MOOSAJEES LIMITED
VS
ARTHUR AND OTHERS

SUPREME COURT
FERNANDO, J.
WIGNESWARAN, J. AND
WEERASOORIYA, J.
SC APPEAL NO. 58/2001
CA APPLICATION NO. 1354/98
SEPTEMBER 16, 2002

Writ of Certiorari - Ceiling on Housing Property Law, No. 1 of 1973-Application under section 13 - Decision of Commissioner - Appeal under section 39(1) - Board of Review - Finality clause, section 39(3) - Application of section 22 of Interpretation Ordinance - Whether Court of Appeal varied a decision which was ex facie not within the power of the Board of Review - Wrong application of section 47 of the Law - Definition of house - Burden of proof - Evidence Ordinance, sections 101 and 102 - Effect of Article 140 of Constitution on section 22 of Interpretation Ordinance.

The 1st respondent tenant applied to the 2nd respondent (Commissioner for National Housing) under section 13 of the Ceiling on Housing Property Law, No. 1 of 1973 ("CHP Law") to purchase the house in dispute owned by the appellant. On 25.01.1984 the Commissioner refused the application holding the premises were business premises under section 47 of the CHP Law. On appeal to the Board of Review under section 39(1) of the Law, the Board held that it was a house as it had been used for residence from 1943. The Court of Appeal refused an application by the appellant to quash the decision of the Board by certiorari. The Court held that in view of section 22 of the Interpretation Ordinance, read with section 39(3) of the CHP Law, the court's jurisdiction was ousted as the decision of the Board using the test of user was not *ex facie* outside the Board's jurisdiction and by its order dated 09.02.2001, refused the application for a writ.

Held;

1. In terms of section 47 (definition of 'house') the premises had been originally constructed as an eating house and assessed as such, but not originally constructed for residential purpose, although since 1943, it had been used for residence and assessed as such in 1980.

2. The Court of Appeal wrongly placed the burden of proof on the appellant to prove that the building was originally constructed for residential purposes when in terms of sections 101 and 102 of the Evidence Ordinance, the burden of proving the original purpose of the building was on the 1st respondent.

3. In the above circumstances, the decision of the Board of Review was *ultra vires* and a nullity-outside its jurisdiction and the appellant was entitled to a writ of certiorari notwithstanding section 39(3) of the CHP Law. Further, Article 140 of the Constitution prevailed over section 22 of the Interpretation Ordinance. For that reason also, section 39(3) of the CHP Law had no application.

Cases referred to :

1. *Abeysekera* v *Wijetunga* (1982) 2 SLR 737 at p. 739
2. *Mohammed Ismail* v *Hussain* (1993) 2 SLR 380
3. *Anderson* v *Ahamed Husny Appellate Law Recorder* Vol 2 March 2001 p. 13
4. *Withanarachi* v *Gunawardena* (1996) (1) SLR 253 at p. 257

5. *Sitamparanathan* v *Premaratne* (1996) 2 SLR 202
6. *Rex* v *Northumberland Compensation Appeal Tribunal* (1952) 1 All ER 122
7. *Anisminic Ltd v* Foreisn Compensation Commission (1969) 2 AC-147
8. *O' Reilly* v *Mackman* (1983) 2 AC 237 at p. 278
9. *R* v *Hult University Visitor* (1993 A.C.) 682 at p 701
10. *Maradane Masque Trustes* v *Mahamud* (1967) 1 AC 13
11. *Atapattu* v *People's Bank* (1907) 1 SLR 208 at p 221
12. *Sirisena Cooray* v *Tissa Bandaranayake* (1999) 1 SLR 1 at p.14
13. *Wljepala Mendis v PRP Perera* (1999) 2 SLR 110 at p 119

APPEAL against the judgment of the Court of Appeal reported in (2001) 2 SLR 101 (Overruled)

Dr. J. de Almeida Gunaratne with *Parakrama Agalawatta* and *Kishali Pinto Jayawardena* for appellant.

Rohana Jayawardena for 1st respondent.

Uditha Egalahewa, State Counsel for 2nd respondent.

Cur.adv.vult

December, 5, 2002

WEERASOORIYA, J.

The 1st respondent-respondent ("the 1st respondent") made an application under Section 13 of the Ceiling on Housing Property Law, No. 1 of 1973 "(the C. H. P. Law") to the Commissioner of National Housing ("the Commissioner") to purchase the premises bearing No. 17, Hunupitiya Road, Colombo 2, and the Commissioner by his order dated 25.01.1984, dismissed the application holding that the premises were business premises. The 1st respondent appealed against that order to the Ceiling on Housing Property Board of Review ("the Board") under Section 39(1) of the C. H. P. Law, and the Board reversed the Commissioner's finding and allowed the appeal on the basis that the premises in question were residential and therefore a house. The petitioner-appellant ("the petitioner") thereafter invoked the jurisdiction of the Court of Appeal seeking to quash

the said order of the Board by way of a writ of certiorari. The Court of Appeal by its judgment dated 09.02.2001, dismissed the petitioner's application. Thereafter the petitioner obtained special leave to appeal from this Court upon the following questions.

(1) Whether the Board of Review and the Court of Appeal erred in law in applying the test of user of premises instead of considering the purpose of construction in determining whether the premises constituted a 'house' as defined under Section 47 of the C. H. P. Law ?

(2) Whether the Board of Review and the Court of Appeal erred in law in placing the burden of proof on the petitioner to establish that the premises is not a house as so defined ?

(3) Whether the Court of Appeal lacked jurisdiction to review the order of the Board of Review in view of the clause contained in Section 39 (3) ?

(1) Test of User

It is not in dispute that the 1st respondent as tenant of the petitioner made an application in terms of Section 13 of the C. H. P. Law to purchase the premises. Upon such application being made, the Law requires the Commissioner to hold an inquiry into such application and upon being satisfied on the requirements laid down in Section 17 (1) (a), (b), and (c) to make a recommendation to the Minister whether such premises should be vested. The issue whether a tenant could maintain such an application depends on whether the premises fall within the meaning of a 'house' as defined in Section 47 of the C. H. P. Law :

"House" means 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, and through which unit access cannot be had to any living accommodation, and includes a flat or tenement, but shall not include-

(1) sub divisions of, or extensions to a house which was first occupied as a single unit of residence ; and

(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, 1st, 1972 ;"

This definition postulates the following criteria to be satisfied by the applicant.

(a) It must be an independent living unit whether assessed or not for the purpose of levying rates.

(b) It must have been constructed mainly or solely for residential purposes ; and

(c) It must have a separate access and through which unit access can not be had to any other living accommodation.

The Commissioner by his order dated 25.01.1984 (P1a) held that the premises were business premises. However, on appeal, the Board reversed the finding of the Commissioner and held that the said premises had been used mainly or solely for residential purposes.

Learned Counsel for the petitioner contended that the Board applied the wrong test by misconstruing Section 47 of the C. P. H. Law.

It is to be observed that the Board without asking itself the question as to whether the premises had been constructed mainly or solely for residential purposes as laid down in the definition of a house in Section 47 asked the question ".....whether the said premises is a business premises or not" and thereafter applied exception (2) to the definition of a house contained in the section. In fact, the said exception is meant to take even a building which was constructed mainly or solely for residential purposes, outside the definition of a 'house' if such building was used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of 10 years prior to March 1st, 1972.

The Court of Appeal disagreed with the contention of learned Counsel for the petitioner that the Board formulated the wrong question and held that implicit in this question was the proposition whether the premises in question were residential or business.

The petitioner had presented his case on the basis that the premises at the inception had been assessed for the purpose of levying rates as an "eating house" indicating that the original purpose of construction was for

business. Therefore, the petitioner's case was that though used by the 1st respondent as residential premises, the premises had been originally constructed for business purposes.

It would be manifest that there was no dispute that from 1943, since the 1st respondent came into occupation of the premises, that the premises were used for residential purposes. But to enable the 1st respondent to purchase it, it must be shown that the premises were constructed mainly or solely for residential purposes. It was open to the 1st respondent to state that premises had been continuously used as a residence thereby entitling him to the protection of the Rent Act. However, it would be a different situation when the (1st respondent) tenant makes an application under Section 13 of the C. H. P. law to purchase it, where different criteria are spelt out under Section 47 of the C. H. P. Law.

In the circumstances, the Board misdirected itself in addressing the question whether the said premises were business premises or not. This misdirection was the outcome of failing to appreciate the provisions of Section 47 of the C. H. P. Law. The Court of Appeal has taken the mistaken view that implicit in the question was whether the premises in question were residential or business.

The misconstruction of Section 47 of C. H. P. Law was reflected in the application of the test of user of premises to determine the question whether the premises was a house. The primary test postulated by that section is the test as to whether the premises were constructed for residential purposes. It is to be noted that this section does not permit a choice between two primary tests. The effect of the reasoning of the Board and the Court of Appeal was to impose a burden on the owner to prove that it was constructed for business purposes which is contrary to what is envisaged in Section 47.

It is necessary to consider the decisions of this Court, on the definition of a house as given in Section 47 of C. H. P. Law.

The case of *Abeysekera* vs. *'Wijetunga*[1] laid down the rule that the test to be applied to determine what a house is, for the purposes of C. H. P. Law, must be an objective test and not a subjective one and that its initial construction and the purpose of construction is what matters.

"In *Mohamed Ismail* vs. *Hussain*[2] Court applied the criterion of user mainly because of the lack of direct evidence relating to the initial purpose of construction. However, it was disclosed that the premises had been originally assessed as a house. Therefore, it would be clear that, there was no occasion to consider the original purpose of construction of the premises and the question of devolution of the burden of proof in the context of Section 47 of the C. H. P. Law did not arise for consideration.

On the foregoing material, I hold that the Board and the Court of Appeal erred in applying the test of user of premises instead of considering the purpose of construction in determining whether the premises constituted a house within the meaning of Section 47 of C. H. P. Law.

(2) Burden of Proof

Section 101 of the Evidence Ordinance provides :

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. When a person is bound to prove the existence of any fact, it is said that burden of proof lies on that person".

This section is concerned with the duty to prove one's case as a whole and is distinguishable from Section 103 which explains the burden of proof as to a particular fact. This section reads as follows

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

The difference in scope could be seen from illustration (A) to Section 101 which states as follows.

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."

But however, where B concedes that he committed the act alleged but pleads that it does not entail criminal liability since the general exception relating to exercise of the right to private defence or any special exception

contained in the Penal Code is applicable, B is bound to establish facts to bring him within that exception. (*Vide* Section 105).

Section 102 provides for the devolution of the burden of proof in the following terms.

> *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".*

The question as to which party should begin to lead evidence before the Labour Tribunal came up for consideration before the Supreme Court in the case of *David J. Anderson* vs. *Ahamad Husny*.[3] The Court held that although the Labour Tribunal is not bound by the Evidence Ordinance, the principle enshrined in Section 102, that the person on whom the burden of proof lies would fail if no evidence at all were given on either side, is a common sense principle, departure from which would not be justified if the circumstances do not warrant such a departure.

In the present case, the primary test postulated by Section 47 of C. H. P. Law is whether the premises were constructed for residential purposes. If no evidence is given by either side, it is the 1st respondent who would fail before the Commissioner. The 1st respondent had failed to lead any evidence to establish that the premises were constructed for residential purposes. The petitioner had produced assessment extracts (P43-P53) which showed the premises were originally assessed as an eating house though used as a residential house. There was no reason to deviate from the rule set out in Section 102 of the Evidence Ordinance at the inquiry before the Board of Review.

Accordingly, I hold that the burden of proof that the premises were constructed for residential purposes lay with the 1st respondent, and has not been discharged.

(3) Ouster Clause

Learned Counsel for the 1st respondent contended that the order of the Board is final and conclusive and cannot be impeached on the material submitted by the petitioner. This contention is based on Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance as amended by Act, No. 18 of 1972.

Section 39(3) of the C. H. P. Law provides :

> *"The determination of the Board on any appeal made under sub section (I) shall be final and shall not be called in question in any Court".*

The material parts of Section 22 of the Interpretation Ordinance (as amended) read as follows.

> *"Where there appears in any enactment.....the expression "shall not be called in question in any Court".....in relation to any order, decision,.....which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision.....made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.*
>
> *Provided however, that the preceding provisions of this Section shall not apply to the Supreme Court or the Court of Appeal as the case may be.....in respect of the following matters only, that is to say-*
>
> *(a) Where such order, decision.....is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision....; and*
>
> *(b) .....".*

Learned Counsel for the petitioner contended that the Board had the power *ex facie* to make the order it did, namely to hold whether the premises in question were either residential or business premises. He contended that nevertheless that power of the Board did not confer jurisdiction to the Board :

(a) to formulate the wrong question.

(b) to misconstrue the provisions of Section 47 of the C. H. P. Law and apply the wrong test ; and

(c) to take into account irrelevant considerations.

The ouster clause in Section 39(3) of the C. H. P. Law read with Section 22 of Interpretation Ordinance came up for consideration in *Withanaratchi vs. Gunawardena*[4] where the Court held that on a consideration of the entirety of the facts and circumstances it could not conclude that the decision of the Board was unreasonable and unsupported by the evidence on record. The Court observed that at most the alleged error lay in the evaluation and the assessment of the oral and documentary evidence and therefore the error if at all was one made within the area of jurisdiction of the Board of Review.

Thus, the two grounds enumerated namely ; (a) where a decision is unreasonable or (b) where it is unsupported by evidence are obviously grounds that would affect the jurisdiction of the Board.

The decision in the case of *Sitamparanathan vs. Premaratna* [5] is significant in that it held that Section 39(3) of the C. H. P. law did not protect a decision which patently lacked jurisdiction to decide.

At this point it is useful to examine this question in the light of the English precedents.

In *R. vs. Northumberland Compensation Appeal Tribunal*[6] the Court of Appeal held that certiorari to quash the decision of a Statutory Tribunal lay, not only where the tribunal had exceeded its jurisdiction but also where an error of law appeared on the face of the record. This case turned upon the amount of compensation payable to the clerk to a hospital board in Northumberland who has lost his employment consequent upon the introduction of the National Health Service. Upon a misconstruction of the regulations, the Compensation Appeal Tribunal refused to allow him his full period of service on the basis that there were two periods of service and that only the second period of service should be counted which appeared to be a manifest error of law.

This case is significant in that it revived the power of review for mere error of law on the face of the record and marked the beginning of the process towards bringing all decisions on questions of law within judicial review.

The application of the doctrine of ultra vires was made wider for the purpose of minimising the effect of ouster clauses by the House of Lords

in the celebrated case of *Anisminic Ltd. vs. Foreign Compensation Commission.*[7]

In this case, the Foreign Compensation Commission rejected a claim for compensation for a property already sold to a foreign buyer on the erroneous ground that the Statutory Order in Council required that the successor in title should have been of British Nationality at a certain date. Upon Anisminic challenging the Commission's decision on the ground that the Commission had misconstrued the relevant 1962 order from which the Commission derived jurisdiction, in that the 1962 order did not require both the applicant and his successor in title to be British to qualify for compensation, the House of Lords held that :

(a) the ouster clause did not protect a determination which was outside jurisdiction ; and

(b) (by a majority) the misconstruction of the Order in Council which the Commission had to apply involved an excess of jurisdiction since they based their decision on a ground which they had no right to take into account and sought to impose another condition not warranted by the order.

The principle deducible from the Anisminic case is that every error of law by a tribunal must necessarily be jurisdictional. This case became the leading example of jurisdictional error by a tribunal in the course of its proceedings.

The majority view of the House of Lords was that the error destroyed the Commission's jurisdiction and rendered the decision a nullity, since on a true view of the law, the Commission had no jurisdiction to take the nationality of the successor in title into account. Therefore, by asking the wrong question and by imposing a requirement which the Commission had no authority to impose, it had overstepped its power. (*Vide Administrative Law* - Wade and Forsyth 8th Edition - page 270)

Thus, a tribunal has in effect no power to decide any question of law incorrectly ; any error of law would render its decision liable to be quashed as ultra vires.

This categorical pronouncement of the law was upheld and confirmed in two subsequent cases namely *O'Reilly vs. Mackman* [8] and *R.* vs. *Hull University Visitor* [9]

In *Reilly* vs. *Mackman* (supra) Lord Diplock stated that :

"The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination" not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity".

In *R.* vs. *Hull University Visitor* (supra ;) Lord Browne Wilkinson stated that :

".....the decision in Anisminic Ltd. vs. Foreign Compensation Commission (1969 2 AC 147) rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis ; a misdirection in law in making the decision therefore rendered the decision ultra vires".

Lack of jurisdiction may arise in many ways as enumerated below which would cause a tribunal to step outside its jurisdiction.

(a) the absence of formalities or conditions precedent to the tribunal to clothe itself with jurisdiction to embark on a inquiry ;

(b) where at the end of an inquiry tribunal makes an order that it has no jurisdiction to make ;

(c) where in the course of proceedings tribunal departs from rules of natural justice, and asks itself the wrong question or takes into account matters which it was not directed to take into account. (*Vide Anisminic Ltd.* vs. *Foreign Compensation Commission* at page 195).

In *Maradana Mosque Trustees vs. Mahamud* [10] an appeal from the judgment of the Supreme Court, the Privy Council held that where statutory authority was given to a Minister to act if he was satisfied that a school is being administered in a certain way, he was not given authority to act, because he was satisfied that the school had been administered in that way. It was held that the Minister had asked himself the wrong question and never brought himself within the area of his jurisdiction and therefore, acted without or in excess of jurisdiction.

In the light of the above decisions, the question that arises for consideration in the present case is whether the Board went outside its designated area and outstepped the confines of the territory of its inquiry.

Undoubtedly, the Board asked itself the wrong question to wit; whether the premises were business premises or not. It would be obvious that the proper question to have asked was whether the premises was a 'house' within the meaning of Section 47 of the C. H. P. Law. In failing to ask the proper question the Board went out of bounds and wandered outside its designated area. Further, the Board erroneously laid the burden of proof on the petitioner to prove that the premises were business premises. This initial misdirection caused the Board to apply the wrong test of user.

It is also evident that the misconstruction of the provisions of Section 47 of the C. H. P. Law, led the Board to rely on irrelevant considerations namely ;

(a) that the tenant had continued to be in uninterrupted occupation for a long period ; and

(b) that the premises had been assessed as a house in 1980.

On a careful examination of the above material, it is manifest that the Board had digressed away from its allotted task and outstepped the confines of the territory of its inquiry and thereby exceeded its jurisdiction.

Learned Counsel for the petitioner contended that in any event ouster clause in Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance (as amended) is inoperative in view of the constitutional implications flowing from Article 140 of the Constitution.

Article 140 of the Constitution provides :

"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the Judge of any Court of First Instance or tribunal or other institution or any other person :

....."

Article 168(1) of the Constitution permits the continued operation of legislation in force immediately before the commencement of the Constitution :

> *"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force".*

The Supreme Court in *Atapattu vs. People's Bank* [11] in interpreting Article 168(1) expressed the view that ouster clause would be operative only "except as otherwise expressly provided" in Article 140 and held that language used in Article 140 is broad enough to give the Court of Appeal authority to review even on grounds excluded by ouster clause. This case held further that constitutional provisions being the higher norm will prevail over the ordinary statutory provisions.

In *Sirisena Cooray vs. Tissa Bandaranayake* [12] the Supreme Court upheld and confirmed the view expressed in *Atapattu vs. People's Bank.* This view was reiterated in *Wijepala Mendis vs. P. R. P. Perera.* [13]Thus, the aforesaid decisions firmly establish the view that the ouster clause does not operate to exclude the jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution.

In the circumstances, the impress of finality set out in Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance has no application to the impugned decision of the Board. Accordingly, I hold that the Court of Appeal had jurisdiction to review the decision of the Board and a writ of certiorari would lie to quash it.

For the above reasons, I set aside the decision of the Board dated 23.10.1998 and the Order of the Court of Appeal dated 09.02.2001 and allow this appeal with costs fixed at Rs. 5,000/= payable by the 1st respondent to the petitioner.

FERNANDO J.—I agree.

WIGNESWARAN J.—I agree.

Appeal allowed.