IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Buddhisarani Shiroma Vithanage,
No. 5, Pelawatta Road,
(correctly Pelawatta Lane),
Nugegoda.
Petitioner

CASE NO: CA/WRIT/347/2015

Vs.

The Commissioner of National Housing,
Department of National Housing,
2nd Floor, "Sethsiripaya",
Battaramulla.
And 4 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: H. Withanachchi with Shantha Karunadhara for the Petitioner.
Maithree Amarasinghe, S.C., for the 1st Respondent.
Ranjan Suwandaratne, P.C., with Ranjith Ranadheera for the 2nd, 3rd and 5th Respondents.

Decided on: 13.03.2019

Samayawardhena, J.

The house No. 5/1, Pelawatta Road, Nugegoda was vested in the Commissioner of National Housing by order published in the Gazette marked 1R1 dated 16.08.1985. This was done by the 1st respondent Commissioner of National Housing in terms of section 8(4) of the Ceiling on Housing Property Law, No.1 of 1973, as amended.

At the time of vesting, Weerasekera was the tenant of the house under Peiris Appuhamy. Both Peiris Appuhamy and Weerasekera are now dead. The petitioner is a successor in title of Peiris Appuhamy, and the 2nd-5th respondents are the heirs of Weerasekera.

Adjoining to the said house No. 5/1 is the house No. 5 where petitioner is living as the prominent owner. As seen from the Plan P1 made in 1960 and the Preliminary Plan P9 made in 2007 for a partition action, both the premises—No. 5 and No. 5/1—are situated in the same corpus.

After the death of Peiris Appuhamy, intestate, there are several co-owners to the land. Therefore, a partition action has been filed by the widow of Peiris Appuhamy to partition the larger land which included the abovementioned houses No. 5 and No. 5/1. As this partition action was filed after the house No. 5/1 was vested in the Commissioner of National Housing, the Commissioner of National Housing has also been made a party to it. That partition action has, as seen from P10, been dismissed without proceeding to trial, on a preliminary question of law, on 21.02.2013.

Thereafter the Commissioner of National Housing has, by conveyance marked P12 dated 02.07.2013, transferred to Weerasekara, the tenant, the house No. 5/1 together with the land in extent 20.34 Perches. The Commissioner has identified the aforesaid portion of land, as stated in the conveyance, by way of the Preliminary Plan P9 prepared for the abortive partition action.

It is this decision of the Commissioner in relation to the transfer of land, not the house, which is being canvassed by the petitioner in these proceedings.

Accordingly, the petitioner seeks to quash by way of writ of certiorari the decision of the Commissioner to adopt the Plan P9 to identify the land to be transferred together with the house, and to cancel by way of writ of mandamus the conveyance P12.

Section 16(1) of the Ceiling on Housing Property Law reads as follows:

"Where any house which is not a flat or a tenement is vested in the Commissioner under this Law, there shall also be vested in the Commissioner such extent of land and such rights as is or are in the opinion of the Commissioner reasonably appurtenant to the house."

It is common ground that before the Commissioner for National Housing decided the extent of land which is reasonably appurtenant to the house vested, the Commissioner did not hear the petitioner and the other co-owners of the land. It is important to remember that by Gazette Notification 1R1 only the

house No. 5/1 was vested with the Commissioner. No extent of land, appurtenant to the house, properly identified by way of a Plan, was vested with the Commissioner by it.

The determination of the extent of land reasonably appurtenant to the house is an important determination, which directly affects the rights of the co-owners of the land, particularly the petitioner who is living in the adjoining land of the same corpus as the prominent owner.

Under section 16(1), when the Commissioner forms an opinion with regard to the extent of land reasonably appurtenant to the house, he shall, in my view, give a hearing to the parties who would be affected by his determination. He cannot decide that important question affecting the proprietary rights of the true owners of the property arbitrarily or by giving a hearing only to the tenant—the prospective transferee.

The intention of this piece of legislation was not to give lands to the tenants, but to give houses. If only the house is given, as it is of no use, the legislature wanted to give an extent of land reasonably appurtenant to the house.

It is the contention of the learned State Counsel for the Commissioner of National Housing that the Preliminary Plan P9 prepared for the partition case was based on the old Plan P1 made in 1960, and therefore the Commissioner was not unreasonable when he formed the opinion in relation to the extent of land reasonably appurtenant to the house based on the said Preliminary Plan P9.

I do not think that the Commissioner shall take a mechanical approach in deciding the extent of land reasonably appurtenant to the house.

At the time the partition action was filed, only the house No. 5/1 was vested with the Commissioner of National Housing. The situation was the same when the partition action was dismissed on a preliminary question of law. Hence, in the partition action, the tenant Weerasekara or the Commissioner of National Housing, could not have, as of right, successfully claimed the entire Lot X in the Preliminary Plan P9. It is settled law that a tenant cannot claim prescriptive title to a property without first changing his character of possession.

When the Commissioner forms the opinion as to the extent of land reasonably appurtenant to the house, he shall, in my view, *inter* alia, consider the condition of the property at the time of his forming the opinion.

The 2nd, 3rd and 5th respondents have apprehended some fear on this matter and by paragraph 8 of their written submissions voluntarily given an explanation in advance regarding the access road to house No. 5/1 which is part of Lot X in the Preliminary Plan in the following manner:

> *The plan based on which the said conveyance marked P12 was prepared is plan No.2579 marked P9 and the sole access to the premises in question is the access from Palawatte Road over lot Z and the appurtenant land given up to lot Z and if lot Z is not given these respondents find it impossible to enter their own house as Cooray Road is a*

> *completely independent road nothing to do with the property in question and the said preliminary plan 2579 makes it clear that there is a clear boundary separating premises No.5/1 from the Cooray Road.*

This provides an example of the matters the Commissioner shall take into account when deciding the extent of land reasonably appurtenant to the house.

If I may make my own observations, in the old Plan made in 1960 marked P1, the northern boundary of the Lot where house No. 5/1 is situated is "*Property of D.J. Cooray*" and therefore the only access road to house No. 5/1 had been from Pelawatta Road in the south. But, when the Preliminary Plan P9 was prepared for the partition case in 2007, the northern boundary of the Lot where house No. 5/1 is situated is a road known as "*Cooray Place*". That is a relevant factor to be taken into account by the Commissioner in deciding the extent of land reasonably appurtenant to the house.

Learned counsel for the petitioner has drawn attention of this Court to section 20 of the Ceiling on Housing Property Law to state that the Commissioner has not followed the mandatory provisions of the Law in determining the question of the extent of land as is reasonably appurtenant to the house. In my view, section 20 is not applicable as it relates to "*Notice to persons entitled to make claims to the price payable in respect of any vested house*". In short, it relates to monetary claims in respect of houses vested. That matter has not been put in issue in this application. In this application, what has been put in issue is

the question of the extent of land as is reasonably appurtenant to the house.

Learned President's Counsel for the 2nd, 3rd and 5th respondents has raised two preliminary objections to the maintainability of this application. As it has been emphasized even in the written submissions, I must deal with them.

One relates to acquiescence. In paragraph 3(a) of the written submissions learned President's Counsel states that although the petitioner to this application was a party to the partition action, she never objected to the appurtenant land possessed by Weerasekara as depicted in the Preliminary Plan. I cannot understand the point of argument. In partition actions, parties do not ordinarily object to the Preliminary Plans prepared by Court Commissioners. Those Preliminary Plans represent the current status of the land to be partitioned in situ. The petitioner does not dispute the Preliminary Plan. But it does not mean that at the end of the trial, the Judge will partition the land as depicted in the Preliminary Plan. I reject that preliminary objection.

The second preliminary objection relates to laches. The learned President's Counsel states that conveyance P12 is dated 02.07.2013, but the petitioner came to Court on 02.09.2015, and therefore application shall be dismissed *in limine* due to delay. It is the position of the petitioner that she was not aware of the aforesaid conveyance until she complained to the police against Weerasekara for surveying the land without any authority. It is at that inquiry, Weerasekra has told the police

that he surveyed the land according to the conveyance P12 given by the Commissioner of National Housing. The petitioner has explained the delay.

This leads me to deal with another important matter, which vitiates the decision of the Commissioner of National Housing. After the Commissioner of National Housing took the impugned decision *ex parte*, it was incumbent on his part to communicate it to the persons adversely affected by it, especially the petitioner. According to section 39(1) of the Ceiling on Housing Property Law, "*Any person aggrieved by any decision or determination made by the Commissioner under this Law may, within one month of the date on which such determination is communicated to such person, appeal against such decision or determination to the Board (of Review), stating the grounds of such appeal.*" The Commissioner did not, before the execution of the conveyance, communicate the determination (to accept Lot X of the Preliminary Plan as the extent of land as is reasonably appurtenant to the house No. 5/1) to the petitioner or any of the co-owners to the land depriving them the opportunity to appeal to the Board of Review against that determination. This is a serious procedural flaw, which alone is sufficient to allow the application of the petitioner. Vide *Leelawathie v. Commissioner of National Housing [2004] 3 Sri LR 175, Muttiah v. Commissioner of National Housing [1995] 2 Sri LR 74*.

For the aforesaid reasons, I allow the application of the petitioner and grant reliefs as prayed for in paragraphs (a) and (c) of the prayer to the petition. Accordingly, I quash by certiorari the determination of the Commissioner of National

Housing to adopt the Plan marked P9 to decide singularly the extent of land reasonably appurtenant to house No. 5/1, and compel the Commissioner by mandamus to cancel the conveyance P12 which was executed based on the said determination.

There is a misconception that in judicial review, this Court cannot give directions to the authorities what to do and how to do. In *Wickremasighe v. Chandrananda de Silva, Secretary Ministry of Defence [2001] 2 Sri LR 333 at 353* Gunawardena J. held:

> *That justice is blind does not mean judges should not be clear sighted. Besides, as stated above as well under the judicial review procedure the court exercises a supervisory jurisdiction. A court exercising such supervisory powers can inspect and even direct. Under the judicial review procedure, far from being confined to the matters averred in the petition, the court is less inhibited and is free to adopt a more interventionist attitude-not with a view to withholding or denying relief but with a view to grant it when justice of the case demands that such a course of action be adopted.*

I direct the Commissioner of National Housing to hold a proper inquiry with the participation of the alleged co-owners of the land (i.e. the parties to the partition action) including the petitioner and make a fresh determination in terms of section 16(1) of the Ceiling on Housing Property Law.

Application is allowed with costs.

Judge of the Court of Appeal