

application in Rs. 1050/- to 1 - 7 respondents and Rs. 525/- to 8th respondent.

SENANAYAKE J. - I agree.

Order set aside.

**JAYAWARDENA
VS.
CHAIRMAN, CEILING ON HOUSING PROPERTY BOARD OF
REVIEW AND OTHERS**

COURT OF APPEAL
K. VIKNARAJAH
C.A. NO. 1523/82
22 SEPTEMBER 1988.

Landlord and tenant - Ceiling on Housing Property Law, No.1 of 1973 sections 13, 17, 17 A, 39 (1) - Vesting Order - Purchase by tenant - Divesting - Right of appeal and review. - Writ of Certiorari

Held:

Under Section 17(1) of the Ceiling on Housing Property Law the vesting in the Commissioner takes place after the Commissioner is satisfied that it is an appropriate case for vesting after considering the equities of the case. In fact under Section 17 (1) there has to be an application for the purchase of the house. For instance under section 13, a tenant can make an application to purchase a house let to him, provided the conditions set out in the section are satisfied. Under section 17(1) the Commissioner after holding an inquiry at which the landlord and tenant are present, and after hearing both parties, makes a determination whether he would recommend to the Minister to vest the house. This determination is notified to the parties and the party dissatisfied with the determination can appeal to the Board of Review. The party dissatisfied with decision of the Board of Review can seek his remedy by writ.

The Minister on being notified by the Commissioner that it is a fit case for vesting, may by order published in the Gazette vest such house in the Commissioner. Thereafter under subsection (2) the Commissioner shall enter into an agreement with the applicant for the sale of such house subject to the conditions set out therein.

There are several provisions under which houses are vested namely Section 8(4), 11(4), 14(3) and 17(1). The power to divest was given to the Commissioner by the amendment introduced by Law No. 34 of 1974.

Properties are vested under section 17 for the purpose of conveying them to the tenant and this is obligatory under the Law if the conditions mentioned in the agreement are complied with (Section 17(3) (a)). The power to divest under section 17(A) would generally be in respect of houses vested under provisions *other than section 17(1)* unless there are exceptional circumstances. eg. if the tenant after

entering into an agreement for sale commits a breach of any of the conditions and fails to complete the sale or where the procedure followed before the vesting shows that the aggrieved party has been deprived of the right to appeal to the Board of Review because the determination of the Commissioner had not been notified and there are serious irregularities which would warrant the Commissioner reviewing the matter as in the instant case where the owner had no opportunity to appeal to the Board of Review because the Commissioner's determination was not communicated to him.

In such exceptional circumstances the Commissioner can act under section 17(A) (1) and make a divesting order though the vesting was under section 17. Otherwise the Commissioner's power to divest under section 17 A (1) does not extend to a vesting order made under section 17 because the applicant has a vested right and the aggrieved party has always a right of appeal to the Board of Review and the order of the Board of Review can itself be reviewed in a Court of Law.

Cases referred to:

1. *Arsenal Football Club vs. Ende* 1977 QB 100.

APPLICATION for writ of certiorari to quash order of Commissioner of National Housing.

H.L. de Silva, P.C. with *D.S. Wijesinghe* for petitioner.

K.C. Kamalabayson, S.S.C. for 4th respondent.

Dr. H.W. Jayewardene, Q.C. with *P.A.D. Samarasekera P.C., Upali Almeida* and *H. Amarasekera* for 5th respondent.

Cur. adv. vult.

11 November 1988

VIKNARAJAH, J

The petitioner who was the tenant of premises No. 237 Thimbrigasyaya Road, Colombo 5 made an application under section 13 of the Ceiling on Housing Property Law No. 1 of 1973 as amended by Law No. 34 of 1974 and Law No. 18 of 1976 to the Commissioner of National Housing the 4th respondent for the purchase of the said premises tenanted by her. In consequence of the petitioner's application an inquiry was held and a vesting order was published in the Gazette of 4.2.1977. The vesting order was made under section 17(1) of the said Law. Under this section the Minister on being notified by the Commissioner by order published in the Gazette vests such house in the Commissioner with effect from such date as may be specified, therein. By letter dated 20.1.77 this vesting order was communicated by the 4th respondent to the petitioner and petitioner was requested to deposit one fourth of the

purchase price of the premises. In compliance with the said letter the petitioner paid on or about 20.1.77 a sum of Rs. 3,833/- being one fourth of the purchase price. Thereafter certain monthly payments were paid by the petitioner. The petitioner also entered into a sales agreement with the 4th respondent. This vesting order was made by Mr. Peter Keuneman the then Minister.

Subsequently the 5th respondent who was the former owner of the said premises made representations to the new Minister of Housing Mr. Chelliah Kumarasuriar in the new Cabinet and as a result the new Minister directed the 4th respondent to divest the said premises. In consequence of such directive the 4th respondent divested the said premises under section 17A(1) of the said law.

This divesting order under section 17A(1) was the subject of an application for writ of certiorari No. 849/77 made by the present petitioner. The then Supreme Court delivered judgment on 25.7.1978 quashing the divesting order and Sharvananda J in the course of the judgment observed as follows:-

"Further, the report of the Secretary, Ministry of Housing and Construction dated 24.5.77 refers to a number of irregularities connected with the original vesting and makes certain disclosures respecting the circumstances of the vesting which call for an investigation into the genesis and property of the vesting order. It is desirable that the Commissioner should inquire into the history of the vesting order and also satisfy himself as to the validity of the Secretary's criticism and decide whether circumstances justify that an order should be made by him under section 17A of the law. Before he makes any order under the Section which will affect the petitioner, the petitioner should be heard on her objections, if any to the order of divestment. Though the present order, purporting to be made under section 17A and referred to in the Gazette notification P9 is set aside for the reasons set out, the quashing of same will not bare the 1st respondent Commissioner from looking into the whole matter afresh".

The reason for quashing the divesting order was because the divesting order had been made by the Commissioner of National Housing on a directive in writing by the Minister. The Supreme Court dealing with section 17A(1) stated as follows:-

"The section gives no guidance whatsoever as to the basis on which the discretion to make a divestment is to be exercised and imposes no limit as regards the grounds on which the discretion is to be exercised, but it definitely postulates that the proper authority for exercising the discretion to make a divesting order is the Commissioner for National Housing. The prior approval of the Minister is only necessary to give legal efficacy to the discretion for the Commissioner to divest the ownership. The Minister superimposes his sanction on the determination made by the Commissioner. Before reaching that discretion the Commissioner has to direct his mind to this matter and bring an independent judgment of his own to bear on the issue. It is manifest from the tenor of the Gazette notification P9 dated 20.6.77 referred to above that the Commissioner made his order of divestment upon being directed in writing by the Minister of Housing and Construction".

Consequence to this judgment of the Supreme Court the Commissioner held inquiry commencing on 6.10.1981 at which inquiry the petitioner and 6th respondent were present and represented by Attorneys at Law. No objection to jurisdiction was taken at the inquiry but evidence was led on 6.10.1981, 30.10.81, 11.11.81, 30.11.81, 9.12.81, 21.12.81, 24.12.81, 12.1.82, 20.1.82, 22.1.82, 23.1.82 and written submissions were tendered thereafter.

The Asst. Commissioner who held the inquiry made his report dated 26.1.82 to the Deputy Commissioner of National Housing in which he states as follows:-

"Attorney-General has advised us that the power given to the Commissioner to divest under section 17A would not extend to an order under section 17. In view of this advice may I inform the owner with copy to tenant, that it is not possible to consider to review the order made by the Hon. Minister under section 17(1) as the law does not permit us to do so"

Thereafter the owner viz the 5th respondent was informed by letter dated 28th January 1982 that 'it is not possible to consider to review the order made by the Hon Minister under section 17(1) of the Ceiling on Housing Property Law No. 1 of 1973 as the law does not permit me to do so".

From this decision of the Commissioner the 5th respondent appealed to the Board of Review. By order dated 6th October 1982 the Board of Review set aside the decision by the Commissioner, contained in his letter of 28.1.82 and directed the Commissioner to take steps under section 17A as indicated by the Supreme Court in its judgment in S.C. Application No. 849/77 on the findings he has made after the inquiry in his report of 26.1.82.

The present application before this Court is by the petitioner (tenant) to quash this order of the Board of Review.

Learned Counsel for the petitioner submitted that the 5th respondent has no right of appeal to the Board of Review from the decision of the Commissioner set out in his letter of 28.1.82 but that the 5th respondent should have moved this Court by way of a writ to review the order made by the Commissioner. He therefore submitted that the order of the Board of Review was made without jurisdiction and should be quashed. Counsel for petitioner further submitted that the Commissioner had no power under section 17A to divest after an order of vesting had been made under section 17.

Under section 39(1) of the Ceiling on Housing Property Law any person aggrieved by any decision or determination made by the Commissioner under this Law may within one month of the date on which such determination is communicated to such person appeal against such decision or determination to the Board stating the grounds of such appeal.

The determination of the Board on any appeal made under subsection (1) shall be final and shall not be called in question in any Court (Section 39(3)).

It was in pursuance of section 39(1) the 5th respondent appealed to the Board of Review from the decision of the Commissioner contained in his letter of 28.1.82.

When a statute provides a right of appeal, any matter concerning jurisdiction can be decided in the appeal. The Appellate Tribunal is not limited to consider the appeal only on the merits. The discretionary remedy by way of writ of certiorari on the ground of violation of natural justice or objection to tribunal's jurisdiction is an alternative remedy.

"There is abundant authority to the effect that jurisdictional questions can be raised by way of appeal" - Wade - Administrative Law 5th Edition page 823.

In the case of *Arsenal Football Club v. Ende* (1) Lord Denning sets out the facts as follows:-

"The Arsenal Football Club Ltd has their grounds and stands at a stadium in Avenell Road, Ilington. Up till 1973 the rateable value of it was £9250. But their peace was then disturbed by a Mr. Ende who lives about half a mile away. He does not object to football but he objects to people who pay too little rates. He thought that the property of the football club was assessed at too low a rateable value. So he himself made a proposal that the rateable value should be increased from £9250 to \$60,000. The football club took strong objection to this proposal. They said that Mr. Ende has no locus standi to make such a proposal. He was a busy body interfering in things that did not concern him. The matter went before the local Valuation Court. That Court held that he was a 'person. . .aggrieved' who could make a proposal. They heard evidence and held that there should be an increase in the rateable value. It was nowhere near the £60,000 suggested by Mr. Ende. But it was 50 per cent increase. They increased the rateable value from £9250 to £13,900. The football club appealed to the Lands Tribunal. The Tribunal considered, as a preliminary point whether Mr. Ende has any locus standi. They held that he had none with the result that his proposal fell to the ground".

The Lands Tribunal decided the preliminary issue in favour of the club. The effect of their decision was that Mr. Ende's proposal was invalid that the local Valuation Court has no jurisdiction in the matter and the Tribunal allowed the appeal and confirmed the assessment of £9250 originally entered in the valuation list.

Mr. Ende appealed to the Court of Appeal against the Lands Tribunal's decision on the grounds that he was a person aggrieved and he also submitted to the Court of Appeal that on the point of locus standi, the Arsenal Football Club ought not to have appealed to the Lands Tribunal. The only proper course was to the Divisional Court for prohibition or certiorari.

Lord Denning dealing with this submission at page 116 stated as follows:-

"I cannot accept this suggestion. It is plain to me that the Valuation Court itself had jurisdiction to decide whether or not Mr. Ende was a 'person aggrieved' and that the Lands Tribunal on appeal equally had jurisdiction to determine it. Whenever a point is raised as to the jurisdiction of an inferior tribunal, the tribunal can itself determine it and on appeal the appellate Court can likewise determine it".

The Court of Appeal allowed the appeal holding that Mr. Ende is a 'person . . . aggrieved' by the under assessment of the Arsonal Football Grounds and that Mr. Ende was entitled to bring his grievance before the Valuation Court and to get the assessment increased to a correct level.

The House of Lords affirmed this judgment of the Court of Appeal (vide 1977 2 A.E.R. 267)

Thus in the instant case the Board of Review had the power in appeal to decide whether the Commissioner's jurisdiction to divest under section 17.A extends to vesting orders made under section 17.

The other submission of learned Counsel for petitioners is that the Commissioner had no power to divest under section 17A after an order of vesting is made under section 17.

The Asst. Commissioner who held the inquiry following the judgment of the Supreme Court in S.C.Appln 849/77 which I have referred to earlier in my judgment had after several dates of inquiry chosen to follow the advice of the Attorney-General that the powers given to the Commissioner to divest under section 17A would not extend to an order under section 17.

Senior State Counsel who appeared for the 4th respondent stated that the Attorney-General did not give any advice in this case to the Commissioner but a general advice was given some months earlier in another case.

Section 17A(1) provides 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 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".

Under section 17(1) the vesting takes place after the Commissioner is satisfied that it is an appropriate case for vesting after considering the equities of the case. In fact under section 17(1) there has to be an application for the purchase of the house. For instance under section 13 a tenant can make an application to purchase a house let to him provided the conditions set out in the section are satisfied. Under section 17(1) the Commissioner after holding an inquiry at which the landlord and tenant are present and after hearing both parties makes a determination whether he would recommend to the Minister to vest the house. This determination is notified to the parties and the party dissatisfied with the determination can appeal to the Board of Review.

The Minister on being notified by the Commissioner that it is a fit case for vesting, may by order published in the Gazette vest such house in the Commissioner.

Thereafter under sub-section (2) the Commissioner shall enter into an agreement with the applicant for the sale of such house subject to the conditions set out therein.

Senior State Counsel submitted that there is a vested right in the applicant after the vesting order is made under section 17 and therefore the Commissioner cannot under section 17A(1) take away that vested right by making a divesting order. I am inclined to agree with this submission.

There are several provisions under which houses are vested viz 8(4), 11(4), 14(3) and 17(1). The power to divest was given to the Commissioner by an amendment introduced by Law No. 34 of 1974. The position under section 17 is different. The properties are vested under section 17 for the purpose of conveying them to the tenant

and this is obligatory under the law if the conditions mentioned in the agreement are complied with (see. 17(3A)). The power to divest under section 17A would generally be in respect of houses vested under provisions other than section 17(1). If the landlord or tenant is not satisfied with the determination made by the Commissioner under section 17(1) he could appeal to the Board of Review, and it is open to the party dissatisfied with the decision of the Board of Review to seek his remedy in a Court of Law by way of writ.

But under certain exceptional circumstances the Commissioner can make a divesting order under section 17A in respect of a vesting order made under section 17. For example if the tenant after entering into an agreement for sale committed breach of any of the conditions and fails to complete the sale, the Commissioner can under section 17A divest the property.

Another example would be where the procedure followed before the vesting shows that the aggrieved party has been deprived of the right to appeal to the Board of Review because the determination of the Commissioner had not been notified to the aggrieved party and there are serious irregularities which would warrant the Commissioner to review the matter then the Commissioner can act under section 17A(1) and make a divesting order after hearing the party who is going to be affected by the divesting order. These are exceptional situations where the Commissioner can act under section 17A(1) but generally the Commissioner's power to divest under section 17(A)(1) does not extend to a vesting order made under section 17 because the applicant has a vested right and the aggrieved party has always a right of appeal to the Board of Review, and the order of the Board of Review can still be reviewed by a Court of Law in appropriate proceedings.

In the instant case before me the 5th respondent who is the owner and landlord had no opportunity to appeal to the Board of Review because the determination of the Commissioner to vest had not been communicated to the 5th respondent. "Further the report of the Secretary, Ministry of Housing and Construction dated 24.5.77 refers to a number of irregularities connected with the original vesting and makes certain disclosures respecting the circumstances of the vesting which calls for an investigation into the genesis and property of the vesting order". This was the view of the Supreme Court in the

earlier application No. 849/77 and that is why the Supreme Court directed "the Commissioner to inquire into the history of the vesting order and also satisfy himself as to the validity of the Secretary's criticism and decide whether circumstances justify that an order should be made by him under section 17A".

On the facts of this case the Commissioner has the power to act under section 17A(1) and review the vesting order made under section 17.

For the above reasons I affirm the order made by the 1st to 3rd respondents dated 6.10.82 marked P4 and direct the Commissioner to take appropriate steps.

The application of the petitioner is dismissed with costs.

Application dismissed.

**SUPERINTENDENT, ABBOTSLEIGH GROUP AND OTHERS
V.
ESTATE SERVICES UNION**

COURT OF APPEAL,
A. DE Z. GUNAWARDANA, J.,
C.A. 381/83,
L.T. HATTON 10/4515/83

23 MAY 1991,
(WRITTEN SUBMISSIONS TENDERED ON
24 JUNE 1991 AND 02 AUGUST 1991)

Industrial Disputes Act - Suspension of service - Interdiction - Constructive termination.

The workman's services were suspended when he did not comply with the order given by the Superintendent, to act in terms of the settlement entered into in a Labour Tribunal case, and vacate the quarters given to the workman in one division of the estate and occupy quarters in another division. The workman refused to occupy the quarters allocated to him in the other division, as he alleged that some of the necessary repairs were not effected, as undertaken by the employer.

Held:

1. That the two grounds urged by the workman to assert that his services have been constructively terminated, do not directly relate to the duties he has to perform as Plucking Kanakapullai, or to his salary and emoluments. What is