

THE SUPERIOR ORDER REGULAR OF THE SOCIETY OF
JESUS IN THE DIOCESE OF TRINCOMALEE
v
TALAGUNE AND OTHERS

COURT OF APPEAL.
JAYASINGHE, J (P/CA).
SRIPAVAN, J.
CA 95/99.
CHP BRA 2480.
CNH CA/OC/516.
CH OC/12/81.
OCTOBER 4, 2002.
NOVEMBER 6, 28 2002.

Ceiling on Housing Property Law Sections 2(3), 8(4), 11(2), 39(3) – Constitution Article 140 – Finality Clause – House vested – Divested – Vested – Legality – Court of Appeal (Appellate Procedure) Rules 1990 – Objection to be taken at commencement of hearing – Legitimate expectation of a hearing.

C devised the premises in suit by her last will to the petitioner - a charitable trust. The 1st respondent was the tenant of the upper floor of the premises. C was in occupation of the ground floor. The 1st respondent made an application to purchase the entire premises. The 2nd respondent Commissioner vested

the entire premises in terms of section 8 (4) CHP Law. Against the said vesting, the petitioner sought a *writ of certiorari* in the Court of Appeal. At the hearing the Attorney-General informed Court, that the 2nd respondent Commissioner had revoked her decision to vest. The Writ application was withdrawn. The 2nd respondent Commissioner informed the 1st respondent that his application to purchase premises has been dismissed. The 1st respondent appealed to the Board of Review. While the appeal was pending the 2nd respondent informed the petitioner that the premises is vested in the Commissioner with effect from 13.3.84. Against this order the petitioner appealed to the Board of Review, which dismissed the same on the ground that there was no right of appeal.

The petitioner sought to quash the said order of the Board of Review.

An objection was taken that the petitioner has not complied with Rule 3 (1) and (2), that the order of the Board of Review is final and conclusive in terms of section 39 (3) of the CHP Law.

Held:

- (1) Where an objection is taken in terms of Rule 3 (1) it must be taken at the commencement of the hearing and the matter disposed of as a preliminary issue unless the Court thinks that such objection can be dealt with along with the merits.
- (2) Article 140 of the Constitution is broad enough to give the Court of Appeal authority to review even on grounds excluded by ouster clause. The Constitution vests in the Court of Appeal an unrestricted power to review administrative action in the exercise of its jurisdiction under Article 140, which being the supreme law would over rule any preclusive clause found in ordinary legislation.

Held further:

- (3) The Commissioner of National Housing is acting without any jurisdiction to vest the property under section 8 after the Attorney General appearing for him informed the Court of Appeal that the letter indicating that, it is vested, has been revoked; if the Commissioner formed the view it is a surplus house, having earlier revoked his decision, then he ought to have instituted an inquiry before the determination that it is a surplus house.

Per Nihal Jayasinghe, J (P/CA)

"When the Attorney-General informed the Court of Appeal that the Commissioner had revoked his earlier decision to vest, the petitioner is entitled to the belief that the matter has firmly been laid to rest; if the Commissioner had chosen to reactivate the process of vesting, it was only legitimate that the petitioner expected that there would be "a hearing".

- (5) When a public authority promised to follow a certain procedure, it is in the interest of good administration that it would act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

APPLICATION for a writ of *certiorari/mandamus*.

Cases referred to:

1. *Kiriwanthe v Navaratne* 1990 2 Sri L.R. 393
2. *Peter Atapattu v People's Bank* 1997 1 Sri L.R. 208
3. *Re Westminster AI* 1986 AI 668
4. *Attorney-General of Hong Kong v Ng Yuen Shin* 1983 2 AI 629
5. *R v Liverpool Cpd exp. Liverpool Taxi Fleet Operators Association* 1972 2 QB 299

Romesh de Silva PC with *Hiran de Alwis* for petitioner.

P.A.D. Samarasekera PC with *A.R.Surendran, Arul Chelvaratnam and Safana Gul Begam* for 1st respondent.

Cur.adv.vult.

January 10. 2003

NIHAL JAYASINGHE, J. (P/CA)

The Petitioner is a Charitable Trust. An elderly lady one Mrs. Crowther devised the premises in suit No. 53/7, Gregory's Road, Colombo 7 by her Last Will to the petitioner abovenamed. Mrs. Crowther died on or about 11.03.1984. Testamentary proceedings were thereafter instituted in the District Court of Colombo and Probate issued on 03.07.1985. The 1st respondent was the tenant of the upper floor of the premises and the said Mrs. Crowther was in occupation of the ground floor upto her death. After the death of the said Mrs. Crowther, the executor alleged that the 1st respondent wrongfully trespassed into a portion of the ground floor of the premises and the executor accordingly filed a *rei vindicatio* action for a declaration that the petitioner is the owner of the premises; that the 1st respondent is in unlawful occupation of the premises and obtained judgment for the ejectment of the 1st respondent. The 1st respondent appealed against the judgment to the Court of Appeal, which was dismissed. An application for the special leave to the Supreme Court was also refused. Writ was issued against the 1st respondent and the petitioner was placed in possession of the ground floor of the premises. The petitioner is now in occupation of the said premises.

The 1st respondent thereafter made an application to the 2nd respondent to purchase the entire premises. Petitioner contends that the 1st respondent's application is misconceived in that he was not the tenant of the entire premises. The 2nd respondent however by 'A12' informed the petitioner that he has vested the premises in terms of Section 8(4) of the Ceiling of Housing Property Law. Against the said vesting the petitioner prayed for a *writ of certiorari* in the Court of Appeal. At the hearing the Attorney-General informed the Court that the 2nd respondent had revoked 'A12' and the petitioner accordingly withdrew its application for writ. Thereafter the 2nd respondent informed the 1st respondent that his application to purchase the premises has been dismissed. Against this decision the 1st respondent appealed to the Ceiling on Housing and Property Board of Review. While the appeal was pending the 2nd respondent by his letter dated 22.04.1993 informed the petitioner that the premises is vested in the Commissioner with effect from 13.03.1984 and the said decision was accordingly gazetted. Against the said order of the 2nd respondent, the petitioner appealed to the Board of Review. The Board of Review dismissed the petition of appeal on 23.01.1999 on the ground that there has been no decision or determination made by the Commissioner of National Housing and therefore there was no right of appeal (vide A27). It is against the order of the Board of Review that the petitioner is seeking relief from this Court.

The learned President's Counsel for the Petitioner submitted that in terms of Section 8(4) a house can be vested only if,

"any person who has without reasonable cause failed to send a declaration within the period referred to in Sub Section (1) or Sub Section (2) of Section 8 or

has made an incorrect declaration.....".

and that the Commissioner of National Housing was accordingly obliged to inquire whether the petitioners have in fact sent a declaration; whether there was a legal obligation to send such declaration; whether the failure to send such declaration was without reasonable cause. Counsel then submitted that the Commissioner was also obliged to determine whether the house is an excess house in terms of Section 2(3); whether in terms of Section 8 the petitioner could retain the house; that the house has been vested without proper inquiry. The learned

President's Counsel also submitted that once the Commissioner has made a decision not to vest the house he has no right in law to change his own decision.

It is also the submission of the learned President's Counsel for the petitioners that the Commissioner's decision to vest the house is *ex facie* wrong as he has not made a determination whether or not the house in question is an excess house. He has by 'A12' reversed his earlier decision while the appeal to the Board of Review is pending; that the Commissioner's decision is bad in law as the 1st respondent has no *locus standi* to make an application for the purchase of the premises as he is the tenant of a part of the said premises; That there is no determination as to the number of houses the petitioner is entitled to retain in Colombo.

Mr. Samarasekera, President's Counsel for the 1st respondent submitted that the petitioner is a body of persons whose entitlement to houses had been earlier determined by the Commissioner of National Housing and that it was under a legal and statutory duty to notify the Commissioner that it had acquired the ownership of an additional house in terms of Section 11(2). The learned President's Counsel submitted that the Commissioner by his letter dated 27.11.1990 inquired from the Petitioner details of the acquisition of the property in question, to which inquiry the petitioner failed and neglected to respond. Counsel submitted that the petitioner instead wrote to the Chairman, National Housing Development Authority who in turn suggested to the Commissioner to seek advise of the Attorney-General *re* the legal position as to whether the titled devolved on the Petitioner upon the death of Mrs. Crowther or on the date of the executors conveyance. The Attorney-General has advised that the property was vested by the 2nd respondent.

The 1st respondent at the hearing raised two preliminary objections.

1. The petitioner has failed to comply with the imperative provisions of Rules 3.1 of the Court of Appeal (Appellate Procedure) Rules 1990 and as such the Petition is liable to be dismissed.
2. The order of the Ceiling on Housing Property Board of Review is final and conclusive in terms of Section 39 (3) of Ceiling on Housing Property Law and therefore the Petitioner is not entitled to assail the said order of the Board of Review in these proceedings.

As regards the first preliminary objection Mr. Romesh de Silva, P.C., submitted that the respondents are in fact estopped from taking of the objection in that the 1st respondent himself has forwarded documents 'R2' and 'R3' which are in the written submissions and submitted that in any event since the respondents themselves are relying on the documents filed by the petitioner, it is inequitable for the respondents to urge before this Court of the violation of Rule 3.1. The learned President's Counsel further submitted that Rule 3.1 is not mandatory and that even if the petitioner failed to comply with Rule 3.1 a discretion is vested with the Court to consider the documents relied upon by the petitioner and that there is no automatic dismissal provided by law. The learned President's Council submitted that in *Kiriwanthe v Navaratne*⁽¹⁾ Court had held that mere technicalities should not stand in the way of Court in arriving at a just finding. In that case the Court has held where there is a discretion the Court would exercise that discretion judicially and not technically; that in exercising discretion the Court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain discipline of the law. *Kiriwanthe v Navaratne (supra)* had further held that the weight of authority thus favours the view that while all these rules must be complied with the law does not require or permit an automatic dismissal.

I have considered the submissions of Counsel carefully. I am of the view that where objection is taken in terms of Rule 3.1 it must be taken at the commencement of the hearing and the matter disposed as a preliminary issue unless the Court thinks that such objection can be dealt with along with the merits. I am of the view that an objection taken at the end of the hearing in terms of Rule 3.1, is sustained, then the Court would have unnecessarily protracted the proceedings considering the other matters when the application could have been dismissed in *limine*. Court ought to refuse to consider any objection under Rule 3.1 if taken after the merits of the case are gone into, as it was done in this case.

As regards the second objection the Supreme Court in *Peter Atapattu v People's Bank*⁽²⁾ had held that the language of Article 140 of the Constitution was broad enough to give the Court of Appeal authority to review even on the grounds excluded by ouster clause. It is the view of this Court that the Constitution vests in this Court an unrestricted power to review administrative action in the exercise of its jurisdiction under Article 140, which being the Supreme Law would override any

preclusive clause found in ordinary legislation. Both preliminary objections are accordingly overruled.

I have also considered the validity of 'A2' the gazette notification vesting the premises in question under 8 (4) of the Ceiling on Housing Property Law. However according to 'A21' the Commissioner of National Housing has written to the Petitioner informing that the premises has been determined as a surplus house under Section 2 (3) of Ceiling on Housing Property Law and that it will be vested in the Commissioner of National Housing with effect from 13.03.1984. It is my view that the Commissioner of National Housing is clearly without jurisdiction to vest the property in question under Section 8 (4) after the Attorney-General appearing for the Commissioner of National Housing having informed the Court of Appeal that the letter of 04.09.1986 has been revoked. Nevertheless the 2nd Respondent has purported to issue 'A22' that the premises has vested under section 8 (4). If the Commissioner formed the view in terms of 'A21' that the premises in question is a surplus house having earlier revoked his decision then he ought to have instituted an inquiry before 'A21' is issued. Professor Wade in his book "*Administrative Law*" Seventh Edition at page 494 states thus:

"The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation....."

The classic situation in which principles of natural justice apply is where some legal right, liberty or interest is affected. But good administration demands their observation where the citizen may legitimately expect to be treated fairly. A doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.

In *Re Westminster AC*⁽³⁾ Lord Diplock stated that the decision must affect some other person either;

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
- (b) by depriving him of some benefit or advantage which either (1) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational

grounds for withdrawing it on which he has been given an opportunity to comment; or (11) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn,

In *Attorney-General of Hong Kong v Ng Yuen Shiu*⁽⁴⁾ Court held that:

"When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty".

A similar view was taken in *R. v Liverpool Cpn - exp. Liverpool Taxi Fleet Operators Association*⁽⁵⁾.

When the Attorney-General informed the Court of Appeal that 2nd respondent had revoked 'A12' the petitioner is entitled to the belief that the matter has finally been laid to rest. If the 2nd respondent had chosen to reactivate the process of vesting it was only legitimate that the petitioners expected that there would be a hearing.

If it was the position of the 2nd respondent that the premises is vested under 8 (4) he must be satisfied that the petitioner acted in violation of 8 (4); that he could do only after inquiry. In any event both 'A21' and 'A22' are bad in law and cannot be sustained. Therefore the C.H.P. Board of Review was in error when it dismissed the appeal of the petitioner on the basis that there was no determination made by the Commissioner. I accordingly grant petitioner the relief as prayed for in paragraphs (a) and (b) of the prayer to the petition. The 1st and 2nd respondents shall pay the Petitioner Rs. 15,000/- each as costs.

SRIPAVAN, J. – I agree.

Application allowed.