

EDMOND
v.
D. S. FERNANDO

SUPREME COURT
BANDARANAYAKE, J.
PERERA, J.
WIJETUNGA, J.
S.C. APPEAL NO. 34/95
C.A. SPL. L.A. NO. 404/94
C.A. APPLICATION NO. 746/88.
JULY 10, 1995.

Landlord and Tenant - Ceiling on Housing Property Law, Section 13, Section 39(3), Section 14(1) (c) and Section 17 - Interpretation Ordinance, Section 22 - Finality of determination of Board of Review.

The respondent in his capacity as the tenant of the premises in suit made an application to purchase the said premises. The Commissioner of National Housing after inquiry dismissed the respondent's application on grounds of equity. The respondent then filed an appeal to the Board of Review which set aside the order of the Commissioner and allowed the respondent's appeal.

The Appellant who is the present owner of the premises then sought to have the order of the Board of Review quashed by way of a Writ of Certiorari in the Court of Appeal.

The Court of Appeal held that the determination of the Board of Review was final and that the provisions of Section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended constituted a bar to the issue of a Writ of Certiorari.

Held:

(1) Section 39(3) of the Ceiling on Housing Property Law specifically provides that a determination made by the Board of Review "shall not be called in question in any court."

(2) Therefore the question arises as to whether even if the determination of the Board of Review contained such an error of law it was open to the Court of Appeal to act under the first proviso to section 22 of the Interpretation Ordinance

and issue a Writ of certiorari in this case to quash the determination of the Board of review, for such an error of law.

(3) The Court of Appeal could have granted the Writ only if it was permissible for that court to act under the first proviso to Section 22 of the Interpretation Ordinance.

(4) On an examination of the statute itself there does not appear to be any mandatory provision of law which is a condition precedent to making the determination in question by the Board of Review under Section 39 of the said Law.

(5) The Court of Appeal has rightly taken the view that it was barred by the provisions of section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended from issuing a Writ of certiorari to quash the determination of the Board of Review in the present case.

Cases referred to:

1. *James v. Board of Review (Paddy Lands Act)* [1978/79] 2 Sri L.R. 123.
2. *Mohideen v. Gunawardena* [1986] (2) Colombo Appellate Law Reports at page 487.

Appeal from judgment of Court of Appeal.

T. B. Dillimuni with *M. Jayawardena* for appellant.

Sunil F. A. Cooray with *A. K. Mahakumarage* and *C. Liyanage* for respondent.

Cur. adv. vult.

January 17, 1995.

PERERA, J.

The appellant respondent/respondent (hereinafter referred to as the respondent), in his capacity as the tenant of premises situated at 16th Mile Post, Colombo Road, Seeduwa made an application under S. 13 of the Ceiling on Housing Property Law to the Commissioner of National Housing to purchase the said premises. The Commissioner after inquiry dismissed the respondent's application on grounds of equity. The respondent then filed an appeal against this order of

dismissal to the Board of Review constituted under the same statute. The Board of Review by its order dated 31st March 1988 set aside the order of the Commissioner of National Housing and allowed the respondent's appeal.

The respondent petitioner/petitioner appellant (hereinafter referred to as the appellant) who is the present owner of the said premises then sought to have the order of the Board of Review quashed by way of a Writ of Certiorari in the Court of Appeal.

The Court of Appeal by its order dated 7th November 1994 affirmed the Order of the Board of Review and dismissed the appellant's application with costs. The Court also held that the determination of the Board of Review was final and that the provisions of Section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended constituted a bar to the issue of a Writ of Certiorari.

The present appeal is against this order of the Court of Appeal dated 7th November 1994.

The facts of the case are briefly as follows:

On or about the 7th of May 1973 the respondent made an application to the Commissioner of National Housing for the purchase of the house in question of which he claimed he was the tenant. In this application he declared the name of the owner of the premises in suit as one Gladys Senanayake.

At the inquiry held into this application by the Commissioner of National Housing, Gladys Senanayake stated that she was no more the owner of these premises as she had transferred this property to one Alice Margaret Fernando.

The respondent had also on or about 15.8.73 made an application to the Rent Board of Seeduwa, seeking permission to effect certain repairs to the said house and also sought a determination of the authorized rent of the said premises. At the inquiry before the Rent

Board, Gladys Senanayake once again by her representative informed the Board that she had sold the premises in question to Alice Margaret Fernando.

The respondent thereupon withdrew the said application and on 31.8.73 filed a fresh application before the Rent Board naming Alice Margaret Fernando as the respondent. At this inquiry Alice Margaret Fernando who was present accepted the respondent to the present Appeal as the tenant of the said premises. The Rent Board accordingly made a determination that the authorized rent of the premises as being Rs. 45.40 per month.

Thereafter on 31.12.83 the respondent made a second application to the Commissioner of National Housing to purchase the said house and named the appellant as the respondent as he was the owner of this property at that time. The Commissioner after inquiring into this application made order refusing the application to vest the said house on the ground of equity.

The respondent then filed an appeal against this order to the Board of Review which after due inquiry reversed the findings of the Commissioner and held that the premises in question have been purchased by the present appellant over the head of the tenant. The Board also held that as the standard rent of the premises was below Rs. 100/-, the owner was not entitled to withhold his consent to the vesting in terms of the provisions of Section 14(1) (c) read with Section 13 of the Ceiling on Housing Property Law as the ownership of the house was transferred to him while the respondent (tenant) was in occupation.

It is common ground that the respondent came into occupation of the premises which is the subject matter of this appeal in 1967 under one Gladys Senanayake who was both the landlord and owner of the said premises. Gladys Senanayake by Deed No. 3529 dated 18.2.72 transferred the said premises on which the house in question is situated to Malkanthi Senanayake who in turn transferred the same by Deed No. 47417 dated 25.11.72 to the present appellant. According to the appellant the consideration of a sum of Rs. 7,500/-

for the purchase of this house was furnished by his mother Alice Margaret Fernando and she was placed in possession of the said premises. There is therefore no dispute between the parties on the matters set out above.

On behalf of the appellant, Counsel very strongly urged that the Court of Appeal had erred in law in affirming the order of the Board of Review in this case and invited this Court to set aside the judgment and Order of the Court of Appeal dated 7.11.94. Counsel submitted that both the Ceiling on Housing Property Board of Review and the Court of Appeal have failed to consider and review the ground of equity which was the sole basis upon which the Commissioner of National Housing had decided not to recommend the vesting of this house under the provisions of Section 13 read with Section 17 of the Ceiling on Housing Property Law. Counsel also contended that the Court of Appeal had erred in holding that the determination of the Board of Review was final, in view of the provision of Section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended and thus operated as a bar to an application for a Writ of Certiorari in the present case.

In support of his first submission Counsel invited the attention of this Court to the finding of the Commissioner of National Housing which has been produced marked "A". According to this order the Commissioner has held that notwithstanding the fact that this house may be vested in the Commissioner under Section 13 of the Ceiling on Housing Property Law, as it has been purchased over the head of the tenant, nevertheless he would not recommend such vesting on the ground of equity.

Counsel's main complaint was that the Board of Review in its order marked "B" based its decision on the fact that the appellant had purchased this house over the head of the tenant. The Board had failed altogether to consider the more important aspect of the decision of the Commissioner namely the ground of equity. This he submitted was the sole consideration upon which the Commissioner came to his finding. Counsel urged that the Commissioner rightly held that it was not equitable to vest this house in the particular

circumstances of this case. It was indeed a legal duty on the part of the Commissioner to consider the equities before making a recommendation to vest the house under the provisions of Section 17 of the Ceiling on Housing Property Law.

In view of the strong submission made by Counsel on this matter, I have perused the order of the Board of Review which has been produced marked "B" and it appears to be quite clear that it would not be correct to say that the Board of Review has failed altogether to give its mind to the ground of equity. I may in particular refer to the following passages contained in the Order of the Board of Review on this specific matter.

- a) "The Commissioner held an inquiry and dismissed the appellant's application on the grounds of equity. This appeal is against the said decision of the Commissioner of National Housing.
- b) Counsel (for the appellant) also stated that this is the only house of his client and the Commissioner has come to a correct conclusion by not recommending to vest the premises in suit and therefore requested this Board to dismiss this appeal.
- c) We have considered the submissions and documents placed before us by Counsel carefully."

It was Counsel's contention that the issue of equity was highlighted by his client's Counsel at the hearing before the Board of Review. Although there is some substance in the submission of Counsel that the Board in its order has placed greater emphasis on the fact that the appellant had purchased this house over the head of the tenant, I am unable to agree with the submission that the Board has altogether failed to take cognizance of the ground of equity upon which the Commissioner's decision was based.

I would now proceed to consider the second submission urged by Counsel in the present appeal, viz., that the Court of Appeal was in error when it held that the determination of the Board of Review was final and that the provisions of Section 39(3) of the Ceiling on

Housing Property Law read with Section 22 of the Interpretation Ordinance as amended constituted a bar to the issue of a Writ of Certiorari in this case. In other words Counsel's contention was that the Court of Appeal had overlooked an error of law contained in the determination of the Board of Review namely that the equitable consideration on which the decision of the Commissioner of National Housing not to recommend vesting was based, had not been considered by the Board of Review when it made its determination in appeal. The Court of Appeal had therefore erred in refusing to issue a Writ of Certiorari in this case. I have already expressed my view on this question in the earlier part of this judgment. Be that as it may – I would now consider the legal validity of this argument. Section 39(3) of the Ceiling on Housing Property Law specifically provides that a determination made by the Board of Review “shall not be called in question in any Court”.

Therefore the question arises as to whether even if the determination of the Board of Review contained such an error of law it was open to the Court of Appeal to act under the first proviso to Section 22 of the Interpretation Ordinance and issue a Writ of Certiorari in this case to quash the determination of the Board of Review, for such an error of law.

The Court of Appeal could have granted the writ only if it was permissible for that Court to act under the first proviso to Section 22 of the Interpretation Ordinance which is as follows:

“Provided however that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters and the following matters only. That is to say:

- a) Where such determination ... is *ex facie* not within the power conferred on such person, authority or tribunal making or issuing such determination and

- b) – where such person, authority or tribunal upon whom the power to make or issue such determination is conferred, is bound to conform to the rules of natural justice,
- c) – or where compliance with any mandatory provision of law is a condition precedent to the making or issuing of any such determination and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provision of such law.”

It was not the contention of Appellant's Counsel that the determination of the Board of Review which was sought to be quashed was “*ex facie*” not within the power conferred on the Board of Review under Section 39 of the said Law nor did the appellant contend that the Board of Review failed to conform to the rules of natural justice.

The case of the appellant was that compliance with a mandatory provision of law was a condition precedent to the making of the said determination by the Board of Review and that the Board of Review had failed to comply with such mandatory provision of law. Counsel for the appellant however did not specify in the course of his argument the mandatory provision of law which was a condition precedent to the making of the determination by the Board of Review. On an examination of the statute itself there does not appear to be any mandatory provision of law which is a condition precedent to making the determination in question by the Board of Review under Section 39 of the said law. I hold therefore that the Court of Appeal has rightly taken the view that it was barred by the provisions of Section 39(3) of the Ceiling on Housing Property Law read with Section 22 of the Interpretation Ordinance as amended from issuing a Writ of Certiorari to quash the determination of the Board of Review in the present case.

I find support for this view in *James v. Board of Review (Paddy Lands Act)*⁽¹⁾ and *Mohideen v. Gunawardena*.⁽²⁾

I therefore affirm the judgment of the Court of Appeal in this case dated 7.11.94.

The appeal is dismissed with costs.

BANDARANAYAKE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.
