied—

(a)

(b)

(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") vest such house in the Commissioner with effect from such date as may be specified therein".

Section 47 defines "house" to mean "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., but shall not include—

(1)

(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".

Learned Counsel for the petitioner referred to the householder's list from 1962 to 1972 viz., R 6, R 6 A, R 7, R 7 A, R 8, R 8 A, R 9, R 10 & R 11 to show that the other occupants of the premises other than the 5th respondent and members of her family were lodgers.

In R 6, the householder's list for 1962, against the names appearing in cages 4 to 8, 9 to 17 and in the continuation sheet R 6 A in cages 2 to 11 the relationships to the Chief Occupant — I. Rajaratnam, the son of the 5th respondent, are not given. In R 7 the householder's list for 1966 against the names in cages 5, 6 and 11, the relationship to the Chief Occupant is given as "lodgers" and in the continuation sheet R 7 A, there appear to be two households in the premises. In the household of which the son of the 5th respondent was the chief householder, the persons whose names appear in cages 3 to 8 are stated to be lodgers.

In the householder's list for 1968, R 8, only the 5th respondent's family appear to be in occupation while R 8 A, the continuation sheet gives the members of yet another household in the same premises. R 9 the householder's list for 1970, R 10, for 1971 and R 11 for 1973 show only one household and that too consisting of the members of the 5th respondent's family.

R 12 which is a copy of the proceedings in 1971 of an inquiry into objections by the 5th respondent to the assessment for the year 1971, the 5th respondent has stated that she has not given out any portions of this house on rent. The assessor in his report, states after inspection that the entire building parts of which were assessed separately, is now occupied as one unit. R 13 which is also a report on assessment made in 1964 shows that one portion is occupied as a dispensary at a rent of Rs. 50 per mensem while some 13 rooms appear to have been given on rent. It was on this report that separate assessment numbers from 121/1 to 23 were given but R 12 in 1971 recommends that the whole premises be given one assessment number viz., No. 121.

In plaint A 1 in a District Court action filed in 1965 by the petitioner's father Alibhoy Adamjee against the 5th respondent to eject her from the premises, the plaintiff has averred that the defendant has sub-let portions of the said premises to persons whose names are not known to the plaintiff.

Learned Counsel for the 5th respondent referred to X 2 which is a declaration made by the 5th respondent in respect of these premises in 1974. In that she says the premises are used as a residence. In X 1 a to X 1 e which are extracts of assessment registers from 1941 to 1978, the premises are described as a house. Though X 1 c refers to rooms let out separately X 1 a refers to one unit.

A perusal of all these documents does not disclose that the premises in question have been used as business premises continuously by the rooms being given out to "lodgers or boarders". There appears to have been certain periods such as in 1966 (R 7 and R 7 A) when this has been done but one cannot say that from 1962 to 1972 these premises have been used mainly or solely for a purpose other than a residential purpose as contemplated in the definition of "house" in section 47 of Law No. 1 of 1973. I am therefore of opinion that the 1st respondent Board has come to a correct finding on the first ground that has been urged by petitioner's Counsel.

The second submission made by learned Counsel for the petitioner is that the 5th respondent has failed to prove in terms of section 17 (1) (c) that she is in a position to make the purchase of the premises. He submits that in her evidence before the 1st respondent Board she had stated that she has no property other than this house ; that she has no sources of income and that she has to rely on her sons and grandchildren to help her ; and in these circumstances her mere ipse dixit that her son will furnish her with the money is not sufficient especially as her son had not given evidence and shown that he had the capacity to provide the purchase price to his mother.

Under cross-examination she has stated that her son had a shop in Peliyagoda and that it is a lucrative business and that it is this son who is prepared to advance the money.

Learned Counsel for the 5th Respondent drew our attention to section 20 A (1) (e) of the Rent Act.No. 7 of 1972 which speaks of the Commissioner being satisfied with the financial capacity of the applicant to construct a number of residential units while in section 17 (1) (c) what the Commissioner has to be satisfied is that the applicant is in a "position" to make the purchase. He also points out to the fact that no cross-examination in detail was directed at the 5th respondent to test her assertion that her son was carrying on a lucrative business in Peliyagoda and could provide her with the necessary funds to purchase the premises. I am of the view that there is prima facie evidence from the 5th respondent as to her capability of paying the purchase price and this does not appear to have been seriously challenged.

A further submission made by the petitioner's Counsel is that even if the 5th respondent's son provided the purchase money, she would be a constructive trustee for him and hold the property not for her benefit but for the benefit of her son. Section 84 of the Trusts Ordinance (Cap. 87) states that "where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration".

This is a case of a son lending money to his mother. Could it be said he does not intend to pay or provide such consideration for the benefit of the mother? I do not think that in the circumstances, a constructive trust would arise. I hold that the second submission of the learned Counsel for the petitioner fails. I would therefore dismiss this application with costs fixed at Rs. 315 payable by the petitioner to the 5th respondent.

G. P. S. DE SILVA, J. – I agree.

Application dismissed.
