RAZAQH

v.

SURAWEERA AND OTHERS

COURT OF APPEAL
JAYASINGHE, J. AND
EDIRISURIYA, J.
CA NO. 946/98
BR/CHP NO. 1980
FEBRUARY 12, 2002

Ceiling on Housing Property Law, No. 1 of 1973, sections 2 (1), 8 (2), 8 (3), 8 (5), 11, 17 and 39 – Vesting by operation of law – Owner not opting to retain ownership – Are they surplus houses vesting by operation of law? – Is there a right of appeal to the Board of Review?

The petitioner was the owner of six houses. After Law, No. 1 of 1973 came into operation, the petitioner made a declaration under the above Law stating that, she did not propose to retain ownership of the said house. These six houses were thus vested in the Commissioner. Thereafter, in 1978 upon representation made by the petitioner to the Commissioner, the petitioner was informed that four houses had not been vested. One of the tenants applied to the Court of Appeal challenging the said decision of the Commissioner. The Court of Appeal directed the Commissioner to hold an inquiry, before divesting.

At the inquiry, the petitioner's (estranged) husband, consented to the vesting of the premises. The Commissioner cancelled the earlier letter of divesting, and restored the earlier vesting order. The petitioner appealed against this order to the Board of Review. The Board of Review dismissed the appeal on technical grounds. The writ of *certiorari* sought against that order made by the Board of Review was dismissed by the Court of Appeal; however, the Supreme Court, set aside the order and directed the Board of Review to hear and determine the appellant's appeal.

At the Board of Review it was contended by the respondent tenant, that the order of the Commissioner is not a decision or a determination after inquiry and therefore there is no right of appeal to the Board of Review, which contention was upheld.

Held :

(1) S. 8 (2) and S. 8 (3) have to be read with S. 8 (5) of Law, No. 16 of 1973.

(2) S. 8 (5) states that any house the ownership of which is not proposed to be retained in terms of any declaration made . . . is referred to as a surplus house. The houses vested in the Commissioner in this case are surplus houses.

(3) Thus, vesting is by operation of law and it is not a decision or a determination made by the Commissioner after inquiry. Therefore, there is no right of appeal to the Board of Review.

APPLICATION for a writ of *certiorari.*

Cases referred to :

(1) *Abeysekera v. Wijetunga* – (1982) 2 SRI LR 737.

P. A. D. Samarasekera, PC with *K. Gunawardena* for petitioner.

P. Nagendra, PC with *L. W. Pannila* for 6th respondent.

M. A. M. Marleen, PC with *M. M. M. Munzir* for 5th and 7th respondents.

Anil Gunaratne, Deputy Solicitor-General for 8th respondent.

Cur. adv. vult.

May 17, 2002

EDIRISURIYA, J.

The petitioner in this case was the owner of six houses bearing 01
assessment Nos. 27/4, 27/11, 27/12, 27/14, 27/15 and 27/16, Jayantha Weerasekera Mawatha, Colombo 10.

After the Ceiling on Housing Property Law, No. 1 of 1973 came into operation the petitioner made declarations under the above Law stating that she did not propose to retain ownership of the said houses.

The Commissioner of National Housing by his letter dated 25. 03. 1974 (A4) informed the petitioner that all six houses vested in him.

Upon representations made by the petitioner the Commissioner by his letter dated 13. 11. 1978 informed the petitioner that premises bearing Nos. 27/11, 27/12, 27/16 and 27/4 had not been vested (A5).

Thereafter, the tenant of No. 27/12, W. A. Perera applied to the Court of Appeal for a writ of *certiorari* challenging the decision of the Commissioner. The Court of Appeal directed the Commissioner to hold an *inter partes* inquiry before divesting the premises.

Thereupon, the Commissioner held a fresh inquiry. The petitioner states that she was abroad and was receiving medical treatment in India. She states she was estranged from her husband; that at the above inquiry her husband without her express or implied authority had consented to the vesting of the said premises. The Commissioner by his letter dated 06. 08. 1984 [A6 (*a*)] cancelled his earlier letter of 13. 11. 1978 (A5) and restored his earlier vesting order dated 25. 03. 1974 (A4). In response to the letters sent by the petitioner the Commissioner by his letter dated 05. 02. 1986 (A7) informed her that he could not divest the premises. Thereafter, she lodged a petition of appeal dated 05. 03. 1986 to the Board of Review (A8).

The Board of Review dismissed the appeal on 03. 10. 1987 stating that the appellant had been negligent in preparing the petition of appeal and the Board could not help her to extricate herself from difficulty to which she had fallen as a result of her own negligence. The Board of Review was also of the view that the appealable period set out in section 39 of the Ceiling on Housing Property Law has long

expired and in that situation the Board had to refuse the application to amend the caption by the substitution of C. M. M. Samoon or S. M. Azhar in place of S. M. Samoon as the 3rd respondent.

Thereafter, the petitioner applied to the Court of Appeal for a writ of *certiorari* to quash the order dated 03. 10. 1987 of the Board of Review and for a writ of *mandamus* directing the Board of Review to substtitute S. N. Azar in place of the original 3rd respondent and to hear the petitioner's appeal.

The Court of Appeal dismissed the application stating that the appeal to the Board of Review was long past the one-month period allowed for appeal and that material facts have not been disclosed by the petitioner.

Thereafter, the petitioner appealed to the Supreme Court from the order of the Court of Appeal.

Delivering the Supreme Court judgment, Fernando, J. the other two judges agreeing said the Court of Appeal was in error in taking the view that the Board of Review has decided that the appeal was out of time. He further said the facts which in the opinion of the Court of Appeal the appellant improperly failed to disclose were not in any way relevant to the application made by the appellant to challenge the order of the Board of Review in regard to substitution and they were relevant to the question whether the appeal was out of time but since that was not the matter really in dispute their non-disclosure was of no consequence.

Since the respondents had submitted to the Supreme Court that they did not object to the substitution it was thought that there was no reason to direct the Board of Review to go into that question again.

Accordingly, the Supreme Court allowed the appeal and set aside the order of the Court of Appeal and substituted therefor,

(*a*) an order in the nature of a writ of *certiorari* quashing the order dated 03. 10. 1987 made by the Board of Review.

(*b*) an order in the nature of a writ of *mandamus* directing the Board of Review:

(i) to substitute 6th respondent (M. S. M. Azhar also known as S. N. Azar) in place of the original 3rd respondent named in the petition of appeal dated 05. 03. 1986; and

(ii) to hear and determine the appeal dated 05. 03. 1986.

It was urged before the Board of Review that the order of the Commissioner is not a decision or a determination after a proper inquiry and therefore there is no right of appeal to the Board of Review. Following the decision of the Supreme Court case *Abeysekera v. Wijetunga*[1] the Board of Review held that it does not have jurisdiction to grant the relief prayed for by the appellant and dismissed the appeal. Hence, this application to this Court.

The petitioner has prayed that a mandate in the nature of a writ of *certiorari* quashing the order of the Board of Review be issued or alternatively to direct the Commissioner of National Housing by writ of *mandamus* to divest the 4 houses vested in him. He has also prayed that vesting of 4 houses in the Commissioner be quashed.

The learned counsel for the petitioner Mr. Samarasekara, PC contended that vesting of property in terms of the provisions of the Ceilling on Housing Property Law could be quashed in view of the finding of the Supreme Court in case *Abeysekara v. Wijetunga and Others* (*supra*) where His Lordship the Chief Justice Neville Samarakoon held that a property which the Commissioner had declared to have vested in him was not a house but a business premises and quashed

the order of the Board of Review. His Lordship the Chief Justice further held that the contention of the Commissioner that the property was vested in him has no legal consequence.

It seems to me that this finding relates to the nature of the subject-matter and therefore has no application to the facts of the instant case. It is not in dispute that the relevant premises are houses within the meaning of the Ceiling on Housing Property Law. It should be noted that in the same case the Supreme Court held that in the absence of a decision or a determination made under the provisions of the law there was no right of appeal to the Board of Review.

The learned counsel for the petitioner further contended that the refusal of the Commissioner to exercise his powers under section 17 (A) was a decision that the Board had the jurisdiction to set aside.

The learned counsel for the 5th and 7th respondents Mr. Marleen, PC and the learned counsel for the 6th respondent Mr. P. Nagendran, PC contended that the petitioner has failed to appeal to the Board of Review against the Commissioner's decision refusing to divest the premises.

It is significant that the relief the petitioner has prayed for in the appeal (A8) is the decision of the Commissioner to vest the premises in him.

In the six declarations compendiously marked A1 the petitioner as owner declared that she did not propose to retain the said six houses. Mr. Marleen, PC contended that when a declarant furnishes a declaration in terms of sections 8 (2) and (3) of the Ceiling on Housing Property Law stating that the declarant does not propose to retain any house such a house becomes a "a surplus house" in terms of section 8 (5) of the Ceiling on Housing Property Law.

Mr. Samarasekara, PC the learned counsel for the petitioner submitted that vesting of houses takes place under section 11 of the Ceiling on Housing Property Law. This section reads thus: "any house owned by any person in excess of the permitted number of houses . . . vest in the Commissioner". Mr. Samarasekara further submitted that the permitted number has to be gathered from section 2 (1). In this case according to him two houses in respect of two dependent children and two more are permitted. What vests in the Commissioner under section 11 in this case are only two houses.

Having regard to the circumstances of this case I am of the opinion that sections 8 (2) and 8 (3) have to be read with section 8 (5) of the said Law.

Section 8 (5) states "any house the ownership of which is not proposed to be retained in terms of any declaration made under this section . . . is hereinafter referred to as a surplus house".

Therefore, I am of view that houses vested in the Commissioner in this case are surplus houses.

In the circumstances, I hold that vesting of premises is by operation of law and that it is not a decision or a determination made by the Commissioner after a proper inquiry. Therefore, the petitioner has no right of appeal to the Board of Review in terms of section 39 of the Ceiling on Housing Property Law.

The petitioner has also prayed for a writ of *mandamus* to direct the Commissioner to divest the four houses, which have vested in him.

The learned counsel for the 5th and 7th respondents contended that vesting of the premises took place as far back as 10. 04. 1973 (A1) but the petitioner made representations to the Commissioner to divest the houses five years after the premises vested in the Commissioner.

He further contended that apart from five years delay in making representations to the Commissioner for the divesting of four houses vested in the Commissioner there is also a delay of one year and six months in coming to court in invoking the writ jurisdiction of the court against the order of the Commissioner refusing to divest the houses (*vide* A10 Court of Appeal application No. 237/86) without first having appealed to the Board of Review in terms of section 39.

He contended that on the ground of unreasonable delay too the petitioner's application should be refused. Viewed in this light it seems that there had been unreasonable delay on the part of the petitioner in invoking the jurisdiction of this Court.

The learned counsel for the petitioner contended that the hearing of the appeal to the Board of Review was in terms of the direction of the Supreme Court by its judgment dated 10. 06. 1992 (A12) and therefore, the Board of Review should have determined the petitioner's appeal on merits without disposing of it upon a preliminary objection.

It is clear that the Supreme Court has not directed the Board of Review to hear and determine the appeal only on the merits. It is my view that the appeal could be heard and determined on a preliminary issue as well. Accordingly, I disallow the application. No costs.

JAYASINGHE, J. – I agree.

Application allowed.