SUPREME COURT

Biso Menika
Vs.
Cyril de Alwis and Others

S.C. No 59/81 — C.A. Application No. 1123/80

Certiorari – Landlord and Tenant – Ceiling on Housing Property Law No 1 of 1979 s.9,13,17 – Rent Act s. 22(7) — delay — excuse — other legal remedies

Biso Menika had been a servant of one Mrs. Mabel Peiris since 1952. By Deed of No. 4396 of 31.12.73 Mabel Peiris gifted Premises No. 88, Horana Road to Biso Menika. The 7th Respondent was in occupation of the premises at time of the gift having been a tenant of the donor Mabel Peiris since 1963. The 7th Respondent refused to attorn to Biso Menika. Biso Menika filed action for vindication of title and ejectment of 7th R. But the action was dismissed on the ground that premises No. 88, Horana Road had vested in the Commissioner on National Housing on 19.2.76 under Section 17(1) of the Ceiling on Housing Property Law. This vesting was consequent to an application by the 7th Respondent to purchase the premises under Sections 9 of the Ceiling on Housing Property Law alleging that Mabel Peiris owned houses in excess of the permitted number. This allegation was proved to be wrong as Mabel Peiris owned only two houses.

7th Respondent also made an application to purchase premises under Section 13 of the C.H.P. on 12.2.73. Petitioner moved Court to quash the vesting order made by the Minister of Housing.

It was also contended on behalf of the 7th Respondent that no Writ of Certiorari should apply as there was undue delay on the part of the petitioner to seek relief and that the petitioner had misrepresented facts.

Held 1) that 7th Respondent had no right to purchase premises under Section 9 of the CHP Law because Mabel Peiris did not own any houses in excess of the permitted number.

2) That 7th Respondent had no right to purchase the house under Section 13 of the CHP Law because at the time of making application Mabel Peiris was not debarred by Section 22(7) of the Rent Act from instituting action for ejectment of 7th Respondent.

3) That the 7th Respondent had ceased to be a tenant on his refusal to attorn to the Appellant and therefore he was not qualified to assert the right of purchase under Section 13 of the CHP Law.

4) That the Commissioner of National Housing acted ultra vires in taking action under section 17 the CHP Law and the Minister acted ultra vires in making the vesting order because the application of the 7th Respondent under Sections 9 and 13 was not valid.

5) That Writ of Certiorari lies at the discretion of Court and will not be denied if the proceedings were a nullity; even if there is delay, especially where denial of the Writ is likely to cause great injustice, it will be issued.

6) That the disposition of parties to explore other lawful avenues which hold out reasonable expectation of obtaining relief without incurring expenses of coming into Court do constitute circumstances justifying delay in coming to Court.

7) That there was no attempt on the part of the Petitioner to deceive Court by suppressing or misstating any material fact.

APPEAL from judgment of Court of Appeal.

Before: Sharvananda, J, Wanasundera, J & Ratwatte, J.

Counsel: I.Q.N. de S. Seneviratne with C. de S Wijeyeratne for the Petitioner.
D. Premaratne, S.S.C., with K.C. Kamalasabayson, S.C., for the 6th & 8th Respondents.
Miss M.Seneviratne with H. Seneviratne for the 7th Respondent.

Argued on: 16th, 17th & 19th March, 1982.
Cur. adv. vult.

Decided on: 11.5.1982

SHARVANANDA, J.,

By her petition filed on 19.1.80., the petitioner appellant moved the Court of Appeal for the issue of a Writ of Certiorari quashing the Vesting Order dated 13th August 1976, made by the Minister of Housing, under the provisions of Section 17(1) of the Ceiling on Housing Property Law No. 1 of 1979 (hereinafter referred to as the "Property Law") in respect of premises No. 88 Horana Road, Panadura belonging to her.

The Court of Appeal held that there was no inquiry under section 17 before the Vesting was made, but, in the exercise of its discretion, refused the petitioner's application on the ground of delay and misrepresentation of facts. The petitioner has, with leave granted by this Court, preferred this appeal to this Court.

The petitioner had been in the employment of one Mrs. Mabel Peiris since 1952. The latter, by Deed of Gift No. 4396 dated 31.12.73 donated the aforesaid premises i.e. 88 Horana Road, to the petitioner when it was in the occupation of the 7th respondent who had been her tenant thereof from 1963. Though the 7th respondent was notified of the above Deed of Gift 4396, and was requested to attorn to the petitioner, he had refused to attorn to her and has continued to remain in the premises. The petitioner thereupon instituted action No. 14426 in the District Court of Panadura on 7.5.75 against the 7th respondent for vindication of her title and ejectment of the 7th respondent from the said premises. The District Court by its judgment dated 9.8.77 accepted the petitioner's title to the said premises and held that in view of the 7th respondent's refusal to attorn to the petitioner he was a trespasser and had forfeited his rights and privileges as a tenant. The Court however dismissed the petitioner's action on the ground that the said premises had become vested in the Commissioner of National Housing consequent to Vesting Order dated 19.2.76, and published in Government Gazette of 13.8.1976, made under section 17(1) of the Property Law.

By application dated **12.2.73** the 7th respondent purported to apply under sections 9 & 13 of the Property Law to the Commissioner of National Housing for the purchase of the said house No.88 Horana Road let to him. In this application he stated that Mrs. Mabel Peiris of No.86 Horana Road, was the owner of the premises. He further stated that the rent per month paid by him was Rs.50/-. It was his case that Mrs. Mabel Peiris was the owner of 3 houses situated at Panadura i.e. 86 Horana Road, 88 Horana Road (occupied by him) and No. 1 Kaviraja Mawatha. Under the provisions of the Property Law the maximum number of houses which could be owned by an individual was two. ("permitted number of houses"). Any house owned on the date of the commencement of the Property Law, by a person who was not a member of a family, in excess of that number constituted a surplus house for the purpose of the Property Law. That Law did not bar the alienation of any house that comes within the category of "permitted number of houses". But such alienation to a stranger entitled the tenant of such house to make an application for the purchase of the house from the new owner/landlord (Section 13).

If there was no transfer to a stranger the tenant could not apply to purchase any of the permitted number of houses. On the other

hand a tenant of a surplus house could make application within 4 months of the commencement of the Law for the purchase of such house, even though there was no transfer of ownership of such house (section 9).

Further an owner of a surplus house had to notify a tenant of such house the ownership of which such person did not propose to retain. And if the ownership of the surplus house is transferred without such intimation, the tenant could apply to purchase that house (sections 8 & 10). The difference in the measure of the rights of the tenant of the respective category of houses has to be appreciated in determining the pre-emptive rights of the 7th respondent to purchase the house let to him.

In providing for involuntary divesting of houses the Law encroaches on the right of persons and hence is subject to strict construction. The presumption is that existing legal rights are not to be taken away or eroded except by clear words in the statute.

Mrs. Mabel Peiris had no children: hence, under provisions of the Property Law she could own only two houses. It was the contention of the 7th respondent that Mrs. Mabel Peiris had a "surplus house" within the meaning of the Property Law and that as Mrs. Peiris had not made any declaration under section 8 of the Property Law and had failed to indicate which of the houses she proposed to retain, the premises No.88 of which he was the tenant should be treated as a surplus house in respect of which he could make an application under section 9 of the Property Law.

The petitioner refuted the respondent's statement and stated that Mrs. Peiris owned only two houses, Nos. 86 and 88 on the date of the commencement of the Property Law and that though she owned premises No.1, Kaviraja Mawatha, there was no house on the said land, it being a bare land only. To qualify himself to make an application under section 9 of the Law the 7th respondent had to satisfy Court of the existence of a house in premises No. 1, Kaviraja Mawatha, in order to establish that Mrs. Peiris owned three houses. For that purpose he produced deed No. 4324 dated 29.1.73 by which Mrs. Peiris transferred premises No.1, Kaviraja Mawatha to one T.M.M Banda. He rested the proof of his case on that deed. There is however ex facie no reference to any house on that deed of conveyance. According to that deed what was conveyed was only

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bare land. No other evidence was adduced to establish that there was in fact a house in the premises. There is no reference to any house as being the subject matter of conveyance by that deed. Counsel for the 7th respondent strenuously submitted that since the operative clause recited that the transferee was "to have and to hold the said *land and premises* which are of the value of Rs. 6000/-", and since one land alone was set out in the schedule to the deed, the mention of "land and premises" connoted something beside the said land and that something was a house. This ingenious contention overlooks the language and style of conveyancing and is insubstantial. If there was a house in existence, that fact could have been proved by positive evidence – by production of assessment registers, house-holder lists etc., I agree with the finding of the Court of Appeal that the 7th respondent had failed to establish the existence of a house in premises No. 1, Kaviraja Mawatha, Panadura. In view of this conclusion the 7th respondent's assertion that Mrs. Peiris was on the relevant date, owner of three houses is untenable and argument based on such assumption therefore fails. Mrs. Peiris had no surplus house to entitle 7th respondent to make an application under section 9 of the Property Law. This section applies only to a surplus house owned by a landlord. The house in question was therefore not a surplus house that could be applied for under section 9 of the Property Law. Hence it was not competent for the 7th respondent to have made an application under section 9 for the purchase of the premises No.88 Horana Road. The application could not have been entertained by the Commissioner.

The question next arises whether the 7th respondent is entitled to maintain his application under section 13 of the Property Law for the purchase of the house occupied by him.

> Section 13 of the Law reads as follows - "Any tenant may make an application to the Commissioner for the purchase of the house let to him *where no action or proceedings may under Rent Act No.7 of 1972 be instituted for the ejectment of the tenant of such a house on the ground that such a house is reasonably required for occupation as a residence for the landlord of such a house or for any member of his family.*"

The provision of the Rent Act No. 7 of 1972 which positively bars the institution of an action for the ejectment of the tenant on the

ground referred to in section 13 of the Property Law is section 22 (7) of the Rent Act. This section provides as follows:

> "notwithstanding anything in the preceding provisions of this Act, no action or proceedings for the ejectment of the tenant of *any premises referred to in sub-section (1) or subsection (2)(1)* shall be instituted on the ground that such premises are reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purpose of the trade, business .....of the landlord, where the ownership of such premises was acquired by the landlord on a date subsequent to the specified date, by purchase or inheritence or gift, other than from a parent or spouse who had acquired ownership of such premises, on a date prior to the specified date ....." In this sub-section "specified date" means "the date on which the tenant for the time being of the premises ..... came into occupation."

The premises referred to in sub-section 22(1) and sub-section 22(2)(1) of the Rent Act and alluded to in section 13 of the Law are respectively residential premises, the standard rent of which for a month does not exceed Rs. 100/- and premises the standard rent of which exceed Rs. 100/-. The rent of the premises, the subject matter of the 7th respondent's application, is Rs. 24/92 per month. Hence they are premises in respect of which, by the terms of section 22(7) of the Rent Act an action for ejectment of the tenant from the premises could not be instituted on the ground of reasonable requirement by the transferee from the original landlord. If such premises are transferred over the head of the tenant, though the transfer is not invalid, yet it attracts section 13 of the Property Law and entitles the tenant to apply for the purchase of the house from the new owner-landlord. The integration of section 22(7) of the Rent Act into the scheme of the Property Law via section 13 of the Law has the following effect:- the pre-emptive right of purchase under that section of the Law (a) accrues only in the event of there being a transfer or devolution of the premises from the original landlord to a new owner, such as is referred to in section 22(7) of the Act, subsequent to the date when the tenant came into occupation of the premises and (b) is available only to the person who was the tenant of the premises prior to such transfer or devolution and who continues to be tenant under the new owner. Section 22(7) of the Rent Act

postulates the existence of the relationship of landlord and tenant between the new owner and the person who was the tenant of the premises at the time of the transfer of the premises. It is essential for the competency of an application under section 13 of the Property Law that the applicant should have become the tenant of the premises under the new owner. The relationship of landlord and tenant is constituted by the tenant recognising the new owner as his landlord by attorning to him. If he refuses to attorn he forfeits the tenancy and becomes a trespasser and is not entitled to make or maintain any application under section 13 of the Law.

It may be argued that in respect of the house in question that Mrs. Peiris could not have, under section 22(1) of the Rent Act ejected the 7th respondent on the ground of her reasonable requirement for occupation as residence, since that sub-section did not empower the Court to entertain an action for the ejectment of the tenant on that ground where the standard rent of the premises was under Rs. 100/- per month and the tenancy had commenced prior to the date of the commencement of the Rent Act of 1972. But the language of section 13 for this Property Law indicates that what was incorporated by reference in that section was the relevant provision of the Rent Act which absolutely bars the institution of such action in respect of all categories of premises governed by the Rent Act and not the section of the Rent Act which fails to recognise reasonable requirement as a ground for the institution of an action for ejectment. The clause in section 13 of the Law "Where no action or proceedings *may* under the Rent Act No. 7 of 1972 be instituted" has the import of "where no action or proceedings under Rent Act *shall be* instituted." The word "may" in the context must be construed that way. It is clear that the reference is to section 22(7) of the Rent Act. Hence the above argument is not available to the 7th Respondent on the consideration of his application under section 13 of the Law.

On the date of the 7th respondent's application under section 13 of the Property Law i.e. 12.2.73 Mrs. Peiris was the owner and landlady of the premises. She had been his landlady and the owner of the premises from the date he became a tenant. No transfer of the premises as postulated by section 22(7) of the Rent Act had yet taken place. Hence section 22(7) has no application to the premises, during the tenure of Mrs. Peiris's ownership. It was not competent for the 7th respondent to have made this application under section

13 of the Property Law against Mrs. Peiris. The application was premature and the Commissioner could not have entertained the 7th respondent's application for the purchase of the house from Mrs. Peiris under section 13 of the Property Law.

Mrs. Peiris gifted the premises to the petitioner and the petitioner acquired ownership thereof only on 31.12.73 long after the 7th respondent's application. In view of the fact that the 7th respondent had refused to attorn to the petitioner on the latter acquiring ownership of the premises in December 1973, he ceased to be a tenant of the premises and hence did not have the status to make or maintain the application against the petitioner under section 13 of the Property Law. It is fundamental that the relationship of tenant and landlord should subsist between the applicant under section 13 of the Law and the respondent from whom the house is sought to be purchased. Proceedings under section 17 of the Law can be taken only on an application warranted by the provisions of the Property Law. If the application is not sanctioned by any provision of that Law it was not competent either for the Commissioner of National Housing or the Minister to have taken proceedings under section 17 and no Vesting Order under section 17 could have been made by the Minister under that section. In view of the fact that the 7th respondent's application is not sanctioned by section 9 or 13 of the Property Law, the Commissioner acted ultra vires in taking action under section 17 and the Minister ultra vires in making the Vesting Order under that section. The proceedings and the Vesting Order were hence nullities and void in Law. Where a statutory authority has acted ultra vires, any person who would be affected by its act, if it was valid, is normally entitled ex debito justitiae to have it set aside if he proceeds by way of Certiorari. The Court may however exercise its discretion to refuse the remedy on the grounds of laches, delay or acquiescence.

The Court of Appeal misdirected itself in holding that the house in question could in the circumstances have been vested in the Commissioner on the application of the 7th respondent.

In view of the above conclusion it is not necessary to deal with the contention of the Counsel for the petitioner which found favour with the Court of Appeal that the procedural requirements of section 17 of the Property Law had not been complied with

The ground for rejection of petitioner's application for Writ by the Court of Appeal is that there had been undue delay and misrepresentation of facts on the part of the petitioner in making her application for Writ. Counsel for the petitioner-appellant has submitted that the conclusions of that Court are not warranted in law and have to be reviewed.

The Minister's Vesting Order complained of though made on the *19th February 1976*, was gazetted on 13th August 1976 and the application for Writ was made about 3 1/2 years later on *19.1.80*. The petitioner became aware of the said Order only on the *7th of September 1976* when her action No. 14424 in the District Court of Panadura was called for delivery of judgment. On that day the 7th respondent produced a copy of the Government Gazette dated 13th August 1976 which showed that the premises in question had been vested in the Commissioner of National Housing. The petitioner thereupon appealed to the Board of Review constituted under section 29 of the Property Law. His appeal was inquired into on 18.3.78. One Mr. Peiris, husband of Mrs. Mabel Peiris appeared for the petitioner at the inquiry. The record of the proceedings of the Board of Review of that date reads as follows:-

> "Mr. Peiris states that the appellant received communication dated *3.11.76*. stating that the premises had been vested and it has been published in the Gazette and that payments are being made to the Commissioner. We have heard Mr. Peiris who has set out the facts very clearly but he concedes that in view of the fact that the Minister had made the Order and vesting has been gazetted, he has no right of appeal. Further the appeal made by the appellant is made prior to the intimation by the Commissioner of the Minister's Order. We therefore make Order dismissing this appeal. Mr. Peiris has indicated to us that he had already made representations to the Committee of Inquiry which is now being held to inquire into injustices caused by the Orders of the Commissioner and has stated that he will pursue that appeal."

The petitioner had on or about *24.9.77* made application to the Committee of Inquiry appointed by the present Minister of Housing to investigate hardships and injustices caused by the administration of the Property Law. That application was inquired into on *23rd October, 1978*. According to her thereafter she had addressed numerous

letters to the Committee and had waited for the Committee's report on her complaint, and as she had not received any reply she filed the present application in Court on 19.1.80. The respondents have not denied this averment.

The Court of Appeal had considered the proceedings of the Board of Review dated 18.3.78 and has concluded that the petitioner had abandoned her appeal to the Board. This conclusion cannot be supported. What happened before the Board that day was that when the petitioner's representative was told that since the Minister had made the Vesting Order under section 17 of the Property Law, the appeal was futile, the representative, being a layman, accepted the untenability of the appeal to the Board. Such acceptance does not amount to an abandonment of the appeal. From an admission of Law that went to the root of the appeal an abandonment of he appeal cannot be spelt. The Board of Review however dismissed the appeal on the ground that the appeal had been preferred prior to the intimation by the Commissioner on 3.11.76 of the Minister's Order. The proceedings before the Board of Review are relevant to show that the petitioner was pursuing a legal remedy that was open to her and that she was not guilty of unreasonable delay in seeking the Writ.

A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well-accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver. As Lord Greene M.R., in *Rex Vs. Stafford Justices* (1940) 2 K.B 33 at page 43 stated :

> "Now, in my opinion, the Order for the issue of Writ of Certiorari is, except in cases where it goes of course, strictly in all cases a matter of discretion, It is perfectly true to say that if no special circumstance exists and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled ex debito justitiae to his Order. That merely means this, in my judgment, that the Court in such circumstances will exercise its discretion by granting the relief. In all discretionary remedies it is well known and settled that in certain circumstances

> – I will not say in all of them, but in a great many of them – the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise the discretion in a particular way and if a Judge at a trial refuses to do so then the Court of Appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the Court is entitled to inquire into the conduct of the applicant, and circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must in my judgment be one of discretion."

The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay.

> "Laches is such negligence or omission to assert a right and taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party operate as a bar in a Court of equity" Ferris - Extra-Ordinary Legal Remedies – para 176.

> "Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equal to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be unjust, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy." *Lindsey Petroleum Co., Vs. Hurd* (1874) L.R., 5 P.C 221 at 239.

An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.

When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically.

> "Recent practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not readily be denied" - de Smith - Judicial Review - 4th Ed. page 426.

In this connection Professor Wade in his "Administrative Law" 4th Ed. at page 561 states -

> "the discretion to withhold remedy against unlawful action may make inroads upon the rule of Law and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right, but the fact that a person aggrieved is entitled to Certiorari ex debito justitiae does not alter the fact that a Court has power to exercise the discretion against him, as it may in the case of any discretionary remedy."

Unlike in English Law or in our Law there is no statutory time limit within which a petition for the issue of a Writ must be filed. But a rule of practice has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the Court has ample power to condone

delays, where denial of Writ to the petitioner is likely to cause great injustice. The Court may therefore in its discretion entertain the application in spite of the fact that a petitioner comes to Court late, especially where the Order challenged is a nullity for absolute want of jurisdiction in the authority making the order.

The Court of Appeal has held that it cannot excuse the delay caused by the petitioner's appeal to the Committee of Inquiry set up by the present Minister in 1977. The question is, did the delay result from the petitioner pursuing a legal remedy, not a remedy which is extra legal. If the petitioner has been seeking relief elsewhere in a manner provided by the Law he cannot be guilty of culpable delay. Further the predisposition of parties to explore other lawful avenues which hold out reasonable expectation of obtaining relief without incurring the expense of coming into Court cannot be overlooked or censored and any delay caused thereby cannot be characterized unjustifiable. The Committee of Inquiry referred to by the petitioner was appointed by the Minister the 8th respondent to inquire into the hardships and injustices caused to persons by the past administration of the Property Law, and report to the Minister. This report is not intended to be an academic exercise, sterile of legal purpose. Section 17(a)(1) of the Law provides-

> "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."

The Court of Appeal has failed to appreciate the legal significance of the Committee's Report. It is designed to inform the mind of the Minister of instances of injustices to enable relief by way of divestment-Orders under section 17(1)(1)-to be rendered. There was certainly legal warrant for petitioner's expectation of getting the necessary relief when she complained to the Committee. This circumstance furnishes reasonable excuse for the delay occasioned by the petitioner's application to the Committee of Inquiry for relief. The Court of Appeal erred in regarding that the Law does not recognise any appeal to any Board unless that Board (and Committee) has the power to set aside the Order of the "Commission" and

consequently refusing to take into consideration the petitioner's appeal to the Committee to excuse her delay in coming to Court. The conduct of the petitioner cannot certainly be branded as unreasonable to disentitle her to a Writ especially when the Order challenged was a nullity.

A person who applies for the extra-ordinary remedy of Writ must come with clean hands and must not suppress any relevant facts from Court. He must refrain from making any misleading or incorrect statements to Court.

> In Halsbury Laws of England - Vol.11, 3rd Ed. page 71, para 128 it is stated "on an application for relief the utmost good faith is required and if the applicant in his affidavit suppress the material facts the Court will refuse an Order without going into the merits."
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> In *Rex Vs. Kesington Income Commissioners* – (1977) 1 K.B. 486. Viscount Reading, C.J., observed – "where an ex parte application had been made to this Court for a rule Nisi or other process, affidavit in support of the application was not candid, and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of its merits. This is a power inherent in the Court." He however warned that this is a power "which should only be used in cases which bring conviction to the mind of the Court that it has been deceived." This power should be exercised only when the statement of facts is calculated to mislead the Court on important relevant matters."

The alleged misrepresentation of facts which was a ground for the Court of Appeal exercising its discretion against the petitioner and rejecting her application was that "in paragraph 14 of her affidavit the petitioner has stated that the Board of Review dismissed the appeal of the petitioner. And in paragraph 19 the petitioner pleaded that the order of the Board was contrary to law as the Board of Review does have the power to hear and determine appeals even if the said property has been vested in the Commissioner of National Housing by the Hon. Minister." The Court construed these averments

as an attempt on the part of the petitioner to conceal the true state of affairs in respect of the Order of the Board of Review dated 18.3.78 when, according to it, she had abandoned the appeal by conceding that she had no right of appeal. In my view the Court has fallen into grave error in concluding that the petitioner had tried to mislead that Court in making the said averments. The Court had misread the context and had without justification assumed that the petitioner had abandoned her appeal to the Board of Review, when her lay-representative agreed with the Board's proposition of law that she had no right of appeal in view of the gazetting of the Vesting Order.

Though the above was the only instance of alleged misrepresentation of facts cited by the Court of Appeal counsel for the 7th respondent drew our attention to averment 10 of the petitioner's affidavit wherein she has stated that on or about 10.11.75 the 7th respondent had made an application under the Property Law to purchase the house, when in fact the 7th respondent had made his application on or about 12.2.73 and had filed an affidavit before the Commissioner on 25.10.75 and inquiry into his application took place on 30.11.75. In my view this erroneous statment does not amount to misrepresentation of facts.

In my view there is no attempt on the part of the petitioner to deceive the Court by suppressing or misstating any material fact.

Counsel for the 7th respondent stated that the delay on the part of the petitioner in making this application for Writ had caused prejudice to the 7th respondent and that it is not just and reasonable for the Vesting Order to be nullified and he be deprived of the chances of completing his purchase of the house. According to the 7th respondent he had on the faith of the validity of the Vesting Order.-

(a) had deposited with the Commissioner of National Housing a sum of Rs. 2363/- as an advance on the purchase price,
(b) had paid a sum of Rs. 2100/- on account of the rent of the premises,
(c) had paid a sum of Rs. 750/- as taxes,
(d) had expended a sum of Rs. 7650/- on repairs effected to the premises.

In my view these payments or expenditure cannot operate as a bar to a Writ which ex debito justitiae the petiitoner is entitled to.

The 7th respondent should be able to get back the advance of Rs. 2362/- from the Commissioner of National Housing on this Vesting Order being declared null and void. The 7th respondent has for his own benefit expended this sum of Rs. 7650/- on repairs to premises he was occupying and not on any improvements. The sum of Rs. 2100/- was according to the 7th respondent paid on account of the rent of the premises. He has also paid a sum of Rs. 750/- as taxes. He was a trespasser as against the petitioner. He had not paid any damages for his occupation of the premises from January 1974. In the circumstances, the 7th respondent has not sufferned any prejudice; no injustice will be caused to the 7th respondent by the issue of the Writ.

I hold that the Commissioner acted ultra vires in entertaining the 7th respondent's application to purchase the house under section 9 and/or 13 of the Ceiling on Housing Property Law and in making a determination under section 17 of said Law. I also hold that the Minister of Housing had no jurisdiction to make the Vesting Order dated 19.2.76 and gazetted on 13th August 1976.

I set aside all the proceedings before the Commissioner of National Housing and the Vesting Order made by the Minister in respect of the premises No. 88, Horana Road, Panadura. I set aside the judgment of the Court of Appeal and allow the appeal and the application of the petitioner-appellant. I direct the issue of a Writ of Certiorari quashing the Commissioner's decision and the Minister's Vesting Order, both alleged to have been made under section 17(1) of the Ceiling on Housing Property Law.

The 7th respondent will pay the petitioner-appellant her costs both in this Court and the Court of Appeal.

In view of the above Order, I trust that the Commissioner will hand over to the petitioner the aggregate amount paid to him by the 7th Respondent as rent, towards the reduction of the damages due to her from the 7th defendant for his occupation of her premises No.88.

WANASUNDERA, J., — I agree.

RATWATTE, J., — I agree.

Appeal allowed