GUNAWARDENE AND WIJESOORIYA
v.
MINISTER OF LOCAL GOVERNMENT, HOUSING AND CONSTRUCTION AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
WADUGODAPITIYA, J. AND
GUNAWARDANA, J.
S.C. APPEAL NO. 55/97 WITH
S.C. APPEAL NO. 56/97
C.A. NOS. 453/86 AND 489/86
JUNE 18 AND JULY 10, 1998

Writ of Certiorari – Divesting of a house – Section 17A of the Ceiling on Housing Property Law, No. 1 of 1973 – Appeal to the Board of Review – Section 39 of the Law – Duty of the Commissioner to communicate to the parties the decision to divest – Natural justice.

In terms of section 8 of the Ceiling on Housing Property Law, No. 1 of 1973, the 3rd respondent declared that premises Nos. 41 1/2 and 43 2/2, Gregory's Road, Colombo 07, were "surplus houses" of which he did not wish to retain ownership. The 3rd respondent gave notice to the petitioners of that declaration. The petitioners who were tanants of the said premises which had since vested in the Commissioner of National Housing (2nd respondent) applied to the Commissioner with notice to the 3rd respondent in terms of the Law to purchase the premises. The Commissioner entertained the applications. Consequently, the petitioners signed agreements whereby the Commissioner agreed to sell the premises to the petitioners. As directed by the Commissioner, the petitioners commenced making monthly payments towards the purchase price to the Commissioner. They also paid all municipal rates and taxes due on the said premises.

However, in 1976 the 3rd respondent applied to the Commissioner for a divesting of the ownership of the premises under section 17A of the Law. The Commissioner refused the application. An appeal by the 3rd respondent was disallowed by the Board of Review. In 1979 a further application was made by the 3rd respondent for a divesting of the premises. This too was refused by the Commissioner. The 3rd respondent did not appeal therefrom to the Board of Review. In 1981, the 3rd respondent made yet another application, for a divesting of the premises. That application was inquired into despite objections

by the petitioners. Thereafter, the Commissioner decided to divest himself of the ownership of the two premises and with the prior approval of the 1st respondent (the Minister) by order published in the *Gazette* No. 365 dated 30.8.85 divested himself of the ownership of the premises. By letters dated 18.2.86 the Commissioner notified the petitioners of the divesting.

Held:

1. The petitioner had duly applied to the Commissioner under section 9 of the Law to purchase the premises. Hence, they had *locus standi* to seek writs of certiorari (*Perera v. Karunaratne* (1997) 1 Sri LR 148 distinguished)

2. The Commissioner failed to communicate his decision to divest himself of the ownership of the premises prior to obtaining the Minister's approval for such divesting in terms of s. 17A of the Law. Such failure deprived the petitioners their right to appeal to the Board of Review under section 39 of the Law against the Commissioner's decision. That failure occasioned a breach of the principles of natural justice. It followed that the impugned divesting order is null and void.

Per Wadugodapitiya, J.

> "It appears that in terms of section 39 (3) of the Law, the determination of the Board of Review upon the appeal made by the 3rd respondent in respect of his first application to divest was final and that the 2nd respondent was wrong to have entertained the 3rd respondent's second and third applications for divesting."

Cases referred to:

1. *Perera v. Karunaratne* (1997) 1 Sri LR 148.
2. *Caderamanpulle v. Pieter Keuneman* SC appeal No. 15/79 SC minutes 19 September, 1980.
3. *Julian v. Sirisena Cooray* (1993) 1 Sri LR 238.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekera, PC with *Keerthi Sri Gunawardena* for the appellant.

K. Sripavan, DSG for the 1st and 2nd respondents.

Romesh de Silva, PC with *Palitha Kumarasinghe* for the 3rd respondent.

Cur. adv. vult.

March 9, 1999.

WADUGODAPITIYA, J.

It is regretted that the delay in writing this judgment was due to matters beyond my control. The briefs were misplaced and the judgment has been written no sooner they were found.

It was agreed that both these appeals be taken up for hearing together, since, expect for the identity of the premises, the facts are identical.

The appellants in both these appeals were the tenants of premises Nos. 41 2/2 and 43 2/2, Gregory's Road, Colombo 7; of both of which, the 3rd respondent was the owner on the date of commencement of the Ceiling on Housing Property Law, No. 1 of 1973 (the Law). . . In terms of section 8 of the above Law, the 3rd respondent declared both premises as "surplus houses" which he (3rd respondent) did not wish to retain ownership of. The 3rd respondent gave notice to the two petitioners of the above declaration. Thereupon, both petitioners made applications in terms of the Law, to the 2nd respondent, with notice to the 3rd respondent (which the 3rd respondent does not deny), for the purchase of premises Nos. 41 2/2 and 43 2/2, Gregory's Road, Colombo 7, which had now vested in the 2nd respondent. It is important to point out that the 2nd respondent filed affidavits in the Court of Appeal, which affidavits have been marked A9 and A7, respectively. According to these affidavits, the 2nd respondent admits in paragraph 5 thereof that applications were made to him by the petitioner for the purchase of the premises in question. Thereafter, the said premises were offered by the 2nd respondent to the petitioners for purchase, which offer was accepted by the petitioners; in pursuance of which, on 18.3.77, the 2nd respondent purported to enter into Agreements of Sale with the petitioners for the sale to them of the said premises, and, as directed by the 2nd respondent the petitioners duly made the requisite monthly payments towards the purchase price to the 2nd respondent (which he accepted and acknowledged) and also paid all Municipal rates and taxes to the

Colombo Municipal Council. Although these directions were given, the 2nd respondent whilst not denying the existence of the Agreements, says that the said Agreements of Sale were, however, not signed by him or by any of his officers. It appears, however, that the 2nd respondent in fact offered the premises to the appellants for purchase, whereupon they accepted the said offer and, at the office of the 2nd respondent, signed their respective Agreements in the presence of two witnesses each, for the purchase of the premises. The 2nd respondent however has not signed the Agreements, but has accepted all payments made by the appellants towards the purchase price and issued the necessary receipts therefor. His not signing the Agreements is, of course, his own fault and not that of the petitioners, and the petitioners cannot be made to suffer for this omission on the part of the 2nd respondent.

However, all this notwithstanding, it appears that in 1976 the 3rd respondent made an application to the 2nd respondent to divest ownership of the said premises under section 17A (1) of the Law, which application was refused by the 2nd respondent. The 3rd respondent thereupon appealed to the Board of Review which disallowed the appeal and upheld the order of the 2nd respondent. Undaunted, the 3rd respondent in 1979, made a further application to the 2nd respondent to divest ownership of the said premises under section 17A (1) of the Law. This too was refused by the 2nd respondent. The 3rd respondent did not appeal therefrom to the Board of Review. It, however, appears that by letter dated 8.7.81, the petitioners were informed that the 3rd respondent had made yet another application to the 2nd respondent to divest ownership of the premises and further that the 1st respondent would hold an inquiry on 25.8.81 to determine whether the ownership of the premises should be divested. In this connection, it appears that in terms of section 39 (3) of the Law, the determination of the Board of Review upon the appeal made by the 3rd respondent in respect of his first application to divest was final and that the 2nd respondent was wrong to have even entertained the 3rd respondent's second and third applications for divesting. The petitioners on their part objected to the holding of such an inquiry. This, however, was not a matter on which leave to appeal was granted in the instant Appeals.

After unsuccessful litigation by the petitioners (in the Court of Appeal Applications Nos. 958/81 & 963/81) to stop the 2nd respondent from holding the inquiry and to give effect to the terms of the Agreements of Sale between the petitioners and the 2nd respondent, the inquiry into the question of divesting the premises commenced. The petitioners state that the reasons set out by the 3rd respondent requesting divesting were never made known to them although they asked for them. Written submissions were tendered by both parties and the petitioners continued to make their payments to the 2nd respondent for which official receipts were issued. Thereafter, the petitioners received letters dated 18.2.86 (A5 and A3) from the 2nd respondent informing them that the premises had been divested. The relevant *Gazette* notification appeared in *Gazette* No. 365 of 30.8.85 (A6 and A4), stating, *inter alia*, that the divesting had been done "with the prior approval of the Minister" (1R). It appears that although the *Gazette* is dated 30.8.85, the letters of the 2nd respondent notifying the petitioners of the divesting are dated 18.2.86.

The petitioners complain that as the decision of the 2nd respondent to divest was not communicated to them by the 2nd respondent (prior to obtaining the Minister's approval, and prior to the publication of the order in the *Gazette*) they were deprived of their statutory right to appeal to the Board of Review under section 39 of the Law.

They, thereupon, made applications to the Court of Appeal for writs of Certiorari to quash the orders of the 2nd respondent divesting the said premises.

Before the Court of Appeal, the 2nd respondent, in paragraphs 12 and 13 of his affidavits, admitted that his decision to divest was not communicated to the petitioners before publication in the *Gazette* and went on to state: " I consent to have the documents marked P3 and P4 (now A5 and A3 and also A6 and A4) quashed by Your Lordships' Court".

It is of significance also, that the 3rd respondent (the owner) in his affidavits in the Court of Appeal himself agrees with the 2nd

respondent and says, "I agree with the averments contained in paragraphs 12 and 13 of the affidavit of the 2nd respondent". Thus, both the 2nd and 3rd respondents consented to the quashing of the divesting Order. This is precisely what the two petitioners had asked the Court of Appeal to do. However, this notwithstanding the Court of Appeal dismissed both applications, on the grounds that:

(*a*) "the petitioners have no legal right to have been informed of the reasons/decisions of the Commissioner to divest the said premises,"

(*b*) "Nor have they any legal rights which could be enforced by an appeal from such a decision to the Board of Review", and

(*c*) the 2nd respondent has exercised his statutory authority lawfully,

(*d*) in terms of the decision in *Perera v. Karunaratne* (post), the applications had to be dismissed.

Having erroneously found as a fact that, "Admittedly they (the appellants) have not made applications to purchase the premises under section 9 of the Law", the learned Judge of the Court of Appeal proceeded to base himself on the decision in *Perera v. Karunaratne*[1] (which I shall advert to later, and which in my view does not apply to the appeals before me) and hold against the appellants.

The appellants appealed to this Court against the decision of the Court of Appeal upon the following main grounds:

i. the failure of the 2nd respondent to communicate his decision or determination in respect of the 3rd respondent's application to divest the ownership of the premises after inquiry and, before seeking the approval of the 1st respondent in terms of section 17A (1) of the Law; was wrong in law.

ii. the consequential depriving and denial to the appellants of their statutory right of appeal to the Board of Review against any "decision or determination of the Commissioner" was a violation of their statutory right of appeal;

iii. the 2nd respondent divested the ownership of the premises only upon the 3rd application of the 3rd respondent, which he had no power to do, having refused the first two applications. The appellants complain that the learned Judge of the Court of Appeal did not deal with this matter at all; and

iv. the Court of Appeal had erroneously proceeded on the basis that although the premises were declared to be surplus, the appellants had not made any applications for the purchase of the said premises, despite the express admission by the 2nd respondent in his affidavits where he states: "I only admit that an application was made to me by the petitioner for the purchase of the premises in question".

The 3rd respondent on the other hand prays that the appeals be dismissed for the reason that:

i. the appellants have not made any application to the 2nd respondent for the purchase of the premises within the time prescribed in section 9 of the Law, (viz within 4 months of the commencement of the Law) and that, therefore, the appellants have no *locus standi* to make an application for Writs of Certiorari, and

ii. that the decision of the 2nd respondent to divest was duly communicated to the appellant by a writing dated 18th February, 1986, by the 2nd respondent and therefore the appellants could have appealed to the Board of Review under section 39 of the Law.

Special leave to appeal was granted by this Court in respect of the following questions only:

1. Was there evidence that the tenant had made an application in terms of section 9, and if not, had he *locus standi*?

2. Was the Court of Appeal in error when it held that the petitioner admittedly had not applied for the purchase of the premises, and thereupon proceeded to hold that the petitioner had no right to be informed of the Commissioner's decision to divest?

3. Was the Commissioner under a duty to communicate the fact of divesting to the petitioner?

4. Was the Commissioner under a duty to communicate his order to divest under section 17(A), to the petitioner?

5. If so, has there been a failure to communicate such decision to the petitioner?

6. What was the order which was required to be communicated to the parties?

If I may first take up questions Nos. 1 and 2 above, it appears that the most important matter upon which the learned Judge of the Court of Appeal proceeded, was his erroneous finding of fact that, "Admittedly they (the apellants) have not made applications to purchase the premises under section 9 of the Law;" the consequence being that they had no *locus standi* to question the validity of the 2nd respondent's decision to divest.

He does not say, however, where or in what context or by whom this alleged admission was made. Nowhere were we able to find any such admission; nor was learned President's Counsel able to enlighten us as regards this mystery. Certainly, it is clear that neither of the appellants has stated anywhere that they ever made any such admission. On the contrary each of the appellants stoutly maintains that, "I duly made application to the Commissioner of National Housing (2nd respondent) with simultaneous notice to the 3rd respondent for the purchase of premises No. 41 2/2, (and No. 43 2/2) Gregory's Road, Colombo 7" (paragraph 5 of appellant's affidavit). By way of answer,

the only other person who would know about this matter (viz the 2nd respondent) says in paragraph 5 of his affidavits: "Answering the averments contained in paragraph 5 of the affidavit (of the appellants), I only admit that an application was made to me by the petitioner for the purchase of the premises in question." (The numbering of the paragraphs in the appellant's affidavit in the Court of Appeal is the same). The 3rd respondent, in his affidavits refrains from answering the said paragraph 5. In any event he does not deny it; nor does he seek to question or cast doubts upon it. Further, it appears that the 2nd respondent has expressly admitted the averments of the appellants where the latter state: "Thereafter the said house was offered by the 2nd respondent for purchase, which offer was accepted by me". In any event, it is clear that nowhere has the 2nd respondent stated that the said applications were defective or invalid or, not duly made, or that they were found wanting in any particular in terms of section 9 of the Law. The contrary seems to be the true state of things, where the said applications were in fact accepted by the 2nd respondent, and were followed up with Agreements to Sell, which were drawn up by him and signed by the appellants in his office before the necessary witnesses, but which he himself neglected to sign. Payments as directed by the 2nd respondent towards the purchase price were also made by the appellants and accepted by the 2nd respondent who issued official receipts therefor. All these steps were quite unnecessary and uncalled for if the appellants had not made the requisite applications to purchase the premises.

What appears to have happened seems to be that the learned Judge of the Court of Appeal, having erroneously found as a fact that, "Admittedly they (the appellants) have not made applications to purchase the premises under section 9 of the Law.", proceeded to base himself on the decision in *Perera v. Karunaratne (supra)* and held against the appellants. It appears that the facts in the above case (otherwise known as the Baur's case) were quite different to those in the instant case. In the Baur's case, the tenants of the Flats in question had not made applications to the Commissioner of National Housing to purchase any of the Flats (except for one who applied, not to the Commissioner, but to the Board of Review nearly 8 years after the stipulated four months). Further, the Flats had not

been offered for sale by the Commissioner to any of the tenants and none of them was making any payments to the Commissioner towards the purchase price. On the contrary, the tenants continued to pay their monthly rent to their landlord. In the circumstances the Court rightly held that the tenants had no *locus standi* to question the validity of the Commissioner's decision. All they had were rights of tenancy. They had no legitimate expectation of becoming owners of the Flats. It is thus quite clear that Baur's case is quite different, and has no application to the two Appeals before us. The Court of Appeal was in error in holding that the decision in Baur's case applied to the applications before him, and erred in adopting the following dictum from that case, viz *"In the absence of proper applications before him,* the 1st respondent (Commissioner) was under no administrative duty to notice the appellants or give them a hearing prior to divesting". (emphasis mine). But having done so, and despite the fact that there were in fact two applications, the Court of Appeal in the instant cases, went on to hold as follows: "Thus, the petitioners have no legal right to have been informed of the reasons/decisions of the Commissioner to divest the said premises. Nor have they any legal rights which could be enforced by an appeal from such a decision to the Board of Review". This conculusion is clearly wrong.

Therefore, for the reasons set out above, I hold:

(i) that the appellants in these two cases did in fact make applications to purchase the said premises and that they were in conformity with the law as set out in section 9 of the Law;

(ii) that the appellants did have *locus standi* to file applications for Writs of Certiorari;

(iii) that the Court of Appeal erred when it held that the petitioners admittedly had not made applications to purchase the premises, and proceeded to hold that the petitioners had no right to be informed of the 2nd respondent's decision to divest.

I now turn to the other questions on which leave to appeal was granted.

As referred to earlier, the learned Judge of the Court of Appeal held *(inter alia)* that the petitioners did not have "any legal rights which could be enforced by an appeal from such a decision to the Board of Review". In other words, in the mind of the learned Judge of the Court of Appeal, no question of a right to appeal to the Board of Review ever accrued to the appellants, and section 39 of the Law did not therefore apply to them. Thus, if they had no right of appeal, then it followed that they had no right to be told of the decision of the 2nd respondent, and so, the 2nd respondent was under no duty to inform the appellants of his decision to divest. I am unable to agree with this line of reasoning of the Court of Appeal which stems from the erroneous application to these appeals before us, of the decision in Baur's case.

As set out above, what Baur's case was, "*In the absence of proper applications before him,* the 1st respondent (Commissioner) was under no administrative duty to notice the appellants . . . prior to divesting". In the instant Appeals there were in fact two applications and, it would follow that the 2nd respondent was indeed under a duty to inform the appellants of the fact that he had taken a decision to divest. In fact, the dictates of the principles of natural justice would demand as much. The facts clearly show that the appellants did in fact have a legitimate expectation of purchasing the premises in question and that a decision to divest would have affected them adversely. It is also clear that they had *locus standi* to question the validity of the 2nd respondent's decision to divest, and therefore were clothed with a right of appeal to the Board of Review under sec. 39 of the Law. Thus, if the 2nd respondent refrained from informing the appellants, they would surely be deprived of their legitimate right of appeal.

The 2nd respondent in fact admits that he did not inform the appellants of his decision to divest, when in paragraph 12 of his affidavits he says: "I admit the averments contained in paragraph 25 of the affidavit (of the appellants) and state that the decision to divest

the premises in question has not been communicated to the petitioner before such order was *Gazetted*"

It is clear then, that there has in fact been a failure to communicate, and that this failure has resulted in the appellants being deprived of their right to appeal to the Board of Review under section 39 of the Law. I am of the view, therefore, that the 2nd respondent was indeed under a duty to inform the appellants of his decision to divest, so as to enable them to appeal.

In fact, it has been held that the Commissioner is under a duty to inform the parties of his decision to notify the Minister, so that any party may exercise his right of appeal to the Board of Review. The failure to so inform the parties rendered the Commissioner's notification to the Minister and the subsequent vesting null and void. *Caderamanpulle v. Pieter Keuneman*[2].

The case of *Julian v. Sirisena Cooray*[3] is of much relevance in this connection. Here, the Commissioner of National Housing, after inquiry, made a decision not to vest the premises in question; thus preventing the appellant (tenant) from purchasing it. He made his recommendation to the Minister accordingly, whereupon the latter having agreed, decided not to vest the premises, and made order accordingly, rejecting the appellant's application. It was only thereafter that the Commissioner informed the appellant by letter, of the Minister's decision to reject his (appellant's) application. What is of importance is the fact that after the Commissioner made his decision not to vest the premises, he had failed to communicate such decision to the appellant before making his recommendation to the Minister against the vesting. Agreeing with and following the decision in *Caderamanpulle v. Keuneman,* the Court held that such failure on the part of the Commissioner to communicate his own decision to the appellant vitiates the decision of the Minister to reject the appellant's application. Accordingly, the Court quashed the order of the Minister, and directed the Commissioner to communicate his own

decision to the appellant to enable the appellant to prefer an appeal to the Board of Review in terms of section 39 of the Law if he so desired.

I, therefore, hold that the 2nd respondent was in fact under a duty to communicate his decision to divest to the appellants before obtaining the 1st respondent's approval and that his failure to have done so has occasioned a failure on his (2nd respondent's) part to observe the principles of natural justice and was clearly wrong. It follows, and I so hold, that the subsequent divesting order by the 2nd respondent (A6 and A4) is null and void.

I must, before concluding, make reference once more, to paragraph 13 of the 2nd respondent's affidavits, in which he says : "Answering the averments contained in paragraph 26 of the affidavit (of the appellants), I state that I consent to have the documents marked P3 and P4 (A5 and A3 and also A6 and A4) in the appeals before us) *quashed by Your Lordships' Court*". *(Letters A5 and A3 dated 18.2.86,* inform the appellants that the two premises in question have already been divested and that the divesting order has been published in *Gazette* No. 365 of 30.8.85; which *Gazette* is marked A6 and A4). The 2nd respondent continued to maintain this position at the hearing before us, and learned DSG appearing for him consented to the quashing of A5 and A3 and also A6 and A4.

Thus, the 2nd respondent of his own volition admits to his having made a mistake and consents to its being rectified, and, it is of no small significance that even the owner of the premises (3rd respondent) agrees, when he says in paragraph 4 of his affidavits: "I agree with the averments contained in paragraphs 12 and 13 of the affidavit of the 2nd respondent". This, notwithstanding, learned President's Counsel for the 3rd respondent stoutly resisted the quashing of A5 and A3, and also A6 and A4, and strenuously contested these two appeals before us, insisting that they be dismissed, which submission, I have, of course, found to be without merit.

For the reasons aforesaid :

(i) I set aside the judgment of the Court of Appeal dated 30.4.96 and allow both appeals;

(ii) I issue a mandate in the nature of a Writ of Certiorari quashing the order of the Commissioner of National Housing (2nd respondent) divesting himself of the ownership of premises Nos. 41 2/2 and 43 2/2, Gregory' 's Road, Colombo 7, which order is published in, Government *Gazette* No. 365 of 30.8.85 (marked A6 and A4) respectively, and

(iii) I direct the 2nd respondent to communicate to each of the appellants forthwith, his decision to divest (in respect of premises Nos. 41 2/2 and 43 2/2, Gregory's Road, Colombo 7) to enable the appellants to appeal to the Board of Review in terms of section 39 of the Law, if they so desire.

The appellants in both appeals will be entitled to their costs payable by the 3rd respondent.

DHEERARATNE, J. – I agree.

GUNAWARDANA, J. – I agree.

Appeals allowed; certiorari issued.