

EUGENE NONA
v.
KARUNADASA AND OTHERS

SUPREME COURT
FERNANDO, J.,
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
SC APPEAL NO. 126/96
CA NO. 300/94
C.N.H. NO. CH/6/51788/2417
JUNE 3, 1997.

Writ of Certiorari – Ceiling on Housing Property Law, No. 1 of 1973 – Appeal under section 39 (1) – Procedure of Appeal to the Board of Review – Validity of the Appeal.

The appellant who sought to appeal to the Board of Review under section 39 (1) of the Ceiling on Housing Property Law, No. 1 of 1973, against the decision of the Commissioner for National Housing dated 12.08.91 in favour of an application made by the appellant's tenant under section 13 of the Law to purchase the house let to him was unaware of the address of the Board of Review; whereupon the appellant sent a registered letter to the Commissioner dated 26.8.91, within one month of the impugned decision as required by section 39 (1). In that letter the appellant objected to the Commissioner's decision and asked him to consider the matter sympathetically and to restore the house to her. As per the postal receipt the address on the envelope of that letter was "The Department of National Housing Ceiling on Housing Property Board of Review (Unit for the implementation of section 39), Department of National Housing, Maligawatte, Colombo 10". No action was taken on the appellant's letter until July, 1992, when on representations made

by the appellant the Board of Review considered the matter but rejected the appeal upholding a preliminary objection that there was no properly constituted appeal preferred to the Board within the stipulated time limit. The Court of Appeal affirmed the order of the Board of Review. In doing so the Court added that the appellant had also failed to state any grounds of appeal.

Held:

1. In the circumstances of the case, the receipt of the appeal by the Commissioner amounted to receipt by the Board.
2. The burden was on the tenant to establish that the appellant's letter dated 26.8.91 was received after the appealable period by producing the relevant documents from the Commissioner's file. This the tenant had failed to do. The Court must assume that it had been received by the Commissioner soon after 26.8.91.
3. It is unnecessary to set out all the points in support of an appeal, particularly where the order appealed from baldly stated a conclusion, without any findings. In any event, by asking that her case be considered sympathetically, the appellant raised the issue whether upon a consideration of the equities she should have been allowed to retain her house. Hence, there was no failure by her to specify grounds of appeal.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, P.C with *C. E. de Silva* for the appellant.

Manohara R. de Silva for the 1st respondent.

2nd respondent absent and unrepresented.

Cur. adv. vult.

February 12, 1998

FERNANDO, J.

The question for decision in this appeal is whether the appellant's letter dated 26.8.91 constitutes a valid appeal to the Board of Review set up under the Ceiling on Housing Property Law, No. 1 of 1973, conforming to section 39 (1) of that law, which provides:

"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".

It is common ground that there are no regulations as to the form and content of appeals, and how they are to be lodged.

The 1st respondent, the tenant of a house owned by the appellant, made an application to purchase that house, under section 13 of the Law. After inquiry, the 2nd respondent, the Commissioner of National Housing (the Commissioner), informed the appellant by letter dated 12.8.91 that he had decided to report to the Minister that he was satisfied that the requirements of section 17 (1) (a) to (c) of the Law had been met; he added that if she was not satisfied with that order she could appeal to "the Ceiling on Housing Property Board of Review under section 39 of the Law" within 30 days. He did not disclose the address of the Board, and his own address was given as:

"Unit for the implementation of section 13, Ceiling on Housing Property Branch, Department of National Housing, Maligawatte, Colombo 10".

The appellant sent a registered letter dated 26.8.91 addressed to:

"The Commissioner of National Housing, Ceiling on Housing Property Branch, Department of National Housing, Maligawatte, Colombo 10".

She briefly set out her version of the facts, as to her family circumstances, the ownership of the house, and how she wished to dispose of it. She then stated: echoing the Commissioner's words, that in no way was she satisfied with his order, and that she strongly objected to it; and she asked him to "kindly [consider ?] this sympathetically and restore the house to her".

There is some mystery as to how and when that letter was received by the Commissioner and/or the Board, and that I will deal with later.

By letter dated 1.7.92 to the appellant, the Secretary to the Board acknowledged that the appeal dated 26.8.91 sent by her had been received; that it had been assigned a number; and that the date, time and place of inquiry would be notified later. By letters dated 18.8.92 both parties were informed that the appeal would be taken up for inquiry on 29.9.92, and were warned that no application for a postponement would be considered. The 1st respondent was not present

on 29.9.92, and the Board ordered that he be noticed for 19.11.92. On that day both parties were represented, but the inquiry was postponed for 30.1.93; and on 30.1.93 a preliminary objection was taken that there was no valid appeal addressed to the Board.

It is clear from the order of the Board, dated 21.8.93, that the Board had examined the Commissioner's file. The Board upheld the preliminary objection:

" . . . There is a minute in the journal of the Commissioner's file to show that as at 11.12.91 there was no appeal against the said decision of the Commissioner. The so-called appellant's letter of 26.8.91 has been filed of record in the Commissioner's file after letters received by the Commissioner in 1992, and indeed along with [an Attorney-at-law's letter] dated 3.6.92. Furthermore, the said letter of 26.8.91 in its contents is no appeal and it has not been addressed to the Board of Review. Even if we were to construe the said letter of 26.8.91 as an appeal, it is clearly out of time as an appeal in terms of section 39 must be lodged within one month of the date of communication. The so-called appellant has thereafter written an undated letter addressed to the Chairman . . . received by this Board on 11.6.92. Having examined its contents we are unable to construe it as an appeal. In any event it cannot cure the failure of the so-called appellant to prefer to this Board a properly constituted appeal within the stipulated time limit . . . "

The appellant applied to the Court of Appeal for *Certiorari* to quash the order of the Board of Review, and for an order directing the Board to accept, and to hear and determine, the appellant's appeal. There was also a prayer that the relevant records maintained by the Commissioner and the Board be called for and examined, but unfortunately that was not done.

The Court of Appeal held that the appellant's letter was addressed to the Commissioner and not to the Board; that it contained no request to the Commissioner to consider it as an appeal to the Board; and that the only request made therein was for the Commissioner to reconsider his decision sympathetically and give back the house to her. Thus, it concluded, there was no basis for the Commissioner to treat the letter as an appeal against his order, and to forward it to the Board. Further, according to the record maintained by the

Commissioner, the letter had been received at his office after 3.6.92 – Clearly more than one month after she received the Commissioner's order; and in any event it did not state any grounds of appeal.

The appellant comes to this court with special leave to appeal against that order. The question whether there was a valid appeal has three aspects: Was the appellant's letter addressed to the Board of Review? If so, was it lodged within the prescribed period of 30 days? If so, did it specify the grounds of appeal?

The Board of Review had to decide whether its appellate jurisdiction had been duly invoked. It could have determined that question by reference only to its own record. The first document in its record was an undated letter from the appellant to the Chairman, received in June, 1992; and to that were annexed copies of the Commissioner's letter of 12.8.91, her letter of 26.8.91 and the registered postal article receipt. The file shows that it was on these documents alone that the Secretary acknowledged the appellant's appeal and gave it a number. Perhaps the Board might have disposed of the matter by holding that there was no document validly invoking its jurisdiction: that the June, 1992 letter, even if it was a proper appeal addressed to the Board, had been received long after the appealable period had lapsed; that the copy of the August, 1991 letter had also been received after the appealable period; and that in any event that had not been addressed to the Board.

But, instead, the Board paid great attention to the contents of the Commissioner's file, almost as if that was a proper place in which to search for a valid appeal to the Board. The Board stated that there was a minute dated 11.12.91 in that file that no appeal had been filed; and a letter dated 3.6.92 from an Attorney-at-law; and that the appellant's letter had been filed along with that letter. That approach gives rise to a question: Would the Board have come to a different conclusion if the appellant's letter had been placed in the Commissioner's file in August, 1991, and/or if the minute of 11.12.91 stated that an appeal had been lodged?

Let me note, in passing, that it would not have been strange for the law to have allowed an appeal against the order of a tribunal to be lodged with that same tribunal, as in the case of the District Court. While section 39 does not stipulate that an appeal must be

lodged with the Board, yet it does not expressly allow an appeal to be lodged with the Commissioner, and I do not wish to rest this judgment on a mere inference that section 39 allows that.

After hearing Counsel for the appellant and the 1st respondent – regrettably, the Commissioner was not represented when special leave was sought and at the appeal – we directed the Registrar to call for the relevant files from the Commissioner and the Board of Review; and to make them available to Counsel with the right to make written submissions; and judgment was reserved. The Board of Review sent its file, but the Commissioner did not; and no written submissions were filed.

Particularly in view of the registered postal article receipt (which I refer to below), several efforts were made to obtain the Commissioner's file. As it was not produced, the present Commissioner was directed to be present in person on 9.7.97, whereupon she said that the file had been sent to the Attorney-General in 1994, and that Department had informed her by a letter dated 8.7.97 that it had been misplaced. She was asked to tender a photocopy of that letter to the Registry, but it was only after several reminders that she finally did so on 2.1.98. In the meantime, upon inquiry from the Attorney-General's Department, the Registrar was informed by letter dated 28.10.97 that the department's own file had been sent to its record room and could not be traced, but that as a matter of practice files received from other departments are returned before its own files are sent to its record room. Thus even six months after the conclusion of the hearing this court was unable to examine the record which was the subject-matter of the *Certiorari* proceedings, and which was of crucial importance to our efforts to find the truth. The delay in preparing this judgment was due to those efforts to obtain the Commissioner's file.

I must now refer to one important matter not dealt with in the impugned orders, the pleadings or the submissions. The appellant's letter was sent by registered post, and the original registered postal article receipt was filed in the Court of Appeal. That describes the addressee of the letter as:

"The Department of National Housing, Ceiling on Housing Property Board of Review, (Unit for the implementation of section 39), Department of National Housing, Maligawatte, Colombo 10."

The authenticity of that receipt was never disputed. It must be presumed, therefore, that the envelope tallied with the receipt. Further, the Board of Review found that letter in the Commissioner's file. The envelope would, in the normal course, have been retained in the file. The Board has made no comment about the envelope. That file would have answered numerous questions.

First, when was that letter received? Unfortunately, the date stamp on the receipt is undecipherable. However, it must have been, in the usual course, date-stamped the very day it was received in the Commissioner's office. In the absence of any suggestion that the letter was posted long after August, 1991, I must assume that it had been received by the Commissioner soon after 26.8.91, and thus within 30 days of his order.

Second, how did it happen that a letter enclosed in an envelope addressed to the Board of Review – and more fully described as the "Unit for the implementation of *section 39*" – was accepted by or on behalf of the Commissioner? Why was it either not accepted, or not immediately forwarded, unopened, to the Board? Or had some administrative arrangement been made for letters addressed to the Board to be accepted and opened by the staff of the Commissioner? On the other hand, if it was by some mistake that it had been accepted and opened, why was it not returned promptly to the appellant – who might then have sent it to the Board?

Third, how and why was a minute made on 11.12.91 that there was no appeal? If the invariable practice was for appeals to be lodged with the Board of Review, had an inquiry been made from the Board, and if so, what was the response from the Board? The Board of Review file, however, does not indicate that there had been any such inquiry or response. If no inquiry had been made from the Board, then on what material was that minute made? Was it simply on the basis that there was no appeal in the Commissioner's file?

Fourth, by letter dated 1.7.92 the Secretary to the Board asked the Commissioner to forward the relevant file. The Commissioner had the appellant's letter by early June: why did he not forward the file or that letter without waiting for the Secretary's letter?

The proceedings of 30.1.93 do not show that the Board made any reference to the Commissioner's file in open court, or made it available

for perusal by the parties. It appears that after reserving its order, the Board examined the file, and acted on material therein which remained undisclosed to the parties; and to the Court of Appeal and this Court.

On the available material, I hold that the appellant sent a letter addressed to the Commissioner in an envelope addressed to the Board. There is no evidence as to the address of the Board at the relevant point of time, and it is quite possible that the Board functioned in the same premises as the Commissioner. Both Counsel were unable to tell us what the address of the Board was at the relevant time. When asked how the appellant could have ascertained that address, Counsel for the 1st respondent was only able to suggest the telephone directory. But that is no safe guide: the directories for 1994, 1995 and 1996 list the Chairman and the Secretary "C H P Board of Review" – without an address – under "National Housing Department". The Commissioner having failed to specify the address of the Board, it was not unreasonable for the appellant to have sent her letter to the same address. However, she did not address the letter itself to the Board.

The question whether, in the circumstances of this case, the appellant's letter constituted a valid appeal to the Board could not have been decided by ignoring the address appearing on the envelope, and looking only at the letter: it was the address on the envelope, more than anything else, which determined who would receive the letter. The letter and that address must therefore be considered together: Do they constitute a purported appeal to the Commissioner, in which event the envelope must be treated as mistakenly addressed to the Board? Or a purported appeal to the Board, in which event the letter must be treated as mistakenly addressed to the Commissioner? There is no third interpretation possible. I think the second interpretation must be preferred. The appellant was told that if she was dissatisfied with the order, she could appeal to the Board; accordingly, in her letter she expressed her dissatisfaction and strong objections, and asked for relief; and, what is most important, if delivered in accordance with the address on the envelope, her letter would have been received by the Board, and by no one else. And in that event the Board would have had to consider whether the reference to the Commissioner was just a mistake. But the Board did not appreciate the significance of the postal article receipt (of which it had a copy);

and therefore failed to look for the envelope; and consequently failed to address that vital question.

It might have been further argued that even assuming the appellant's letter to have been addressed to the Board, yet it was not actually received by the Board. However, it is quite clear that when the Board became aware that the letter had been received by the Commissioner it did not dissociate itself from the Commissioner – even by a passing remark that receipt by the Commissioner did not amount to receipt by the Board. Instead, it approached the issue whether an appeal had been duly lodged as if receipt by the Commissioner would have been sufficient, provided that it was in due form and within time. The circumstances make it probable that receipt by the Commissioner was not unauthorised *vis-a-vis* the Board.

As to whether the appellant's letter was received in due time, the argument proceeded on the basis that posting was in order. It was neither suggested that it should have been delivered by hand, nor that it had been posted after the expiry of the appealable period of 30 days. The objection was that it had not reached the Board of Review in time. I have already held that, in this instance, receipt by the Commissioner amounted to receipt by the Board. As for the date of receipt, copies of the appellant's letter of 26.8.91 and postal article receipt were in the record of the Board; the burden was on the 1st respondent to establish the facts relevant to his preliminary objection by proof that the letter had been received after the appealable period. The best evidence of the date of receipt would have been the date-stamp on the original letter and the post-mark on the envelope: but the 1st respondent did not seek to produce those documents from the Commissioner's file, and the Board itself did not look at them, and filled the gap in the 1st respondent's case by relying on equivocal matters without even giving the parties an opportunity to comment about them – the Commissioner's minute of 11.12.91 and that the original had been filed in June, 1992. On the evidence, the Board should have held that the 1st respondent had failed to prove that the letter had not been received within time.

Finally, I must deal with the contention that the letter did not set out any ground of appeal. That requirement must not be construed with greater strictness than in regard to appeals from original courts and tribunals such as District Courts, Magistrate's Courts and Labour

Tribunals – where an appellant is often permitted to argue even points not contained in the petition of appeal, particularly because the appeal was against an order which baldly stated a conclusion, without any findings, let alone reasons. Here, one issue was whether, upon a consideration of the equities, the appellant should have been allowed to retain her house. The equities depended on the factual position of the parties: ownership of houses, family circumstances, income, etc. The appellant stated her version of the facts. (It is immaterial whether there were errors or omissions, because that would not affect the formal validity of her appeal, but went to the merits, and the merits would have had to be considered only if Board decided that the appeal was in due form.) She then asked for "sympathetic" consideration and for the restoration of her house. Had she asked for "equitable" consideration, there could have been no argument about the formal validity of the appeal; indeed, had she merely stated the facts and asked for restoration of her house, that would have been enough. I hold that the use of the word "sympathetic" did not vitiate her appeal.

For these reasons, I allow the appeal and set aside the order of the Court of Appeal. I quash the order of the Board of Review, overrule the preliminary objection taken by the 1st respondent in the Board of Review, and direct the Board to entertain, hear and determine the appeal on the merits. The Registrar is directed to return its file to the Board of Review.

The appellant is entitled to the costs incurred in the Board of Review, the Court of Appeal and in this court, at the stage of special leave and at the appeal. It would not be just or equitable to order the 1st respondent to pay those costs, because it was the Commissioner's acts and omissions which resulted in the preliminary objection and the subsequent litigation. I therefore order the Commissioner to pay the appellant costs in a sum of Rs. 30,000 within one month.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.