

MOHAMED ISMAIL AND TWO OTHERS
v.
HUSSAIN AND OTHERS

SUPREME COURT.

BANDARANAYAKE J.

AMERASINGHE J.

DHEERARATNE J.

S. C. APPEAL NO. 29/89.

C. A. (L. A.) S. C. APPLICATION NO 20/79.

S. C. APPLICATION NO. 754/77.

JANUARY 01, 1992.

Ceiling of Housing Property Law No. 1 of 1973 – Vesting Order – Dominant character of the premises – Is it a flat or house or residence or business premises in a commercial area ? Natural Justice – Definition of house – Section 47 of the Ceiling on Housing Property Law No. 1 of 1973.

Of the premises, the subject matter of the suit, 3970 square feet were used for residence, while 290 square feet were used as a tea kiosk. Several generations of the appellant's family had been residing in the premises since 1930. Six of the eight rooms were used as living accommodation. While two rooms were used for running a tea kiosk. There was also a living room, toilet and Kitchen. These premises were situated in Old Moor Street, Pettah, a declared commercial area.

Held :

1. All the attributes of residential premises existed at the time of the vesting. Although Old Moor Street admittedly is a commercial area, it does not follow that every building previously used as a residence has changed its character.

2. In terms of s. 47 of Cap. 339 a house means "an independent living unit constructed mainly or solely for residential purposes and having a separate access and through which unit access cannot be had to any other living accommodation". Sub-sections 1 and 2 to section 47 set out 2 exceptions. Sub-section 2 provides that the aforesaid definition shall not include "a house used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of ten years prior to 1st March 1972." As the predominant use to which these premises were put was as a residence for the appellant and her family and continued to be so and were not premises mainly or solely used for some other purpose, the provisions of sub-section 2 will not apply.

3. Although the respondent complains that he was informed of the vesting order only after it was made, the respondent had gone before the Board of Review who sent the case back to the Commissioner who held an inquiry. There was no material prejudice caused to the respondent and the matter was not raised in the Court of Appeal. The respondent was not aggrieved by order of Court of Appeal. (which quashed the vesting).

APPEAL from the judgment of the Court of Appeal.

H. L. de Silva, P. C. with N. H. Musafar for 3rd respondent-appellant.

A. A. M. Marleen for petitioner-respondent

W. S. Marsoof, Senior State Counsel with *Mrs. Wanasundera*, State Counsel for 1st and 2nd respondents.

Cur. adv. vult.

BANDARANAYAKE J.

This appeal arises from a judgment of the Court of Appeal which dealt with an application for a writ of certiorari and/or mandamus made to it by the petitioner/respondent to quash a vesting order made by the Minister of Housing on 27.7.76 under section 17 (1) of the Ceiling on Housing Property Law No. 1 of 1973. The ground on which a writ to quash the vesting order was sought was that the property in question was not premises in respect of which a vesting order

could have been made in that it was not a house or flat or residential premises which could be vested under the said law but that this property constituted 'business premises' situated in a commercial area in which business was carried on and therefore not amenable to an order of vesting by the Commissioner of National Housing.

The Court of Appeal as far back as 2.2.79 took the view that the premises were not residential premises within the meaning of Law No. 1 of 1973 aforesaid and allowed the application of the petitioner respondent and quashed the order made by the Minister published in Government Gazette No. 223/10 of 8.10.1976 communicated by letter dated 30.11.76 and also directed the 1st and 2nd respondents to divest the property. To arrive at this conclusion the Court of Appeal observed that the premises have been licensed as a tea boutique. State Counsel had also submitted that in the opinion of the Attorney General the vesting was not in order in as much as the premises were business premises and not residential premises.

An application for leave to appeal from the aforesaid order was made to the Court of Appeal on 15.2.79. The application had been made by the 3rd respondent/petitioner who died subsequently. The present petitioners were substituted in the room of the deceased 3rd Respondent and the Court of Appeal, treating the following as substantial questions of law, granted leave to appeal to the Supreme Court, to wit : 1 (a) whether in respect of premises which are in extent 3970 sq : ft : which are mainly used for residential purposes, the use of two rooms in extent 290 sq : ft : as a tea kiosk has the effect of converting the entirety of the premises into business premises for the purpose of excluding the operation of law No. 1 of 1973 ; or whether, notwithstanding such user, the premises continue as a 'house' as defined in law No. 1 of 1973; (b) whether in the face of the uncontradicted material placed by the appellants, it was open to the Court of Appeal to come to a finding that the premises, to wit: No : 104 Old Moor Street were not residential premises as a ground for quashing the vesting order made by the Minister of Housing and Construction and published in Gazette Extraordinary No. 233 of B/10/76.

The Court of Appeal also granted leave on a further question whether the said vesting order should be quashed by a writ of certiorari because it was made pursuant to an enquiry held contrary to the principles of natural justice and/or whether the owner was denied an opportunity to appeal against the decision of the Commissioner of National Housing to the Board of Review.

Learned Presidents Counsel for the Appellant submitted that the said judgement of the Court of Appeal dated 2/2/79 had been delivered without a proper consideration of the applicable law. The question whether the premises in question constituted a 'house' within the purview of the Ceiling on Housing Property Law No. 1 of 1973 has to be determined with reference to the definition in Section 47 of that law. There was, it was submitted, a mass of evidence relevant to this matter but ignored by the Court of Appeal which failure constituted a substantial error of law entitling the appellants to have the judgment of the Court set aside and the Ministers vesting order restored. Counsel pointed to the following facts in order to show that a substantial part of the premises was used as a residence :

(a) that the applicant has been living in these premises since 1930; the said premises No. 104 Old Moor St: was assessed as a house from 1941 to 1952. Certified extracts from the Colombo Municipal Council registers have been produced in evidence as 3R28 and 3R29 in support ;

(b) the tenant's (3rd Respondent) Mrs T. P. Mohommed's children and grand children were born in this house. Birth certificates 3R6 to 3R13 support this ;

(c) that the tenant's family including her children and grand children continue to live in this house. Householders lists for 1958, 1960, 1971 and 1973 – (ie) 3R–52, 53, 54, 55 have been produced in support ;

(d) Likewise, Electoral registers for the years 1952 and 1954 to 1973 marked 3R16 and 3R 17 to 27 have been tendered to prove residence ;

(e) that this house consists of 9 rooms 6 of which are bedrooms and a sitting room, a kitchen and a bathroom. The entire premises take up an area of 3970 sq. ft. whereas the two front rooms which were used as a tea kiosk comprised only 190 sq. ft.

(f) the said 2 front rooms were used as a tea kiosk and licensed as such with a license fee of Rs. 25/- from the year 1951 to 1975. Vide register of licenses 3R37 (1951 – 1973), 3R38 (1974–75) whilst the family lived in the rest of the house. (These documents were objected to as having been filed without the permission of Court). These 2 rooms were not licensed as a eating house as suggested by the respondent. – (vide 3R39)

(g) that the Electricity Board charged power consumption to the whole premises at the domestic rate ;

(h) there was also filed Plan 3R14 (of the premises) and suveyer's report 3R14 (a) made by K. Thirunamakarasu licensed surveyor on 1979/78 (documents objected to for the aforesaid reasons). It was the submission of Mr. de Silva that the evidence clearly showed that the premises comprised a house within the definition as its dominant use was for the purpose of residence and not business. The premises were thus validly vested after due enquiry.

It was contended on behalf of the respondents that the respondent had become owner of the premises on Deed 3571 dated 18/9/73 attested by T. Chelvadurai NP. An officer of the National Housing Department informed the respondent on 3/5/76 when respondent presented himself for an enquiry that since the premises had been bought by the respondent over the head of the tenant the premises will be vested in the Commissioner and sold to the tenant. That, it was submitted was the reason for the vesting, and not upon evidence that these were residential premises. The first time that plan 3R14 and report 3R 14 (a) and the licencing register were put in evidence was before the Court (without permission first had and obtained) and that these documents were not before the Commissioner at time of making of decision to vest the premises as aforesaid. The Commissioner did not go into the question whether these were business premises or not. In any event the plan and suveyor's report were prepared at the behest of the tenant and cannot be regarded as final and conclusive evidence of the facts as the respondent has had no access to these premises to inspect and contradict their accuracy. Again, 3R28-31 and 37 - 39 show that from 1953 to 1975, a period of 20 years prior to the coming into force of the Ceiling on Housing property law, the premises have been used even partially for a commercial purpose. The premises is situate in an area declared a commercial area in the Pettah. As at present, the premises have been divested as directed by the Court of Appeal in 1979.

It is observed that the Court of Appeal order dated 2.2.79 quashing the vesting order has been made merely for the reason that State counsel has submitted that he cannot support the vesting and the premises had been licensed as a tea boutique and house and not

upon a consideration of all the available evidence, (eg:) that from 1941–51 it had been described only as a house.

This brings me to the question as to what was the dominant character of the premises at the relevant time. This aspect of the case has not been considered by the Appeal Court at all. The documents 3R14 and 3R14 (a) which in the circumstances ought to have been admitted in the interests of justice, clearly show that only the two front rooms of a much larger house have been used as a tea boutique probably due to economic necessity. The said plan and report are thus supported by the Council registers, to wit ; tea boutique and house. The respondents could have sought the assistance of Court to verify the accuracy of the plan and report. They have not chosen to do so. They have neither objected to the admission of those documents or taken any other step. No commission has been taken to prepare another plan. The affidavit and other documents tendered to the Court such as householders lists etc : show that there were several generations of this family living in these premises since 1930. This family continues to live there. Six of the eight rooms were used as living accommodation at the relevant time. The other two rooms were used as a tea kiosk. There was also a living room, toilet and kitchen. Thus all the attributes of residential premises existed at time of vesting. Although Old Moor Street admittedly is a commercial area it does not follow that every building previously used as a residence has changed its character.

The statutory definition of 'house' contained in section 17 of Cap. 339 describes it as " meaning an independent living unit..... constructed mainly or solely for residential purposes, and having a separate access and through which unit access cannot be had to any other living accommodation. " An examination of the surveyors plan and report taken together with the Appeallants affidavit shows that these premises satisfies the above definition in all respects. There are 2 exceptions provided by the law to the said definition. Section 47 sub section (1) has no relevance to the present issue. Sub section (2) stipulates that the aforesaid definition shall not include " a house used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of ten years prior to 1st March 1972 ". Respondent's Counsel relied on this sub-section which is in the nature of a proviso to section 47 and pointed to the Assessment register which records the premises as tea boutique and house from

1952 to 1975 and submitted that as at least part of these premises had been put to commercial use for over ten years prior to the relevant date it should be considered as business premises to which the proviso applied and therefore not amenable to an order of vesting in terms of section 17 (1).

I am satisfied on all the evidence that the predominant use to which these premises were put was as residence for the appellant and her family and continued to be so and was not premises mainly or solely used for some other purpose so as to attract the provisions of sub-section (2) aforesaid. This finding answers the first two questions posed by the Court of Appeal in 1991. Section 47 (2) thus has no application to the facts of this case. It was not open to the Court of Appeal to have come to a finding that these premises were not residential premises.

That finding drawn from the primary evidence was perverse. Although the respondent complains that he was informed of the vesting order only after it was made, the respondent has gone before the Board of Review who sent the case back to the Commissioner who held an enquiry. There has therefore been no material prejudice caused to the respondent. Nor has the respondent raised this matter in the Court of Appeal. The respondent was not aggrieved by the order of the Court of Appeal. The third question raised by the Court of Appeal must therefore be answered in the negative.

The appeal is allowed. The judgement of the Court of Appeal dated 2nd February 1979 is set aside. The direction given by that Court to the 1st and 2nd respondents dated 2/2/79 to divest the property vested is set aside. As the property has been divested since, the 1st and 2nd respondents are directed to vest the property in the Commissioner of National Housing, the Petitioner-Respondent will pay costs in both Courts.

AMERASINGHE J. – I agree.

DHEERARATNE J. – I agree.

Appeal allowed.