

PERERA
V.
LOKUGE AND OTHERS

SUPREME COURT.
G.P.S DE SILVA, C.J.,
KULATUNGA, J AND
RAMANATHAN, J.
S.C. APPEAL 58/95.
C.A. APPLICATION NO. 1531/84.
30TH JANUARY, 1996.

Writ of Certiorari - Ceiling on Housing Property Law - Sections 39 (3) and 17 - Tenant's application to purchase a house - Equities - Board of Review Decision - Board's Jurisdiction to consider equities - Interpretation Ordinance section 22.

The Board of Review under the Ceiling on Housing Property Law No. 1 of 1973 after a full inquiry and on the ground of equity set aside a decision of the Commissioner for National Housing to recommend the vesting of a House owned by the Appellant to enable the tenant thereof to purchase it under

section 13 of the Law. The Court of Appeal quashed the decision of the Board. It was argued that the Commissioner has to be satisfied only on the matters set out in Section 17 of the Law. If he is so satisfied he must, subject to an appeal to the Board on those matters, notify the Minister of such fact; whereupon the Minister alone is empowered to decide whether a vesting order may be made. Hence, in considering equities, the Board acted outside its jurisdiction.

Held:

(1) There is an area of discretion in the Commissioner to consider the equities of the case and decide whether he will accept the application and notify the Minister that an application has been made.

(2) Even assuming that the Commissioner has no power to reject an application on the ground of equities, he is under a duty to consider equities in addition to the matters set out in Section 17 to enable the Minister to make a fair decision as the Minister's power to make a vesting order is discretionary. The Commissioner's decision including the question of equities is subject to an appeal to the Board.

(3) The Board of Review acted within its jurisdiction. It cannot be said that the decision of the Board is *ex facie* not within the power conferred on it within the meaning of Section 22 of the Interpretation Ordinance. To succeed on that ground there has to be a patent lack of jurisdiction. Mere excess of jurisdiction is not sufficient.

Cases referred to:

1. *Beatrice Sitamparanthan v. Premaratne*, S.C. Appeal No.53/95 S.C. Minutes of 6th February 1996.
2. *Caderamanpulle v. Keuneman*, S.C. Appeal No.15/79 S.C. Minutes of 19th September, 1980.

AN APPEAL from a judgment of the Court of Appeal.

A.K. Premadasa, P.C. with *C.E. de Silva* and *Ms. Mangali Wickramasena* for Appellant.

P.A.D. Samarasekera, P.C. with *Hemasiri Withanachchi* for Respondent.

8th February, 1996.
KULATUNGA, J.

The Appellant is the owner of house No. 20/1, Sri Dharmapala Road, Mount Lavinia. The 2nd Respondent (Commissioner for National Housing) decided to recommend the vesting of the said house to enable the 1st Respondent who is the tenant thereof to purchase it under section 13 of the Ceiling on Housing Property Law No.1 of 1973. On an appeal by the Appellant, the Board of Review reversed the 2nd Respondent's decision.

The Board of Review found that 5 houses owned by the father of the Appellant had vested under section 11 of the law leaving the Appellant with only two houses namely, 20/1 and 20 which are twin houses under one roof. The Appellant lives in No. 20 with his two daughters aged 20 and 16. These are the only houses he owns which he intends to gift to his daughters on the occasion of their marriage. The 1st Respondent's wife owned a building site at Bellanwila which she sold for Rs. 60,000/- after the 2nd Respondent decided to recommend the vesting of house No. 20/1.

On the above facts, the Board of Review after a full inquiry set aside the decision of the 2nd Respondent on the ground of equity. The 1st Respondent then applied to the Court of Appeal for a writ of certiorari against the order of the Board which was allowed by that Court on the ground that the Board had acted in excess of its jurisdiction when it varied the 2nd Respondent's decision without first making a finding that the 2nd Respondent had either failed to consider the respective interests of the parties or to exercise his discretion in that regard reasonably. The Court opined that by its decision, the Board had effectively prevented the application from receiving the attention of the Minister who had the final discretion in vesting the house, to enable the tenant to purchase the same.

I am of the opinion that in view of the preclusive clause in section 39(3) of the Law, the Court of Appeal had no power to quash the decision of the Board of Review in the absence of a ground for such quashing provided by section 22 of the Interpretation Ordinance. One such ground is a failure of natural justice. On the facts of this case that ground is not available. The other ground is that the Board was *ex facie* without

power to make the impugned decision. To succeed on that ground the applicant must establish a patent lack of jurisdiction. Mere excess of jurisdiction as adverted to by the Court of Appeal is not sufficient - see *Beatrice Sithamparanathan v. Premaratne*.⁽¹⁾

Mr. Samarasekera PC for the Respondent submitted that in considering an application for the purchase of a house under section 13 of the Law, the Commissioner had to be satisfied only on the matters set out in section 17 namely;

- (a) that the house is situated in an area which in his opinion will not be required for slum clearance, development or redevelopment or 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.

Counsel argued that where the Commissioner is so satisfied he must, subject to an appeal to the Board of Review on the aforesaid matters, notify the Minister of such fact; where upon the Minister alone is then empowered to decide whether a vesting order may be made.

Counsel contended that consideration of equities is not a prerequisite to the making of a notification under section 17; hence it would be outside the jurisdiction of the Commissioner and the Board of Review to consider equities; and that they have no power to reject an application on the ground of equities. He said that the dicta in *Caderamanpulle v. Keuneman*⁽²⁾ as to the Commissioner's discretion to consider equities is obiter. There the Court held that the Commissioner need not act on every application made under S. 13 and notify the Minister under section 17 even if paras (a), (b) and (c) are satisfied; and that there is an area of discretion in the Commissioner to consider the equities of the case and decide whether he will accept the application and notify the Minister that an application has been made.

In *Caderamanpulle's* case (*supra*) there was no decision of the Board of Review. The Commissioner notified the Minister a recommendation for a vesting without having informed the owner of that decision; whereupon the Minister made order vesting the house in

the Commissioner. The Court quashed the vesting order primarily on the ground that it was inequitable; and that the Commissioner failed to hold a fair inquiry affording the owner an adequate opportunity to state his case; he also failed to inform the owner of his decision to recommend the vesting; hence the vesting order was in breach of natural justice and void.

On the submission of the State that in the course of an application under section 13 the final determination is that of the Minister, Thamotharan, J. said :

"It seems to me that the effective decision or determination in regard to the tenant's application is made by the Commissioner and not by the Minister."

In the circumstances, I am unable to agree that the dicta in Caderamanpulle's case were obiter; that decision has been consistently followed in other decisions. I do not consider it necessary or appropriate to reconsider it. Even assuming that the Commissioner had no power to reject an application on the ground of equities, I am of the opinion that he has incidental power to consider equities for the reason that the Minister's power to make the vesting order is discretionary; and the Commissioner is under a duty to consider equities in addition to the matters set out in section 17 to enable the Minister to make a fair decision. The Commissioner's decision including the question of equities is subject to an appeal to the Board of Review.

In the result it is my conclusion that on the facts of this case, the Board of Review acted within its jurisdiction in making its decision. It cannot be said that the said decision is ex facie not within the power conferred on the Board. The decision in favour of the Appellant is eminently equitable. Hence the specific finding that the Commissioner had failed to consider equities is unnecessary. I accordingly allow the appeal set aside the judgment of the Court of Appeal and restore the decision of the Board of Review, dated 21.09.94. In all the circumstances, I make no order as to costs.

G.P.S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.