

ABEYSEKERA
V.
WIJETUNGE AND OTHERS

SUPREME COURT
SAMARAKOON, C.J., COLIN THOME, J., AND SOZA,
SC NO. 12/82;
SC SPL. LA 10/81;
CA 1578/79
OCTOBER 25, 1982

Ceiling on Housing Property Law No. 1 of 1973, Sections 2(1), 11, 16, 47 - Vesting of surplus house - Test to determine what a house is. Appeal to Board of Review - Absence of determination or decision of Commissioner - Does appeal lie to Board of Review?

The respondent owned six houses on Udupila Road and 5 other premises bearing the following assessment Nos. viz. C 280/1, C 280/2, C 280/3 and C 280/4, Makola South, stated to be business premises.

The respondent's family was made up of the respondent, his wife and 5 minor children and therefore the permitted number of houses was seven in terms of Section 2(1) of the Ceiling on Housing Property Law.

The respondent did not make any declaration under Section 8 as he owned only 6 houses as permitted under the law. The Commissioner of National Housing (CNH) informed the respondent that one house No. 294, Kehelpandura vested in him on 13.1.73 in terms of Sections 11 and 16.

On appeal to the Board of Review it was held that the respondent owned only the permitted number of houses and that CNH should divest the said premises. The CNH divested the house on 11.1.80. The petitioner-tenant applied to the Court of Appeal praying for a Writ of Certiorari quashing the order of the Board. The Court quashed the order and divesting order.

Held -

An objective test whether No. 294, Kehelpandura junction was an independent living unit constructed mainly or solely for residential purposes must be applied. On this test the premises were a wayside boutique constructed for the purpose of business. It was not a house within the meaning of Section 47.

2. In the absence of a decision or determination by the Commissioner, there was no right of appeal to the Board of Review and consequently the Board had

no jurisdiction to entertain an appeal. Thus the proceedings of the Board were void and the vesting order had no consequence in law.

APPEAL from the judgment of the Court of Appeal.

J.W. Subasinghe, S.A., with *K. Thevarajah* and *Miss E.M.S. Edirisinghe* for the 4th defendant-appellant.

J.C.T. Kotalawela for the 1st substituted-respondent.

Cur. adv. vult.

November 11, 1982

SAMARAKOON, C.J.

The Ceiling on Housing Property Law, No.1 of 1973 came into operation on the 13th January, 1973. On this date the 4th respondent-appellant owned eleven buildings. They comprised of six houses bearing assessment Nos. 242/6 and 242/4, Udupila Road and C 280/1, C 280/2, C 280/3, and C 280/4 Makola South. The other five premises are stated to be business premises bearing assessment Nos. 242/-2, 242/3 and 242/1, Udupila Road and C 280/5, Makola South and 294, Kehelpandura Junction, Udupila Road. The appellant was the father of five minor children and the family was therefore entitled to seven houses in terms of section 2(1) of the said Property Law. He states that he did not make a declaration in terms of section 8 of the said Law for the reason that he owned only six houses and therefore owned no house in excess of the Law. He was, he states, not obliged to make a declaration in terms of section 8. By letter dated 30.6.1975 (marked X4) the 5th respondent informed the appellant that premises No.294, Kehelpandura Junction vested in him on the 13th January 1973 in terms of section 11 and section 16 of the Law. This letter refers to a declaration sent by the Appellant to the 5th respondent. There was in fact no such declaration and that is the reason why the space provided in the letter for the date of the declaration is left blank. The 5th respondent appears to have used and adapted a printed form meant for a different set of circumstances. The appellant appealed to the Board of Review in terms of section 39 of the Law against this contention of the 5th respondent. The Board held that the premises in question was a "house" within the Law and that it was not owned in excess of the permitted number of houses in view of the fact that the appellant and his family were entitled to seven houses. The Board therefore ordered the 5th respondent to divest the said premises No. 294, Kehelpandura Junction. This he purported to do by Order dated 11.01.1980 (marked X7). The petitioner-respondent who claimed to be the tenant of the

premises, then came into the picture. He filed an application in the Court of Appeal praying for a Writ of Certiorari quashing the Order of the Board of Review. The Court of Appeal by its Order delivered on 6.2.1981 quashed both the Order of the Board and the divesting Order X7 of the 5th Respondent. Hence this appeal to this Court.

The first question to be decided is whether premises No. 294, Kehelpandura Junction, Udupila Road, is a house within the meaning of section 47 of the Property Law. It defines "House" thus -

"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 other 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 1, 1972."

The test is whether this is an "independent living unit", "constructed mainly or solely for residential purposes". The petitioner-respondent states that for very many years prior to the 13th January, 1973, these premises had been occupied as a residence by him and before him by his parents and grand-parents. The test must be an objective one and not, as contended by the petitioner-respondent (now represented by the 1st substituted respondent) a subjective one. Its construction and the purpose of the construction is what matters.

A description of the building has been given by witness K. J. W. Perera, Private Assessor, before the Board of Review. His description of the building is as follows:

"The front doors of the premises were plank doors about 6' broad. There were about 27 such planks which made up the front door. In the middle there was a pillar. There were two door frames about 12' x 10' and 12' x 6'. There were no doors fixed with hinges. The front door was a boutique type door. On entering the premises there is a hall about 6' broad and 26' long. About 3 planks of the front door were open and the other planks were closed at the time I went for the

inspection. There were no rooms inside the premises but there was a wooden partition partitioning the hall into two portions. The walls are of brick masonry. There is no lavatory to the premises. It was an attached temporary kitchen built out of wood and the roof was of cadjan. There were two small windows near the roof. These two windows were about 14' high quite near the roof and these windows had no panes."

This building has no rooms, no lavatory, and no doors. the entrance was provided with 27 planks each 6" in width, which type is common to wayside boutiques in this country. It is situated at the junction. It is clear to my mind that this was a typical wayside boutique constructed for the purpose of business. It is not a house within the meaning of section 47 of the Property Law, and therefore did not vest in the 5th respondent. The existence or absence of a declaration under the provisions of section 8 has little bearing on the question of vesting.

The events that followed unnecessarily complicated matters. The whole matter flew off at a tangent. The 5th respondent claimed it as vested property. He had no right to it. But there appears to have been some sort of inquiry by him followed by communciations dated 26.06.1975 and 30.06.1975 (X4). The appellant then appealed to the Board of Review in terms of the provisions of section 39 of the Property Law. There was no "decision or determination made by the Commissioner" under the provisions of the Law. Hence there was no right of appeal to the Board of Review. In the absence of such decision or determination the Board could not have entertained such appeal and therefore its proceedings and order were devoid of jurisdiction. The entire exercise from beginning to end was a futile one. I would therefore quash the Order of the Board and declare that the contention of the 5th respondent that it was vested property (X4) has no legal consequences whatsoever. Premises No. 294, Kehelpandura Junction, Udupila Road, did not vest in the 5th respondent in terms of the Ceiling on Housing Property Law.

The appellant will be entitled to costs of this appeal and the proceedings before the Court of Appeal.

COLIN-THOMÉ, J. - I agree.

SOZA, J. - I agree.

Appeal allowed.