

KATHIRESAN

v.

SIRIMEVAN BIBILE, CHAIRMAN, BOARD OF REVIEW, CEILING ON
HOUSING PROPERTY LAW AND OTHERS

COURT OF APPEAL,

S. N. SILVA, J.

C.A. APPLICATION NO. 206/88

14 JUNE, 17 JULY, 19 AUGUST AND 13 SEPTEMBER, 1991.

Ceiling on Housing Property – Ceiling on Housing Property Law, No. 1 of 1973 – Vesting order – Purchase by tenant – Order of the Board of Review – Discretion of Commissioner – Duty to consider the equities – Reasonableness.

Held:

The Ceiling on Housing Property Law, No. 1 of 1973 was enacted *inter alia*, to regulate the ownership of houses. There were two principal methods of such regulation:

1. The imposition of a ceiling on the number of houses that may be owned by individuals or other bodies (Section 2);
2. Giving a right to any tenant to make an application to the Commissioner for the purchase of a house rented to him. This will be applicable in respect of the houses that come below the ceiling imposed by law (Sections 13 and 17).

The right given by Section 13 to a tenant is not in absolute terms. It is available only "where no action or proceedings may under the Rent Act, No. 7 of 1972 be instituted for the ejection of the tenant of such house on the ground that such house is reasonably required for occupation as a residence for the landlord of such house or for any member of his family".

When an application to purchase is made by a tenant in terms of section 13(1), the Commissioner has to satisfy himself of the following matters :

- (a) that such house is situated in an area which in his opinion will not be required for slum clearance, development or redevelopment or for any other public purpose;

- (b) that it is feasible to alienate such house as a separate entity; and
- (c) that the applicant is in a position to make the purchase."

The Commissioner has an element of discretion in addition to the consideration of the above. He must consider "the equities of the case", i.e. he must consider whether his vesting of the house is fair and reasonable in relation to the respective interests of the parties. The requirement on the part of the Commissioner is nothing more than the normal requirement in Administrative Law that where a discretion is vested in an authority, it should be exercised reasonably. In English Administrative Law, this is commonly referred to as "Wednesbury's unreasonableness". It requires that a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.

The standard of reasonableness is not that of "the man on the Clapham omnibus".

It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. The one principle that unites the several grounds of unreasonableness is that powers must be confined within the true scope and policy of the Act.

Section 13 was introduced as a measure of regulating ownership. It remained in operation until the amendment effected by Act, No. 4 of 1985 which provided that no application could be made for the purchase of a house after 1.1.1987. The ceiling also ceased to be in operation from that day. The policy of the law up to that point was that a tenant who was in occupation of a house let to him at the time the present landlord became owner and who continues as tenant under the present landlord, is entitled to apply for the purchase of that house. This policy also involves the vesting of such house without the consent of the landlord, and "this category of tenants has a preponderant or pre-emptive right of purchase."

Where the Commissioner was guided by the fact that the tenant had paid rent for twenty-six years at the time of his application, did not own any other house, had several children while the landlord regularly visited India where he had interests, had not paid any interest on the mortgage of the house for over 12 years, was the owner of a jewellery business but adduced no evidence of his income, while the tenant and his wife were pensioners, he was being fair and reasonable.

Cases referred to:

1. *Biso Manika v. de Alwis and Others* S.C. 59/81 – S.C. Minutes of 11.05.1982.
2. *Caderamanpulle v. Keuneman and Others* S.C. No. 15/79 – S.C. Minutes of 19.09.1980.
3. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K. B. D. 223.
4. *Mendis v. Perera* C.A. 1953/79 (C.A. minutes of 10.12.80) and C.A. 768/84 (C.A. minutes of 06.02.91).

APPLICATION for a writ of certiorari to quash the decision of the Commissioner of National Housing and Board of Review.

S. Mahenthiran for petitioner.

Miss M. Seneviratne, P.C. with *H. Seneviratne* for respondents.

Cur adv. vult.

13th December, 1991.

S. N. SILVA, J.

The Petitioner has filed this application for Writs of Certiorari to quash the order of the 1st, 2nd and 3rd Respondents constituting the Board of Review under the Ceiling on Housing Property Law No. 1 of 1973, and the decision of the Commissioner for National Housing which preceded that order. The Board of Review by its order affirmed the decision of the Commissioner to recommend the vesting of house bearing No. 201, Jampettah Street, Colombo 13, to the Minister, in terms of section 17 of the Ceiling on Housing Property Law. The 5th Respondent became tenant of that house in March, 1947. At that time the owner was a Catholic Nun who was at the Negombo convent. Rents were paid to the Procurator-General of the Archbishop's House. On 6.6.1962 the Petitioner purchased the house and by letter dated 23.6.1962 sent by his Proctor, he requested the 5th Respondent to pay rent to him. The Petitioner filed an action in the District Court for the ejection of the 5th Respondent which was dismissed. There is another action pending against the 5th Respondent on the ground of arrears of rent.

On 27.2.1973 the 5th Respondent made an application in terms of section 13 of the Ceiling on Housing Property Law for the purchase of the house. A decision was taken to vest the house in the Commissioner upon that application. The validity of that decision was challenged in an application for judicial review filed in this Court (C.A. 2478/80) and on 2.3.1982 a Writ of Certiorari was issued to quash that decision. The basis upon which the Writ of Certiorari was issued was that the Petitioner had not been afforded an opportunity to appeal to the Board of Review and that there was a violation of the principles of natural justice. The Court noted that there was a valid application under section 13 and that it was open to the Commissioner to inquire into it, afresh, with notice to parties. Accordingly an inquiry was held by a Deputy Commissioner, at which both parties were represented by Counsel. This inquiry was held on several days during the period 7.5.1983 to 1.10.1984. The entire proceedings of the inquiry have been produced by the 5th Respondent with his objections. The Commissioner decided to recommend the vesting of the house upon this inquiry. On being notified of this decision, the Petitioner filed an appeal dated 20.11.1984 to the Board of Review. At the hearing before the Board, both parties were represented by Counsel. These hearings took place on several days from 16.6.1986 to 18.4.1987. The order of the Board appears at the end of the proceedings marked 'P4'.

Learned Counsel for the Petitioner submitted that the Commissioner and the Board took into account irrelevant matters in considering the equities. That the views of the Commissioner and the Board were tainted by the fact that the Petitioner was visiting India frequently and that the decisions are not based on an objective evaluation of the merits.

Learned President's Counsel for the 5th Respondent analysed each ground set out in the petition of appeal to the Board and thereafter in paragraph 23 of the petition filed in this Court. It was submitted that the Commissioner and the Board considered the equities correctly upon the evidence adduced and that certain grounds urged by the Petitioner in the petition of appeal and the petition filed in this Court are based on misrepresentations of fact.

The analysis done by learned President's Counsel shows that the Petitioner has urged different grounds in the petition of appeal to the Board and in paragraph 23 of the petition filed in this Court. Some of them are demonstrably baseless and have not been pursued. For instance, in the petition of appeal it was stated that the Commissioner failed to consider the effect of the mortgage of the house by the Petitioner to the State Mortgage Bank on which he is "continuing to pay instalments". But, the documents marked X1 and X2 produced at the hearing before the Board reveal that the Petitioner had not paid even the interest due from 14.11.1974. On 5.1.1987 he had deposited Rs. 2000/- in the Bank after an application was made to summon the Bank before the Board. Furthermore, in the petition filed in this Court it is stated that the Petitioner could not exercise the right of Appeal, to the Board meaningfully, because he was unaware of the reasons for the decision of the Commissioner. But, as pointed out by learned President's Counsel the record of the proceedings before the Board reveals that counsel who then appeared for the Petitioner quoted extracts from the decision of the Commissioner in his submissions. Counsel had not addressed any complaint to the Board of any difficulty in presenting his appeal. Hence, this ground (not pursued by Counsel in his submissions before Court) is also baseless. It is seen that there is merit in the submissions of learned President's Counsel with regard to misrepresentations made by the Petitioner in his petition of appeal and the petition filed in this Court. However, I am not inclined to dispose of the application on that ground itself because a perusal of the proceedings before the Board shows that the alleged failure of the Commissioner to consider the equities properly is the only ground urged by Counsel before the Board. This is also the only ground urged by Counsel before this Court. Although baseless grounds have been stated, there is consistency in the grounds urged, at all stages. It has also to be noted that the Petitioner has not urged any ground of law as barring the vesting.

The Ceiling on Housing Property Law No. 1 of 1973 was enacted *inter alia*, to regulate the ownership of houses, as stated in the long title to the Law. Part I of the Law is titled "Regulation of ownership of houses". An examination of the provisions of this Part shows that there are two principal methods of such regulation. They are :

- (i) the imposition of a ceiling on the number of houses that may be owned by individuals or other bodies. This ceiling is provided for in section 2;
- (ii) by giving a right to any tenant to make an application to the Commissioner for the purchase of a house rented to him. This right is introduced by section 13 of the Law read with section 17 and will be applicable in respect of the houses that come below the ceiling imposed by law.

The first method of regulation namely, the imposition of the ceiling on ownership is not relevant to this application since admittedly the house in question is within the permitted number of houses that may be owned by the Petitioner. Submissions made by learned counsel relate to the second method of regulation namely, the right given to a tenant to apply for the purchase of a house let to him.

The right given by section 13 to a tenant is not in absolute terms. It is available only "where no action or proceedings may under the Rent Act No. 7 of 1972 be instituted for the ejectment of the tenant of such house on the ground that such house is reasonably required for occupation as a residence for the landlord of such house or for any member of his family". In the case of *Biso Menika v. de Alwis and others* ⁽¹⁾ Sharvananda, J. (as he then was), considered the impact of the restriction thus contained in section 13. In the course of his judgment he observed as follows:

"The integration of section 22(7) of the Rent Act into the scheme of the Property Law via section 13 of the Law has the following effect :- the pre-emptive right of purchase under that section of the Law (a) accrues only in the event of there being a transfer or devolution of the premises from the original landlord to a new owner, such as referred to in section 22(7) of the Act, subsequent to the date when the tenant came into occupation of the premises and (b) is available only to the person who was the tenant of the premises prior to such transfer or devolution and who continues to be tenant under the new owner."

Hence this category of tenants have in the words of Sharvananda, J. a "pre-emptive right of purchase."

Where such an application has been made in terms of section 13(1) of the Ceiling on Housing Property Law the Commissioner has to satisfy himself with regard to the following matters:

- "(a) that such house is situated in an area which in his opinion will not be required for slum clearance, development or redevelopment or for any other public purpose;
- (b) that it is feasible to alienate such house as a separate entity; and
- (c) that the applicant is in a position to make the purchase."

In the case of *Caderamanpulle v. Keuneman and others*⁽²⁾, Thamotheram, J. held that the Commissioner has an element of discretion, in addition to the consideration of the foregoing matters. The relevant portion of his judgment is as follows:

"This does not mean that every application purporting to be validly made under section 13 has to be acted on and a notification made to the Minister under section 17 even if a, b, and c of the latter section are satisfied. It was rightly conceded by Mr. H. L. de Silva that there was an area of discretion left to the Commissioner for him to consider the equities in the case and decide whether the application should be entertained. Before going into the questions raised at a, b, and c of section 17 he must decide whether he is going to accept an application under section 13 and notify the Minister that an application has been made under this law. The Commissioner is not a mere conduit pipe through whom an application of a tenant under section 13 goes to the Minister even if conditions a, b, and c are satisfied. There is duty cast on the Commissioner to act fairly. The failure therefore to inform the landlord of the Commissioner's decision or determination under section 17 before the order of vesting was made deprives the landlord of his right under section 39 to appeal to the Board of Review."

It is seen from the foregoing passage that the Commissioner has in addition to the three matters specified in section 17(1) to consider "the equities in the case". Thamoatham, J. did not elaborate as to what was meant by the phrase 'equities' in the case'. However, it is clear from the context that what he had in mind was the requirement on the part of the Commissioner to consider whether the vesting of the house is fair and reasonable in relation to the respective interests of the parties. This requirement on the part of the Commissioner, emanating from the judgment of Thamoatham, J. is nothing more than the normal requirement in Administrative Law that where a discretion is vested in an authority, it should be exercised reasonably. The principle of reasonableness in administrative action is well entrenched in English Administrative Law. The elements of reasonableness are stated in the oft-quoted dictum of Lord Greene. MR in the case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*⁽³⁾. In later cases this dictum is commonly referred to as "Wednesbury's unreasonableness". Lord Greene in that case considered the validity of certain conditions imposed by a local authority for the grant of a licence for cinematography performances on Sundays. It was held that these conditions were imposed unreasonably. In the course of the judgment he dealt with the requirement that discretion should be exercised reasonably in the following way :

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington,

L.J. in *Short v. Poole Corporation (I)* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

Dealing with the standard of reasonableness, Professor H. W. R. Wade has in *Administrative Law, 1988* (6th edition) stated that it is not the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. (at page 407). In a later section he has observed, dealing with the several grounds of unreasonableness that "the one principle that unites them is that powers must be confined within the true scope and policy of the Act."

Section 13 was introduced as a measure of regulating ownership. It remained in operation until the amendment effected by Act No. 4 of 1985 which provided that no application could be made for the purchase of a house after 1.1.1987. The ceiling also ceased to be in operation from that day. The policy of the law up to that point was that a tenant who was in occupation of a house let to him at the time the present landlord became owner and who continues as tenant under the present landlord, is entitled to apply for the purchase of that house. This policy also involves the vesting of such house without the consent of the landlord. Therefore, the tenant had a "pre-emptive" right as observed by Sharvananda, J. or a "preponderant right" as observed by Thamocharam, J. In considering what is fair and reasonable, the Commissioner has to attach due weight to this right on the part of the category of tenants entitled to make applications under section 13.

A perusal of the order of the Board of Review reveals that the Board was guided by the following matters:

- (i) that the 5th Respondent (tenant) had been in occupation of the premises paying rent for a period of 26 years at the time he made the application.

- (ii) that the tenant did not own any other house and had several children;
- (iii) that the Appellant (Petitioner) had interests in India. That two of his children were in India and that he went there to enable his daughter to contract a marriage. That his absence from this country even when the inquiry was going on before the Commissioner leaves room to surmise that he has interests in that country;
- (iv) that the documents marked X1 and X2 produced at the hearing of the appeal establish that the Petitioner did not pay any interest on the mortgage of the house from 14.11.1974 up to 5.1.1987. On the latter date a sum of Rs. 2000/- had been paid by the Petitioner after an application was made to summon the Bank to produce documents pertaining to the mortgage;
- (v) that the Petitioner is the owner of a business called "Sakthi Jewellers" and the 5th Respondent was a retired municipal employee whose wife was a retired teacher. That the Petitioner did not adduce any evidence with regard to his income.

The submission of learned counsel for the Petitioner is that the matters set out in (iii) above are irrelevant. He has called it the "Indian web". On a perusal of the proceedings before the Commissioner and the Board, it appears that this "Indian web" surfaced from nowhere but the Petitioner himself. The Petitioner absented himself from proceedings on the basis that he was in India or sought long postponements on that ground. (*Vide* proceedings of 2.9.1983, 29.10.1983 and 12.7.1984). In evidence, the Petitioner was asked a specific question as to why he goes to India "very often". His answer was, that he had relations there. It appears from the order that the Board was not satisfied as to the truthfulness of this answer. The Board has drawn, in my view a reasonable inference, that the Petitioner had other interests in India. This inference is not irrelevant in considering whether the house should be vested and sold to a tenant who has been in occupation for almost 30 years and who is a pensioner having all his interests and children in Sri Lanka. The

Board was also not in error when they held that the law is intended to assist tenants of this category. This basis is supported by the analysis of the relevant provisions done in the preceding sections of this judgment.

As regards the submission that the Commissioner and the Board viewed this matter with some bias against the Petitioner, I have to note that an allegation of bias has not been made by the Petitioner in his affidavit. If such a submission is to be made with any degree of seriousness it has to be supported by a specific averment in the affidavit of the Petitioner. It is clear from the proceedings that the Petitioner appeared before the Commissioner and the Board, at all stages, without making any allegation of bias. Hence I cannot attach any weight to that aspect of the submissions of learned Counsel.

In the cases of *Mendis v. Perera* ⁽⁴⁾ relied upon by learned Counsel for the Petitioner there had been a complete failure on the part of the Commissioner and the Board to consider the equities, that is whether the vesting is fair and reasonable in relation to both parties. In the instant case there has been a full inquiry before the Commissioner and the Board with regard to this aspect. The Petitioner had an unfettered right to adduce evidence and to make submissions. The Board has set out the reasons, on the basis of which it upheld the decision of the Commissioner. I am of the view that there is no merit in the grounds upon which these reasons are now challenged. In these circumstances I make order dismissing the application of the Petitioner. The Petitioner will pay a sum of Rs. 2000/- as costs to the 5th Respondent.

Application dismissed.