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DIGEST

The application of this maxim results in the exclusion of all other provisions save the expressly mentioned provisions. As a letter or certificate of dissatisfaction is not mentioned as a requisite under section 12(2) the irresistible conclusion is that such a letter or certificate is not a pre condition. Hence once the Commission is not satisfied with the explanation, Commission can direct the Director-General to institute proceedings under section 11 of Act No. 15 of 1994. Although the defence has attempted to make a mountain out of a molehill, in view of the above reasoning I hold that the certificate of dissatisfaction is not a requirement under section 23 A (4).

Though the learned presidents counsel submitted that no evidence whatsoever has been led with regard to the existence of the precondition, I think the learned presidents counsel has not adverted his attention correctly to the evidence of Ranatunga at page 899 on 09th July 2007 when the witness said "සමහරක් කරුණු ප්‍රතික්ෂේප කිරීමක් කර තිබෙනවා." Therefore the defence position of "no evidence whatsoever has been led with regard to the existence of the pre condition" is incorrect. On a comparison of V 35 (show cause notice) and the indictment it is manifestly clear, out of the twenty five (25) items included in V 35, items 1, 2, 3, 4, 5, 6, 11, 22, 23, 24 and 25 totalling to the value of nearly 10.6 Million have not been included in the indictment. Therefore it is irrefutable that the explanation given in respect of those items has been accepted and explanation with regard to the other items has been rejected.

Adverting back to the submission made by the learned Deputy Solicitor General under section 39 of the Judicature Act, as I have already opined that there cannot be a patent lack of jurisdiction under section 23 A (4) otherwise than on the question of affording an opportunity to show cause,

any other objection should fall under latent lack of jurisdiction and hence, should have been taken before the accused pleaded to the indictment. As the defence could not have been unaware of the non-availability of a certificate of dissatisfaction, defence should not have lingered till closure of the prosecution case. On that ground alone the objection must fail.

Learned Presidents Counsel for the defence cited the decision in *Kanagarajah v. Queen*[1]. But as pointed out by the learned Deputy Solicitor General the circumstances in that case was different from the instant case. Especially in view of the sequence of events, their lordships had taken a sympathetic view in favour of the accused. In ***Herman Fernando*** (B 1173/96) the issue was whether the notice given under section 23 (4) was sufficient or not. But in the instant case that particular question never arose. All other judicial pronouncements cited by the defence are decisions of the high court and hence is not binding on this court.

Finally I must emphasize that once an opportunity is given and if the Commission is not satisfied with the explanation given in reply on such occasion, I hold that the Commission is not bound to issue a certificate or letter of dissatisfaction. Mere fact of institution of action is ample proof of such dissatisfaction. Dictates of common sense too justifies such a conclusion.

For the aforementioned reasons the appeal is allowed and the order made by the High Court of Colombo dated 30th November 2007 is set aside. The matter is referred back to the High Court for further trial.

RANJIT SILVA J – I agree.

Appeal allowed.

PEOPLE'S BANK AND SEVEN OTHERS V. YASASIRI KASTHURIARACHCHI

SUPREME COURT
TILAKAWARADANE, J.
SRIPAVAN, J., AND
RATNAYAKE, J.
S. C. APPEAL NO. 11/2010
S. C. (SPL.) L.A. NO 294/2009
C. A. (WRIT) NO. 188/2009
JUNE 30TH, 2010
JULY 2ND, 9TH 2010

Constitution Article 4(c) – Civil Procedure Code – Section 34, 207 and 406 – principle of res judicata – a final judgment passed by a competent court, having jurisdiction, will bar a subsequent action between the same parties upon the same cause of action? Collateral estoppel – Parate execution – Peoples Bank Act 29 of 1981 – 32 of 1996

The Court of Appeal issued a restraining order against the Respondent – Appellants from proceeding with the auction and sale of the property scheduled on 7th November 2009, until the final determination of the aforesaid application by the Court of Appeal.

The Supreme Court granted Special Leave to Appeal on the following issues –

(1) Does the order of the Court of Appeal dated 5th November 2009 nullify and/or stay and/or suspend the Court of Appeal judgment in the Writ Application bearing No. 1268/98 and the judgment of the Supreme Court in Case No. S.C. (Spl.) L.A. 60/08?

(2) Does the Commercial High Court of Colombo Case No. 213/07/MR bar the Respondent – Appellant from proceeding with the sale by public action of properties set out in the Resolution dated 10th July 1997?

Held:

(1) The decision of the Supreme Court dated 3rd December 2008 denying leave to appeal against the judgment of the Court of Appeal decision dated 29th February 2008, whereby the Court of Appeal held that the Parate Resolution dated 10th July 1997 was valid and refused to quash the said Resolution is final and conclusive and cannot be reviewed and or rescinded by any other Court. The judgment of the Supreme Court in S.C. (Spl.) L.A. 60/08 [C.A. Application 1268/98 acts as a complete bar to a proceeding by the same party which once again seek to question the validity of Parate Resolution dated 10th July 1997.

In light of the judgment of the Supreme Court in S.C. (Spl.) L.A. 60/08, the later Application in C.A. Writ 188/09 cannot also succeed in view of the principle of 'collateral estoppel' whereby a party is barred from re-litigating an issue already finally determined against such party in an earlier decision.

(2) When there is a strong *prima-facie* case in favour of the party seeking the relief, it is permissible to grant interim relief which give substantially the whole of the relief claimed in the action.

Per Shiranee Tilakawardane, J., -

"The Petitioner – Respondent has also raised the objection that this Court, in granting an interim order to proceed with the sale by the Respondent –Appellant, has acted *per incuriam* – or that this Court cannot by way of interim order grant the final relief prayed for in an Application.

In this context it is relevant to refer to the decision of the Court of Appeal in Shell Gas Lanka Limited v. Samyang Lanka (Pvt.) Limited [(1)], where the Court held that it is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, especially as the facts in this case disclose plainly that there is a strong prima facie case in favour of the party seeking the relief."

(3) The Petitioner – Respondent was presented with ample opportunity to raise issues of fraud and illegality against the Resolution.

Having failed to raise such an argument in the intervening years, the belatedness of this defence clearly reflects that this is an after-thought and indicative of a concoction and clearly manipulative and abuse of legal process.

Case referred to:

Shell Gas Lanka Limited v. Samyang Lanke (Pvt.) Limited – (2005) 3 Sri L.R. 14

APPEAL from an interim order of the Court of Appeal.

S.A. Parthalingam, P.C., with *Kushan D Alwis, Hiran Jayasuriya* and *Nishkan Parthalingam* for the Respondent – Appellants.

Faiz Musthapa, P.C., with *Anil Silva, P.C.,* and *Riyad Ameen* for Petitioner – Respondent.

Cur.adv.vult.

July 09th 2010

SHIRANEE. TILAKAWARDANE, J.

The Appeal is filed against the interim order of the Court of Appeal, dated 5th November 2009 in CA Writ Application 188/2009, wherein a Stay Order was issued restraining the Respondnet-Appellants from proceeding with the auction and sale of the property scheduled on 7th November 2009, until the final determination of the Application bearing No. CA Writ No 188/09 by the Court of Appeal.

This Court granted Special Leave to Appeal on 11th February 2009 on the question of law set out in paragraph 31 (b) and (c) of the Petition; granted relief in terms of paragraph (c) and (e) of the prayer to the Petition dated 16th December 2009 and directed that the record in Court of Appeal Writ No. 188/09 be sent to this Court forthwith.

This Court granted Special Leave to Appeal specifically on the following issues;

1. **Does the order of the Court of Appeal dated 5th November 2009 nullify and/or stay and/or suspend the Court of Appeal judgment in the Writ Application bearing No. 1268/98 and the judgment of this Court, in Supreme Court Case No. SC (SPL) LA 60/08?**

2. **Does the Commercial High Court of Colombo Case No. 213/07/MR bar the Respondent-Appellant from proceeding with the sale by public auction of properties set out in the Resolution dated 10th July 1997?**

The 1st Respondent-Appellant adopted the Resolution (marked as P5) dated 10th July 1997 in terms of Section 29D of the People's Bank Act No. 21 of 1961 as amended by Act No. 32 of 1986 for the recovery of a sum of Rs. 165,091, 129/35 payable by Yahsodha Holdigs (Pvt) Limited, (hereinafter referred to as the Company). The Resolution P5 referred to Mortgage Bonds bearing Nos: 3185, 3186, 3567, and 3568 and the 1st Respondent-Appellant sought to sell by public auction the properties mortgaged under the said Mortgage Bonds.

On 1st December 1998, the Company instituted a Writ Application before the Court of Appeal bearing CA Application No. 1268/98 seeking a Writ of Certiorari to quash the said Resolution dated 10th July 1997. The Writ was canvassed only on two grounds (1) that it was a third party mortgage – and (2) that the Respondent-Appellant had no power to sell the properties as they were not specified in the original offer letter and consequently the Resolution was *ultra vires*. The Court of Appeal by its judgment dated 29th February 2008,

dismissed this Application and held against the Company on both grounds.

Special Leave to Appeal against the judgment was denied by the Supreme Court on 3rd December 2008. It is important to note that following the decision of the Supreme Court to deny special leave to Appeal on the judgment, the Resolution is finally deemed to be valid in law and capable of execution by the 1st Respondent-Appellant.

Thereafter the Respondent-Appellant published notices of auction sale to sell by public auction the several properties referred to in the Parate Resolution dated 10th July 1997.

In the meantime a case for the execution of the mortgage bonds bearing No. HC (Civil) No: 213/2007 MR was filed by the Respondent-appellant on 9th July 2007 before the Commercial High Court. The Respondent-Appellant in his submissions specifically stated that this step was taken due to the delay in delivery of the Court of Appeal Judgment in case No. CA Application No. 1268/98, the uncertainty of its outcome, coupled with the fear that in the meantime that even regular action on the Mortgage Bonds would be prescribed in Law. The Company filed answer in the case on 15th January 2009. That case is presently pending judicial determination before the Commercial High Court. Counsel for Respondent-Appellants submitted that the Petitioner-Respondent Company could pursue whatever monetary claims through their claim in reconvention and recover any monies, if they are due.

The said action in the Commercial High Court was instituted without prejudice to its rights under CA Writ Application 1268/98. Clearly the High Court case has been

instituted by the 1st Respondent-Appellant as a precautionary measure in order to avoid the mortgage bonds from being prescribed, during the pendency of the Writ Application No. 1268/98, as at that time there was no certainty of its outcome.

On 25th March 2009, the Petitioner-Respondent, being the Managing Director of the Company, instituted the present Writ Application bearing No. 188/09 on 25th March 2009, in the Court of Appeal, on the principal ground that, "while the dispute is being adjudicated by the Commercial High Court in case No. HC (Civil) 213/07 MR, which is exercising judicial power, the Respondent-Appellant cannot act in a manner which would result in usurpation of that power and make the exercise of that power a nullity," [vide paragraph 41(c) of the Petition marked A.]

The Counsel for the 1st Respondent-Appellant specifically submitted that the present Application is a blatant attempt to challenge and assail the same Parate Resolution adopted by the 1st Respondent-Appellant on 10th July 1997, upon which the Court of Appeal and the Supreme Court had delivered final judgment, declaring it a valid Resolution.

The Court of Appeal issued notice on the Writ Application No. 188/09 on 15th June 2009. Interestingly, Hon. Anil Gooneratne J, Judge of the Court of Appeal in his Order stated;

> "I am inclined to refuse notice in this Application more particularly, for the reason that there was a prior judicial pronouncement between the same parties, on the same issue and the Application in hand is filed with slight variation.

However this Writ Application needs to be handled very carefully and my brother the Hon. President of this Court had the occasion to discuss this matter with me on many times prior to finalizing this Order".

It is a pity that this view expressed by Hon. Anil Gooneratne J was not given effect to.

After the objections had been filed in the Court of Appeal in the above case, the 1st Respondent-Appellant by letter dated 20th October 2009 fixed the sale for 7th November 2009. In response, the Petitioner-Respondent filed an Application for an interim stay order against the sale on 28th October 2009. The Court of Appeal granted an interim order staying the sale of property by the 1st Respondent-Appellant on 5th November 2009. This Appeal has been filed by the Respondent- Appellant against this Order of the Court of Appeal.

In the present Appeal, the Counsel for the Respondent-Appellants also argued that the Petitioner-Respondent has breached the principle of *"uberrima fides"* and therefore under the law the Stay Order dated 28th October 2009 could not have been granted by the Court of Appeal.

The Respondent-Appellant contends that by instituting the Writ Application CA 188/09, the Petitioner –Respondent has sought to quash the Parate Resolution dated 10th July 1997, which he could not do in Law. In this Application dated 25th March 2009, the Petitioner-Respondent has prayed for a Writ of Certiorari to quash the Resolution dated 10th July 1997 and an interim order deliberately restricting the Respondent –Appellant from auctioning the property which formed the subject matter of the said Resolution.

In the said Writ Application CA No: 188/09 the Petitioner-Respondent has further stated specifically that the mortgage

bonds which formed the subject matter of the Parate Resolution dated 10th July 1997 (paragraph 38) were *inter alia* 'fraudulent and illegal' and unenforceable in law and therefore could not have formed the subject matter of the said Resolution."

In the petition submitted to the Court of Appeal in the Application No. 1268/98, the Petitioner-Respondent has clearly admitted that facilities were granted to the company by the 1st Respondent-Appellant and that the property more fully described in the mortgaged bonds bearing Nos. 3185, 3186, 3567 and 3568 – which form the subject matter of the Parate Resolution – were mortgaged to the 1st Respondent-Appellant and specifically states that the "mortgage bonds were executed" in respect of facilities obtained by the Petitioner-Respondent. Significantly this Application did not allude to the Bonds being 'fraudulent and illegal', but instead at paragraph 9, explicitly conceded that "the property more fully described in the schedule hereto was mortgaged to the 1st Respondent-Appellant", the annexed affidavits dated 17th March 2008, was signed by the Petitioner-Respondent in the present case as the Chairman and Managing Director of the Company.

Therefore, with regard to the very same Parate Resolution the Petitioner Respondent and has taken up a position which wholly contradicts its previous position taken in the case bearing No. 1268/98, a case that finally ruled on the Resolution.

The Respondent-Appellant submits that under the circumstances the Petitioner –Respondent has breached the principle, of *"uberrima fides"* of utmost good faith and that the Court of Appeal erred in granting an Interim Order stopping the auction of the said properties.

In response, the Petitioner-Respondent submitted that the allegation of suppression is totally unfounded and that the Petitioner-Respondent has specifically disclosed in CA Application No. 1268/98 in which reference was made to the relevant mortgage bond in the instant Application. The Petitioner Respondent also submitted that the issue of *uberrima fides* was not included as a ground when granting leave to appeal and as such cannot be raised by the Respondent-Appellant.

Having considered the arguments raised by both parties, it is abundantly clear that the Petitioner-Respondent in seeking to quash the Parate Resolution dated 10th July 1997 by way of Writ Application No. 188/09 has taken up a wholly new position which contradicts the original position taken up in the previous Writ Application filed on the same subject matter bearing number No. 1268/98. Close scrutiny of the arguments reveal clearly that the Petitioner-Respondent has pleaded contradictory and mutually inconsistent facts in order to subvert the sale of properties scheduled for 10th July 2010 by the Respondent-Appellant.

The main issue in this case which was the validity of the Parate Resolution dated 10th July 2010 was raised in the Writ Application 1268/98 and the Court of Appeal by its decision dated 29th February 2008 held the Resolution was valid and refused a Writ of Certiorari to quash the said Resolution. The Supreme Court on the 3rd December 2008 denied leave to appeal against the judgment of the Court of Appeal. Therefore the Resolution dated 10th July 1997 has been determined conclusively to be valid and executable by the decision of this Court on 3rd December 2008. This is final and conclusive and cannot be reviewed and/or rescinded by any other Court.

It is clear that the present Writ Application by the Petitioner-Respondent is a deliberate and calculated attempt to prevent the Respondent-Appellant from proceeding with the auction sale and to circumvent and pervert the effect of the decision of the Court of Appeal and this Court in the said Writ Application No: 1268/98, affirmed by this Court. I find that the Court of Appeal has erred in granting the interim stay order which had the effect of subverting the express intention and direction of the decision in the Writ Application No. 1268/98 on the same subject matter and between, in effect, the same parties.

In this context, the Petitioner-Respondent has raised further the argument that while the Petitioner in CA Application 1268/98 was the company – Yashoda Holdings, the Petitioner in the instant case is not the company but the Petitioner –Respondent, who is the Managing Director of the Company and therefore he was not a party in that case and he is a third party.

It is significant to note at this juncture, that as set out above, that the very same Parate Resolution dated 10th July 1997 was challenged by the Company – Yashodha Holdings Pvt. Limited by way of the Writ Application No. 1268/98 on 1st December 1998.

Petitioner-Respondent is the same Chairman/Managing Director of the company –Yashodha Holding Pvt. Limited and the Company is fully owned and controlled by the Petitioner –Respondent. All the benefits from the company accrue to the Petitioner-Respondent and his family. Despite the corporate veil, the Company – Yashodha Holdings and the Petitioner-Respondent are in fact one and the same entity and represent the same interest. Clearly this was pith and substance of the

finding by the Court of Appeal in its Judgment delivered on 29th February 2008 in Writ Application No. 1268/98.

I find that this argument by the Petitioner-Respondent is without merit. The learned Judges of the Court of Appeal have found specifically in their decision dated 29th February 2008 in CA Writ Application 1268/98 that the Petitioner – Respondent – Mr. Yasasiri Kastutiarachchi, cannot be considered as a third party as against the Company – Yashoda Holdings. The effect of this decision is that the Petitioner – Respondent and the Company are considered to be one and the same entity for the purpose of the present Writ Application No. 188/09.

I find that the judgment of this Court in SC (SPL) LA 60/2008 [C. A. Appl 1268/98] acts as a complete bar to a proceeding by the same party which once again seeks to question the validity of Parate Respondent dated 10th July 1997.

The decision of the Supreme Court is binding on all lower Courts. For modern legal systems, judicial precedents are relevant information for anyone seeking to find law. Furthermore, precedent rules have emerged in accordance with which the *"ratio decidendi"* of a superior Court must be applied by Courts lower in a judicial hierarchy. The decision of the Supreme Court has the distinct advantage of being final on the question of the Resolution passed by the 1st Respondent – Appellant.

I further hold that the Respondent-Appellant, in light of the judgment of this Court in SC (SPL) LA 60/08, the later Application in CA Writ 188/09 cannot also succeed in view of the principle of 'collateral estoppel', whereby a party is barred from re-litigating an issue already finally determined against such party in an earlier decision.

The Petitioner-Respondent has also raised the objection that this Court, in granting an interim order to proceed with the sale by the Respondent-Appellant, has acted per-incuriam – or that this Court cannot by way of interim order grant the final relief prayed for in an Application.

In this context it is relevant to refer to the decision of the Court of Appeal in *Shell Gas Lanka Limited v. Samyang Lanka (Pvt) Limited* [1], where the Court held that it is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, especially as the facts in this case disclose plainly that there is a strong prima facie case in favour of the party seeking the relief.

The Petitioner-Respondent further submitted that the proceedings with the auction sale during the pendency of the Commercial High Court Case No. 213/2007 offends the rule of separation of powers enshrined in Article 4 (c) of the Constitution.

However in this context it is pertinent to note that the powers that are being challenged are the judicial powers exercised by the apex Court and therefore this submission is not tenable in law.

The Respondent-Appellant has also raised the issue of undue delay on the part of the Petitioner-Respondent in raising the issue of fraud and illegality with respect to the Resolution dated 10th July 1997. Between the date when CA Writ Application No. 1268/98 was filed and the date of the present Writ Application No. 188/09 the Petitioner – Respondent was presented with ample opportunity to raise issues of fraud and illegality against the Resolution.

Having failed to raise such an argument in the intervening years, the belatedness of this defence clearly reflects that this

is an afterthought and indicative of a concoction and clearly manipulative and abuse of the legal process.

In all these circumstances I answer the 1st question of law on which Special leave was granted in the affirmative and the 2nd Question of Law in the negative. I allow the appeal of the Respondent-Appellants and set aside the order of the Court of Appeal in Writ Application bearing No. 188/09 dated 5th November 2009.

I further hold that the 1st Respondent-Appellant is entitled to proceed with the sale by public auction under the Resolution of the 1st Respondent-Appellant dated 10th July 1997. I also order costs in a sum of Rs. 100,000/= to be paid by the Petitioner-Respondent to the 1st Respondent-Appellant.

SRIPAVAN J. – I agree.

RATNAYAKE, J. – I agree.

1st Respondent appellant entitled to proceed with the sale by public auction.

Appeal allowed.

KARUPPANNAPILLAI AND TWO OTHERS V. VISVANATHAN AND SEVEN OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.
AMARATUNGA, J., AND
SRIPAVAN, J.
S.C. (APPEAL) NO. 10/2007
S.C. (SPL.) L. A. NO. 233/2006
C.A. (WRIT) APPLICATION NO. 679/2003
JULY 8TH, 29TH 2009
AUGUST 31TH 2009

Writ of Certiorari – Divesting of a house – Ceiling on Housing Property Law, No. 1 of 1973 – Section 9 – Procedure to be followed by a tenant who wishes to purchase a surplus house – Section 17A – Divesting the ownership of houses vested in the Commissioner – Concept of legitimate expectation.– Locus standii

The Appellants are the Trustees of the Sammangodu Sri Kathirvelayutha Swamy Temple and were the owners of the house which is the subject matter of this appeal.

In terms of the Ceiling on Housing Property (CHP) law, the Appellants had made a declaration to the Commissioner of National Housing. On the basis of the said declaration, the said premises was vested as a surplus house by the Commissioner of National Housing. The Appellants had thereafter appealed against that order to the Board of Review of Ceiling on Housing Property. The original Respondent's (Kandiah Visvanathan's) father had been the tenant of the said premises. At the time the appeal was taken for hearing before the Board of Review, the Respondent's father and his mother too had died and their son Kandiah Visvanathan appeared before the Board of Review.

The Board of Review by its order dated 26.06.1978 had dismissed the appeal and decided that the Respondent, Kandiah Visvanathan, is the tenant of the said house.

In the meantime, since the Appellants were agitating for the divesting of the said premises as neither compensation was paid nor the Commissioner had transferred the title of the said property to a third party, the Appellants made an application under Section 17A of the CHP Law to the Commissioner, for divesting the ownership of the said premises to the Appellants. After an inquiry the Commissioner had decided to divest the said premises and sought the approval of the Minister. The Minister had granted approval and the divesting order was published in the Gazette accordingly.

The Respondent appealed to the Board of Review against the decision of the Commissioner and also sought a Writ of Certiorari from the Court of Appeal to quash the decisions of the Minister of Housing and that of the Commissioner of National Housing approving the divesting of the ownership of the said premises.

The Court of Appeal by its judgment dated 21.08.2006 set aside the approval granted by the Minister and the divesting order published in the Gazette.

The 2nd Respondent – Appellants sought and obtained Special Leave to Appeal.

Held

(1) Since the application to the Commissioner under Section 9 of the CHP Law has been made 6 years after the commencement of the said Law, the Respondent has not acted in terms of the mandatory time frame laid down in Section 9 of the CHP Law. Therefore as the Respondent had failed to comply with the relevant provisions, there had been no valid application before the Commissioner for the purchase of the house in question and in such circumstances, there is no requirement or a necessity for the Commissioner to consider such application or inform the Respondent of such decision.

(2) The concept of legitimate expectation could apply only if there was a valid application filed by the Respondent. In the absence of a valid application, the Respondent had no legitimate expectation. The Court of Appeal was in error in holding that the Respondent had a legitimate expectation.

Per Dr. Shirani Bandaranayake, J., -

"Legitimate expectation cannot simply be taken in isolation. It has to be considered in the light of administrative procedures where the legal right or intent is affected."

Cases referred to:

1. *Goonewardene and Wijesooriya v. Minister of Local Government, Housing and Contruction* – (1999) 2 Sri L.R. 263
2. *Desmond Perera and Others v. Karunaratne, Commisioner of National Housing and Others* – (1994) 3 Sri L.R. 316 (CA)
3. *Desmond Perera and other vs Karunaratne* - 1997 - 1 Sri LR 148 (SC)
4. *Attorney General of Hong Kong v. Ng Yuen Shiu* – (1983) 2 AC 629

APPEAL from the Judgment of the Court of Appeal.

Wijayadasa Rajapakse, P.C., with *Nilantha Kumarage* for 2nd Respondent – Appellants.

A. Gnanathasan, A.S.G., P.C., with *Nirmala Wigneswaran, S. C.* for 3rd, 4th, and 5th Respondent – Respondents.

Dr. Sunil Cooray for Substituted Respondents – Petitioners – Respondents.

Cur.adv.vult.

October 26th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 21.08.2006. By that judgment, the Court of Appeal had decided to set aside the approval granted by the Minister dated 19.02.2003 (3R15a) and the divesting order published in the Gazette on 25.02.2003 (3R16). Accordingly the application for a writ of certiorari made by the substituted respondents-petitioners-respondent (hereinafter referred to as the substituted respondents) was allowed. The 2nd respondent-appellants (hereinafter referred to as the appellants) came

before this Court against the judgment of the Court of Appeal for which Special Leave to Appeal was granted.

At the hearing of this appeal it was agreed by all learned Counsel that the only issue that has to be considered was whether the original respondent, namely, Kandiah Visvanathan, (hereinafter referred to as the respondent), who was the father of the substituted respondents, was entitled to a communication of the decision of the Commissioner of National Housing prior to its publication.

The facts of this appeal as submitted by the appellants, *albeit* brief, are as follows:

The appellants are the Trustees of Sammangodu Sri Kathiravelayutha Swamy Temple and were the owners of the house bearing No. 27, Lorensz Road, Colombo 04 (hereinafter referred to as 'as said premises'). When the Ceiling on Housing Property Law (hereinafter referred to as the CHP Law), came into operation, the appellants had made a declaration as required by the said law to the Commissioner of National Housing (X_1). On the basis of the said declaration made by the appellants, the said premises, was vested as a surplus house by the Commissioner of National Housing (X_2 and X_3). The appellants had thereafter appealed against the said vesting order to the Board of Review of Ceiling on Housing Property (hereinafter referred to as the Board of Review). The respondent's father, Kanagasabai Kandiah was the tenant of the said premises and after his death, his widow Sellamma Kandiah became the tenant of the said premises. At the time that appeal was taken for hearing before the Board of Review, the said Sellamma Kandiah had died and her son Kandiah Visvanathan, viz., the respondent, appeared before the Board of Review.

The Board of Review, by its order dated 26.06.1978, had dismissed the appeal and had decided that the respondent, Kandiah Visvanathan, is the tenant of the said House (X^4).

Therefore, one Wigneswarie Kandiah, a sister of Kandiah Visvanathan, had challenged the said order of the Board of Review by instituting action in the District Court of Mt. Lavinia and the said Court had dismissed that action, by its judgment dated 27.03.1995 (X_{13}). Being aggrieved by that judgment the said sister of Kandiah Visvanathan had made a final appeal to the Court of Appeal and by judgment dated 14.10.1999, the Court of Appeal had affirmed the judgment of the District Court (X_{14}). Against the sad judgment of the Court of appeal the said Wigneswarie Kandiah had come before this Court and by its judgment dated 22.10.2002 this Court had dismissed the said appeal (X_{15}).

In the mean time the Commissioner of National Housing, by his letter dated 04.04.1997 (X_{16}), had informed the respondent to pay a sum of Rs. 96,335/- as the assessed value of the said premises and the said respondent had accordingly paid the said sum to the National Housing Authority. Thereafter an inquiry had been held on 20.04.1999 and it was decided that no action would be taken in respect of the transfer of the said premises without the conclusion of all cases relating to said premises.

Since the appellants were agitating for several years for the divesting of the said premises as neither compensation was paid nor the Commissioner had transferred title of the said property to a third party, they had made an application under section 17A of the CHP Law to the Commissioner, for divesting the ownership of the said premises to the appellants. On the basis of the inquiry that was held, the Commissioner had decided to divest the said premises and had sought approval of the Minister for the said divestiture in terms of section 17(A)(1) of the CHP Law (3R15). The Minister had granted approval on 19.09.2003 (3R15a) and the divesting order was published in the Gazette of 25.02.2003 (3R16).

Thereafter the Commissioner by his letter dated 12.03.2003 had informed the Attorney-at-Law for the respondent that action had been taken under section 17(A)(1) of the CHP Law on the application made by the appellant. The respondent had appealed to the Board of Review on the basis of the said decision and had also filed an application seeking for a writ of certiorari before the Court of Appeal to quash the decisions of the Minister of Housing and the Commissioner of National Housing, approving the divesting of the ownership of the said premises and seeking a writ of mandamus compelling the 3rd respondent to issue an instrument of disposition transferring the said premises to the respondent.

During the pendency of the said writ application, the said respondent has died and the 1st to 4th respondents were substituted in place of the deceased.

The Court of Appeal by its judgment dated 21.08.2006 set aside the approval granted by the Minister on 19.02.2003 and the divesting order published in the Gazette on 25.02.2003.

Learned Counsel for the substituted respondents contended that the facts of this appeal are similar to the facts in *Goonewardene and Wijesooriya v Minister of Local Government, Housing and Costruction*(1). It was accordingly submitted that the respondent, who had participated at the inquiry, had a legitimate expectation of becoming the purchaser of the said premises. Therefore learned Counsel for the substituted respondents contended that the Court of appeal had correctly decided that the respondent was a party aggrieved by the decision to divest ant therefore had a statutory right of appeal to the Board of Review in terms of Section 39(1) of the CHP Law. It was further contended on behalf of the substituted respondents that the Commissioner had failed to notify the respondent of

the decision to divest and the reasons for such decision. The contention was that the Commissioner, by failing to notify the respondent of his decision had violated the rules of natural justice.

The Court of Appeal, having considered the application filed by the respondent had held that he had a legitimate expectation of purchasing the premises in question and that a decision to divest would have affected him adversely. The Court of Appeal had arrived at the aforesaid decision on the basis of the letter dated 04.06.1997 (X_{16}) referred to earlier, by which the Commissioner of National Housing had requested the respondent to deposit a sum of Rs. 96,335/-.

It was not disputed that the respondent's father K. Kandiah was the tenant of the premises in question until his death in July 1952. Thereafter the widow of the said Kandiah became the tenant of the said premises. She passed away in July 1973.

The said premises in question was regarded as an excess house by the Board of Review, by its order dated 26.06.1978 (X_4). The said Board of Review, by that order had decided that the respondent was deemed to be the chief occupant of the premises.

The CHP Law, which come into operation on 13.01.1973, specifically deals with the procedure that should be followed by a tenant, who may apply to purchase a surplus house. Section 9 of the said Law, which deals with such situations, has clearly stated that,

> *"The tenant of a surplus house or any person who may succeed under section 36 of the Rent Act to the tenancy of such house may, within four months from the date of commencement of this Law, apply to the Commissioner for the purchase of such house."*

Reference was made to the applicability of Section 9 of the CHP Law in *Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others* (2), where it was held that,

> "Section 9 of the CHP Law is precise, clear and unambiguous. **A tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months from the date of commencement of the CHP Law which was 13.01.1973"** (emphasis added).

It was not disputed that the respondent had made an application to the Commissioner of National Housing in terms of section 9 of the CHP Law only on 06.03.1979. The date of commencement of the CHP Law as defined in section 47 of the said Law, was 13.01.1973 and the respondent had made his application, six (6) years after the relevant date of commencement. Considering the provisions contained in section 9 of the CHP Law, the application of the respondent to purchase the premises in question therefore is clearly out of time.

In *Desmond Perera and Others v Karunaratne, Commissioner of National Housing and Others (supra)*, the Court had taken pains to consider whether there was any obscurity and/or ambiguity in the wording of section 9 of the CHP Law. In that case, the 1st petitioner had made his application for the purchase of the premises on 27.03.1981, which was 8 years after the CHP Law coming into effect. Considering the application made by the 1st petitioner in 1981 and the applicability of the provisions contained is section 9 of the CHP Law, Grero, J. had stated that,

> "The Court is of the view, that there is no obscurity and ambiguity in the wording of section 9 of the CHP Law. . . . Therefore this Court has to give effect to the plain

meaning of this section. In doing so this Court is of the view, that a tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months (four) from the date of commencement of the CHP Law. Much prominence was given to this Law, when it came into force. Petitioners who are the tenants of the 3rd respondent should be or ought to be vigilant about the laws enacted and published regarding their rights and duties. They may make full use of them if they so desire. Failure in their part to comply with section 9 of the CHP Law is not a ground to make a complaint against draftsmen of the said Law. When the wording of the section is so clear and precise, they should have made applications to the Commissioner within four months after the commencement of the Law to purchase the houses as stated in that section. This Law came into operation on 13.01.1973. The 1st petitioner (but not the other petitioners) made his application to the Commissioner on 27.03.81, i.e., 8 years after the commencement of this Law."

The applicability of the provisions contained in Section 9 of the CHP Law was again considered in *Desmond Perera and Others v. Karunaratne, Commissioner for National Housing* (3), where G.R.T.D. Bandaranayake, J., had stated that,

"Section 9 . . . . creates the opportunity for the tenant to opt to purchase the house he lives in. So the section categorically requires him to do only one single thing – namely, to apply to the Commissioner for the purchase of a house. This he must do within the stipulated period of four months from the date of commencement of the law – which was 13.01.73."

In *Desmond Perera and Others (supra)* Court had held that the 1st petitioner had failed to comply with the provisions of section 9 of the CHP Law.

As could be clearly seen, the facts of the present appeal as regards the application made to the Commissioner of National Housing in terms of section 9 of the CHP Law, is similar to the facts in *Desmond Perera and Others (supra).* As stated earlier it is not disputed that the original respondent had made his application 6 years after the commencement of the said Law and therefore the respondent has not acted in terms of the time frame laid down in section 9 of the CHP Law.

The next issue that should be considered is as to whether the respondent had a legitimate expectation as was held by the Court of Appeal on the basis of the request made by the Commissioner of National Housing on 04.06.1997 to deposit a sum of Rs. 96,335/- (X^{16}).

Referring to the said letter dated 04.06.1997 (X_{16}), the Court of Appeal had held that although the application to purchase the house was made out of time and the respondent has no right to purchase the house under section 9 of the CHP Law, the Commissioner had used his discretion and had elected to sell the house to the tenant by requesting the respondent to pay the assessed value of the property, survey fees and the fees for the deed. Accordingly the Court of Appeal had proceeded on the premise that although the respondent had no legal right to purchase the property in terms of section 9 of the CHP Law, since the Commissioner had used his discretion to sell the house to the respondent, that exercise of discretion could confer legitimate expectation to the respondent. In deciding that the respondent had a legitimate expectation in purchasing the premises in question the Court of Appeal had referred to the decision in *Goonawardene and Wijesooriya v. Minister of Local Govern-*

ment, Housing and Construction and Other (supra). Referring to the questions that had to be considered by the Court in that case, the Court of Appeal had held that on the application made to divest the premises in question, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the said premises. Thereafter the Commissioner had sought approval from the 4th respondent-respondent (hereinafter referred to as the 4th respondent) to divest the premises in question in terms of section 17A(1) on the basis of his recommendation dated 06.01.2003 (3R15). The Court of Appeal had further held that although the divesting order was published in the Gazette of 25.02.2003 (3R16). The Commissioner had failed to communicate his decision of divesting, to the respondent, before obtaining the approval of the Minister.

Section 17A(1) of the CHP Law refers to divesting the ownership of houses vested in the Commissioner and the section reads as follows:

> *"Notwithstanding that any house is vested in the Commissioner under this Law, the Commissioner may, with the prior approval in writing of the Minister, by Order published in the Gazette, divest himself of the ownership of such house, and on publication in the Gazette of such Order, such house shall be deemed never to have vested in the Commissioner."*

Learned President's Counsel for the appellant contended that the appellant's position was that the Trustees of the Temple had written several letters requesting the release of the premises in question to the Temple, as the premises in question is situated within the Courtyard of the Temple. Accordingly, the appellant had made an application in terms of section 17A(1) of the CHP Law to the Commissioner for divesting the ownership of the premises in question to the appellant.

On the basis of the said application, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the premises in question. The Commissioner thereafter had taken necessary steps to obtain the approval of the Minister in terms of section 17A(1) of the CHP Law and the divesting order was published in the Gazette on 25.02.2003. (3R16).

Learned President's Counsel for the appellant, referring to the aforementioned decision taken by the Commissioner, contended that as the respondent had not made any application to the Commissioner for the purchase of the premises in question within the time period prescribed in section 9 of the CHP Law, the Commissioner was not bound to communicate the decision of such divesting to the respondent.

It is to be noted that section 17A(1) of the CHP Law, does not stipulate a time limit within which an application must be made in terms of that section. However, the provision contained in section 9 of the CHP Law is different in that context, since a mandatory time frame is clearly prescribed in that section. Considering the provisions contained in sections 9 and 17A(1) of the CHP Law it is clear that, if a tenant is to make complaints against the Commissioner regarding these decisions, it would be necessary for him to follow the procedure laid down in the respective provisions of CHP Law, prior to making such complaints.

In *Desmond Perera and Others v. Karunaratne, Commissioner for National Housing (supra*), the tenants had failed to make applications to purchase the relevant houses within the time prescribed by section 9 of the CHP Law as in this appeal. Considering the question as to the need for the Commissioner to have notified the tenants, this Court had stated that,

"In the absence of applications to purchase houses tenanted by them in terms of the law, these appellants cannot be heard to complain of dereliction of duty by the 1st respondent. In the aforesaid situation, there is no administrative duty to notice the tenants of houses vested that those houses are to be divested" (emphasis added).

Legitimate expectation cannot simply be taken in isolation. It has to be considered in the light of administrative procedures where the legal right or intent is affected. This position was carefully considered in *Attorney-General of Hong Kong v. Ng Yue Shiu* (4), where it was stated 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."

As stated earlier the Court of Appeal in this matter had referred to the decision in *Goonawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others (supra*) in support of the position that the respondent had a legitimate expectation of purchasing the premises and that a decision to divest would have affected him adversely.

In *Goonawardena and Wijesooriya v. Minister of Local Government, Housing and Construction and Others (supra)* the tenants had submitted their applications in terms of the relevant applicable procedure, and considering the said position, the Court had correctly come to the finding that the said tenants had a legitimate expectation. When a party had tendered applications as per the provisions of the applicable statute they do have a legitimate expectation to receive instructions thereafter as to the relevant procedure that they should follow on the basis of the relevant provisions and the applications they had made.