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

In the matter of an appeal in terms of Section 11 of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mr. T. G. Perera,
No. 232/3, Havelock Road,
Colombo 05.

CA No. CA/PHC/0117/2016
HC/Panadura (Writ)
Application No. 3/2014
Commissioner's No.
කඅ/නි/3/18/අභි/29

ORIGINAL APPLICANT

1. **Renuka Nandani Kurukulasuriya,**
2. **N. Dayaranjan Kurukulasuriya,**
   Both of
   No. 232/3, Havelock Road, Colombo 05.

SUBSTITUTED APPLICANTS

v.

1. **Vasantha Premakumara Kudaliyanage,**
2. **Ranjith Gamini Kudaliyanage,**
   Both of
   No. 98, Janapriya Mawatha, Panadura.

RESPONDENTS

AND BETWEEN

1. **Vasantha Premakumara Kudaliyanage,**
2. **Ranjith Gamini Kudaliyanage,**

Both of

No. 98, Janapriya Mawatha, Panadura.

RESPONDENTS - PETITIONERS

v.

1. **Renuka Nandani Kurukulasuriya,**
2. **N. Dayaranjan Kurukulasuriya,**

Both of

No. 232/3, Havelock Road, Colombo 05.

SUBSTITUTED APPLICANTS RESPONDENTS

3. **Mrs. G. Leka Geethanjali Perera,**
   Housing Commissioner, Western Province,
   No. 212, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

RESPONDENTS

AND NOW BETWEEN

1. **Vasantha Premakumara Kudaliyanage,**
2. **Ranjith Gamini Kudaliyanage,**

Both of

No. 98, Janapriya Mawatha, Panadura.

RESPONDENTS – PETITIONERS -APPELLANTS

v.

1. **Renuka Nandani Kurukulasuriya,**
2. **N. Dayaranjan Kurukulasuriya,**

Both of

No. 232/3, Havelock Road, Colombo 05.

SUBSTITUTED APPLICANTS-RESPONDENTS-RESPONDENTS

3. **Mrs. G. Leka Geethanjali Perera,**
   Housing Commissioner, Western Province,
   No. 212, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

3A. P. H. Colambage,
Housing Commissioner, Western Province,
No. 89, Kaduwela Road, Battaramulla.

RESPONDENT - RESPONDENTS

BEFORE	:	M. Sampath K. B. Wijeratne J. & M. Ahsan. R. Marikar J.
COUNSEL	:	Rohan Sahabandu P.C., with C. Elvitigala for the Respondent - Petitioner. Navodi de Soyza, S.C for the Respondent - Respondent. Sanjaya Kodithuwakku for the 1st and 2nd Substituted Applicant – Respondent – Respondents.
ARGUED ON	:	16.10.2024
WRITTEN SUBMISSIONS	:	19.05.2021 (By the Appellant) 08.07.2021 (By the 1st and 2nd Respondents)
DECIDED ON	:	22.11.2024

M. Sampath K. B. Wijeratne J.

Introduction

The Applicant, T.G. Perera, the landlord of the property at No. 98, Janapriya Mawatha, Panadura, submitted an application under Section 18A of the Rent Act[1] to the 3rd Respondent, the Housing Commissioner of the Western Province, seeking permission to demolish the building for redevelopment. It is an undisputed fact that late T.G. Perera was the landlord while the Appellants were the tenants.

While the inquiry was ongoing, T.G. Perera passed away, and letters of administration for his estate were granted to the 1st and 2nd Respondents. As a result, the 1st and 2nd Respondents were substituted in place of late T.G. Perera.

The Respondents-Petitioner-Appellants (hereinafter referred to as the 'Appellants') filed statement of objections to the application made by the landlord, the initial applicant.

Following the inquiry, the 3rd Respondent made an order on 25th April 2014, allowing the application of the 1st and 2nd Respondents, subject to the payment of Rs. 374,400/- as compensation to the Appellants.

The aggrieved Appellants sought a mandate in the nature of writ of *certiorari* from the Provincial High Court of Colombo to quash the order issued by the 3rd Respondent.

The learned High Court Judge of Colombo dismissed the Appellant's application by his judgment dated 5th October 2016. This appeal is filed against the judgment of the learned High Court Judge.

Analysis

Undoubtedly, the primary objective of the Rent Act is to protect the rights and interests of tenants. Enacted in 1972, the Rent Act underwent a significant amendment in 1980[2], when the Legislature introduced Section 18A. This

[1] No. 7 of 1972, as amended.
[2] Rent (Amendment) Act No. 55 of 1980.

provision allowed landlords to apply to the Housing Commissioner for permission to demolish rented residential premises that were 50 years or older, if redevelopment was necessary for more efficient use of the land. In 2002, the Legislature further amended the Act, reducing the minimum age of the building to 40 years and extending scope of the application of Section 18A to business premises as well[3]. In my view, the introduction of Section 18A was intended to relax the protection afforded to tenants under the Rent Act, enabling landlords to utilize their rented properties in a more efficient and effective manner.

For clarity, I will reproduce Section 18A of the Rent Act, which reads as follows:

'18A. *The Commissioner of National Housing may –*

(a) Upon application made in that behalf by the owner of any building used for residential or business purposes and constructed at least forty years prior to the date of the application;

(b) After affording the occupants of such building an opportunity of being heard, make order authorizing such owner to demolish such building if the Commissioner is satisfied that the re-development of the land on which such building stands is necessary for the more efficient utilization of such land.'

Accordingly, in an application under Section 18A of the Rent Act, the following facts must be established:

i. That the building in question was at least 40 years old at the time of the application.

ii. That the redevelopment of the land on which the building is situated is necessary for more efficient utilization of the land.

In the case of *Aboobucker v. Wijesinghe and others*[4], (C.A.) His Lordship Wijeyaratne J., in considering an application for a writ of *certiorari* against the decision of the Commissioner of National Housing, examined Section 18A of the Rent Act. His Lordship observed that, *When the Legislature enacted Section*

[3] Rent (Amendment) Act No 26 of 2002.
[4] [1990]2 Sri L.R. at page 278.

*18A in the terms **'if the Commissioner is satisfied'** the evident intention of the Legislature was to make the Commissioner the sole Judge of whether conditions existed to warrant demolition.'*

In the recent judgment of this Court in *Kithsiri Pradeep Witharana v. P. Leka Geethanjalee Perera and others*[5], the Court of Appeal observed as follows:

'The Act has not specified any condition other than the age of the building. The Commissioner has to consider whether the commercial building that has been constructed more than 40 years ago to suit the socio-economic environment prevailed during that time is good enough to serve the present-day requirements. The land area does not expand with the expansion of the population and their requirements. Therefore, the only solution to fulfil the need of the society is to utilize the land more effectively. Whether this can be done by just a renovation/modification or whether the building needs a structural change is matter to be decided by the Commissioner. Whether the building is in a dilapidated condition or not is not material. What is material is that whether the re-development of the land on which such building stands is necessary for the more efficient utilization of such land.'

Whether the building sought to be demolished is more than 40 years old?

The application of Section 18A is not limited to the buildings those are dilapidated and require immediate demolition and reconstruction. The key consideration in granting or rejecting an application is not the condition of the building, but its age and the necessity for redevelopment to ensure more efficient utilization of the land.

The primary argument put forth by the learned President's Counsel for the Appellants was that the Respondents failed to prove that the building was more than 40 years old at the time the application was made. He argued that, under the Rent Act, strict proof of this fact is required. To support this argument, he highlighted that the reduction of the building's age requirement from 50 years to 40 years reflects the Legislature's intention to demand strict proof of this fact. I

[5] CA/PHC/123/2012, decided on 02.03.2017.

do concede that, in an application under Section 18A of the Rent Act, proof that the building is over 40 years old is indeed necessary.

The learned President's Counsel for the Appellant argued that the test to be applied regarding the age of the building is *'objective'* rather than *'subjective*,' in contrast to the second requirement, which concerns whether the redevelopment of the land on which the building stands is necessary for more efficient utilization of the land.

The '*Black's law Dictionary*' defines the word '*objective*' as '*of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings or intentions.*'[6]

The word '*subjective*' is defined as '*based on an individual's perceptions, feelings, or intentions as opposed to externally verifiable phenomena*.'[7]

As correctly submitted by the learned President's Counsel for the Appellants, the burden of proof is indeed on the Respondents (Applicant) to establish that the building was over 40 years old. In the present case, the application was made on 3rd August 2006[8]. Therefore, the Respondents bear the burden of proving that the building existed at least in the year 1966. However, the determination of whether the building is over 40 years old must be made by the Housing Commissioner based on the available evidence. Thus, the Housing Commissioner must be satisfied not only that the redevelopment of the land on which the building stands is necessary for more efficient utilization of the land, but also that the building is indeed over 40 years old.

The Respondents submitted notices of assessment and extracts from the assessment register to support their claim that the building was over 40 years old. According to the assessment register extracts, the property was described in 1966 as a *'tiled residence and land'* with an annual value of Rs. 400/-. This same description and value persisted until 1973. In 1974, the property description changed to a '*concrete roofed shop and land'* with the annual value increasing to Rs. 2,000/-. The same entry appeared in 1975 as well. Following this, a special

[6] B. A. Garner and H. C. Black, *Black's Law Dictionary*, 11th Edition, at p. 1291.
[7] *Ibid* at p.1723.
[8] *Vide* pages 419 to 421 of the appeal brief.

note was added to the register indicating that, due to a fire at the Urban Council Office, records prior to 1987 were unavailable. In 1989, the description of the property changed again to an '*asbestos roofed shop and the land'* and the annual value increased to Rs. 5,400/-. These entries continued until 1998, and in 1999, the description was updated to a '*concrete and asbestos roofed two storied retail shop'*. with the annual value further increased to Rs. 37,440/-.

The learned President's Counsel for the Appellant argued that it is clear that around 1966, there was a residential building with a tiled roof and the rest of the land. In 1974, it was converted into a shop with a concrete roof. He contended that a new building was constructed in 1974. Furthermore, an asbestos-roofed shop was built on or before 1989. Then, around 1999, a two-story retail shop with a combination of concrete and asbestos roofing was constructed, covering the entire land. Therefore, he argued that the building the Respondents seek to demolish is a new structure from 1999, not the one that existed in 1966. He pointed out that the changes to the building are reflected in the increase in its annual value. However, it is well known that Urban Councils periodically raise the annual value of properties within their jurisdiction.[9]

The learned President's Counsel argued that the Housing Commissioner applied a purely subjective test in determining the age of the building to be demolished, relying primarily on her own observations during her inspection[10]. However, I note that the Housing Commissioner did not solely rely on her own observations to reach the conclusion that the building is over 40 years old. She has explicitly stated that, in addition to her observations, she considered other sources of evidence, including the deeds, assessment registers, and oral testimony from witnesses. Based on this comprehensive review, she was satisfied that the building was indeed over 40 years old. Furthermore, the Housing Commissioner also obtained a report from the Authorised Officer[11], who, based on his own inspection, opined that the building was over 50 years old.

[9] In terms of Section 160 of the Urban Councils Ordinance No. 61 of 1939.
[10] Report at page 315 of the appeal brief.
[11] Report at page 306 of the appeal brief.

In the case of *Ferdinands v. De Silva and another*[12] (C.A.), His Lordship T.G.D. De Alwis J. held that the observations of the Commissioner regarding the building are indeed relevant.

The Appellants claimed that they were not given an opportunity to be heard during the Housing Commissioner's inspection of the building. However, this Court observes that the Housing Commissioner had informed the Appellants to be present at the site, but the Appellants have failed to take advantage of the opportunity provided[13]. Therefore, the Appellants cannot now argue that the Housing Commissioner violated the principles of natural justice, specifically the rule of *audi alteram partem*.

The learned President's Counsel also submitted that the Housing Commissioner failed to set out the specific factors she claims to have observed during her inspection of the premises. However, I observe that the Commissioner did, in her report, provide detailed observations, including that the walls are constructed using *'Kabok'* bricks and plastered with lime. Additionally, she noted that the outside front door is a very old steel door, and the rafters and reapers of the asbestos roof are decayed. Therefore, the Appellant's submission in this regard is without merit.

The above observations raise a significant issue regarding the nature of the roof. According to the entry in the assessment register from 1999 onwards, the roof is described as being made of both concrete and asbestos. However, the Housing Commissioner, after inspection has not mention that any part of the roof is concrete, which casts serious doubt on the accuracy of those entries.

The learned High Court Judge in his impugned order noted that *'it is evident that the real picture or the changes of the premises is not shown by the assessment register'*[14]

Consequently, the learned High Court Judge concluded that although some renovations were carried out, the foundation of the building remained unchanged. After considering all the available evidence, I am of the view that the

[12] 4 Sri SKLR 66.
[13] *Vide* pages 315 and 316 of the appeal brief.
[14] At page 53 of the appeal brief.

changes were limited to certain alterations and renovations. Consequently, I uphold the findings of the learned High Court Judge.

The learned President's Counsel for the Appellant argued that the learned High Court Judge erred in stating that the real picture or the changes to the premises were not reflected in the Assessment Register. According to the assessment registers, there have been changes to the original structure in 1974, 1989, and 1999. The learned President's Counsel contended that these changes, particularly the alterations to the roof, serve as evidence that a new building was constructed. He further argued that the increase in the annual value supports this claim, suggesting that these were not mere renovations, as stated by the 3rd Respondent, Housing Commissioner.

However, I observe that no material had been produced before the Housing Commissioner indicating that a new building had been constructed. Had this been the case, the Urban Council would have been required to approve a new building plan. Furthermore, there was no oral evidence presented to the Housing Commissioner by the Appellant that a new building had been erected. Therefore, the only reasonable conclusion the Housing Commissioner could have reached was that the alterations were simply renovations, as she concluded.

In light of the above analysis, I am satisfied that the Housing Commissioner's determination that the building is over 40 years old is valid. Therefore, the decision of the learned High Court Judge is also legally sound.

Whether re-development of the land is necessary for the more efficient utilization of the land.

The second requirement for a successful application under Section 18A is that the Housing Commissioner must be satisfied that the redevelopment of the land on which the building stands is necessary for more efficient utilization of the land.

The determination of this fact depends on the circumstances of each case. In reaching a conclusion on this matter, the Housing Commissioner has a duty to consider all relevant circumstances as they exist at the time of the hearing. Some factors may carry little or no weight, while others may be decisive. However, the

Housing Commissioner should not disregard any relevant facts and must consider all of them, giving each the appropriate weight and adopting a common-sense approach. It is in this context that the Housing Commissioner's own investigation becomes crucial.

The Housing Commissioner can only be satisfied on this matter by considering all the surrounding circumstances, such as the condition of the building, its location, the potential for more efficient and profitable use of the land after redevelopment, the financial means of the landlord, and other relevant factors. It is not enough for the landlord to simply state an intention to build a new structure; the landlord must establish the genuineness of this intention. It is the responsibility of the Applicant (Respondent) to provide sufficient evidence to the satisfaction of the Housing Commissioner in this regard. Without such evidence, the Housing Commissioner cannot be properly *satisfied.*

In order to establish the *bona fides* and the reality of the application, the applicant should provide supporting evidence, such as the building plan, approval of the plan by the local authority, estimates for the new construction, and proof that the applicant has the financial means to carry out the redevelopment. Only by providing such evidence the Housing Commissioner can be satisfied of the genuineness and feasibility of the application.

However, in the case of *Kithsiri Pradeep Witharana*[15], the Court of Appeal expressed the following view:

The Act does not provide that the financial capacity of the landlord as a material fact in an inquiry under section 18A of the Rent Act. Instead, the law provides that if the landlord fails to re-develop the building within the specified period or periods, he is running at the risk of acquiring the land by the state. Therefore, it is for the landlord to obtain necessary financial assistance and it is not for the 1st Respondent to satisfy that he has financial capacity to redevelop.

Nevertheless, in my view, this Court has not entirely dismissed the relevance of the applicant's financial capacity. It was merely stated that it is not a material fact in itself. In an application under Section 18A of the Rent Act, the Housing

[15] *Supra* note 5.

Commissioner must determine whether the demolition is necessary for more efficient utilization of the land. To make this determination, consideration of factors such as the number of floors and units in the proposed building, and the available facilities. The applicant's financial capacity to complete the construction are important to assess the genuineness of the applicant's intention. In the instant case, the Respondents have submitted both oral evidence and documents to demonstrate that they have sufficient means to carry out the construction[16].

The Appellants stated in their written submissions that the Respondents (Applicants) failed to provide convincing evidence regarding the proposed redevelopment and its necessity. It was argued that the Respondents did not submit an approved plan for the proposed redevelopment, which is a crucial piece of evidence required for the 3rd Respondent, the Housing Commissioner, to make a rational and informed decision.

Admittedly, the Urban Council of Panadura approved a building plan on 3rd June 2005[17]. The Appellant's contention is that by the time the Order was made by the Housing Commissioner, the validity of the approved plan had expired. Although a fresh plan was submitted for approval, it was not approved by the relevant date. In response, the Respondents explained that due to the prolonged inquiry before the Housing Commissioner, the validity of the original plan expired, and the 1st and 2nd Respondents were compelled to resubmit the same plan for approval.

It is a fact that the original application under Section 18A of the Rent Act was made to the Housing Commissioner on 3rd August 2006, and the impugned decision of the Housing Commissioner was made on 25th of April 2014, more than seven years later. According to the Housing Commissioner's Order, there were thirty-one inquiry dates, spanning from October 2016, to November 2013. The Appellants contended in their written submissions that at the time the application under Section 18A was submitted, there was no approved plan for the proposed redevelopment[18]. However, this assertion is factually incorrect, as

[16] *Vide* pages 340, 359, 360 and 363 of the appeal brief.
[17] At page 459 of the appeal brief.
[18] At paragraph 23 of the Written submissions filed by the Appellant.

the plan had already been approved on 3rd June 2005, well before the application was submitted on 3rd August 2006.

The Appellants highlighted evidence of a witness from the Urban Council of Panadura, indicating that the building permit was not extended during the period from 2005 to 2012[19]. However, it is important to note that the building plan was approved in 2005, and the application under Section 18A was made in 2006. Therefore, when the application was submitted, there was indeed an approved plan in place[20]. The validity of that plan, however, expired in 2010 after five years, while the application was still pending.

Another key consideration regarding the genuineness of the application is whether it is an attempt to evict the tenant under the guise of an application under Section 18A of the Rent Act. In this case, the original applicant also initiated proceedings in the District Court of Panadura to evict the tenants from the premises[21], but that case was dismissed on 7th February 2013. The application under Section 18A, however, was made on 3rd August 2006, meaning it was not filed in response to the dismissal of the District Court action.

The exact date of the filing of the District Court case is unclear from the available material, but according to the judgment, the original applicant claimed damages from the tenants starting from 1st August 2008. This suggests that the District Court case was likely filed in 2008. Therefore, it cannot be said that the original applicant used Section 18A as a means to evict the tenant after failing in the District Court case. It is important to recognize that a landlord has the right to pursue different remedies available under the Rent Act simultaneously.

In my view, the potential economic benefit to the landlord could also be a relevant consideration for the Housing Commissioner. The statutory rent paid by the Appellants is only Rs. 634.64[22], which, in my opinion, is a relatively small

[19] At paragraph 22 of the Written submissions filed by the Appellant.
[20] *Vide* evidence at page 273 of the appeal brief.
[21] *Vide* the judgement at page 215 of the appeal brief.
[22] *Vide* page 420 of the appeal brief.

amount for any property rented in an urban area like Panadura. The Appellant has been the tenant of this premises at least since the year 1975[23].

With regard to business premises, another important consideration could be the potential public benefit.

The Appellants raised the issue that the building they occupy cannot be demolished for reconstruction without demolishing the entire row of shops. They argued that the Respondents have not provided evidence of permission to demolish at least two adjoining shops. However, aside from the Appellants' own statement, there was no expert opinion presented regarding these facts. Therefore, I am of the view that the Housing Commissioner did not err in her conclusion on this matter.

The learned President's Counsel for the Appellant argued that the learned High Court Judge erred in stating, *'that if the Housing Commissioner is satisfied that the premises is 40 years old, the Order is within her powers.'* As I have already discussed, the determination of whether the building is over 40 years old must be made by the Housing Commissioner. However, this decision should not rely solely on her own observations. As I have already stated, the Housing Commissioner based her conclusion on a combination of oral testimony, deeds submitted, the assessment registers from the Panadura Urban Council, and her own observations. Therefore, I am of the view that the learned High Court Judge did not err in concluding that, if the Housing Commissioner is satisfied that the building is over 40 years old, the decision falls within her authority.

In the aforementioned case of *Aboobucker v. Wijesinghe and others*[24]*,* His Lordship Wijeyaratne J., having considered the jurisdiction of the Court of Appeal to review an administration action, observed that '*Courts no doubt have jealously guarded its right to review administrative action, but it has now been well establish that courts will not interfere with the exercise of such administrative authority unless they are satisfied that the administrative tribunal*

[23] *Vide* page 390 of the appeal brief.
[24] *Supra* note 4.

has ***acted mala fide or on no evidence or un reasonably or has fail to follow the principles of natural justice or has gone wrong in law****.'* (emphasis added)

In the case of *Anura Abeysinghe alias Abayasinghe v Galle Co-operative Hospital Limited*[25] (C.A.) His Lordship Mahinda Samayawardhena, J. (as His Lordship then was) stated that, '*There is a misconception that even if an administrative or judicial decision is patently erroneous, writ of certiorari does not lie, if the decision-making process was flawless, and the deciding authority has erred on facts and not on law.'*

'It is important to understand that an error of fact can also be an error of law.'

Accordingly, I find myself unable to agree with the learned High Court Judge's conclusion that *'the purpose of a Writ of certiorari is not to, consider whether the decision is correct or not but to consider whether decision given is within the power.'*

The question of whether there was insufficient evidence to support the Housing Commissioner's conclusion is also relevant.

The learned High Court Judge, in the impugned order, observed that it was evident the 3rd Respondent, the Housing Commissioner, had issued the order under Section 18A of the Rent Act while adhering to the correct procedure. The learned High Court Judge further noted that all relevant factors had been duly considered and that the Housing Commissioner acted within her lawful authority, without exceeding her jurisdiction. The evidence considered by the Housing Commissioner, as analysed in this judgment, clearly provided sufficient grounds for her to arrive at the conclusion that she did.

Conclusion

In view of the reasoning set forth in this judgment regarding the matter at issue, I find no grounds to justify interfering with the order of the learned High Court Judge dated 5th October 2016, whereby the writ of *certiorari* seeking to quash the Housing Commissioner's decision was dismissed.

[25] CA (PHC) APN 104/2016

Consequently, I hold that this appeal must fail.

Appeal dismissed. No costs.

JUDGE OF THE COURT OF APPEAL

M. Ahsan. R. Marikar J.

I Agree.

JUDGE OF THE COURT OF APPEAL