

In view of the findings in this Appeal, the Appeal No. C.A. 188/87 made by the Employer-Respondent - Appellant is dismissed without costs.

Appeal No. 179/81 allowed

Appeal No. 188/87 dismissed

**PREMADASA
V.
WIJEYWARDENA AND OTHERS**

SUPREME COURT
THAMBIAH, C.J.,
G.P.S. DE SILVA, J. &
RAMANATHAN, J.
S.C. APPEAL NO. 36/91
C.A. APPLICATION NO. 736/89
17 September, 1991

Writ of certiorari - Status of tenant after decree for eviction during period of stay of writ - Right to purchase house under Ceiling on Housing Property Law, No. 1 of 1973 after passage of Ceiling on Housing Property Law (Special Provisions) Act, No. 4 of 1988 - Withdrawal of application for writ of certiorari - Locus standi

The appellant was a tenant of premises No. 3 Rockwood Place under the 2nd respondent having earlier been a tenant under his father the 1st respondent who in 1979 gifted the premises to the 2nd respondent.

When the Ceiling on Housing Property Law, No. 1 of 1973 came into operation on 13 January 1973 the 1st respondent owned 19 houses including No. 3 Rockwood Place.

On 4.5.1983, the 2nd respondent filed case No. 5639/RE in the District Court of Colombo seeking the eviction of the appellant on the ground of arrears of rent and reasonable requirement. On 4.6.1984 the case was settled. The appellant consented to judgment - writ not to issue till 31 March 1987. On 19.3.1987 the appellant made an unsuccessful attempt to have the consent judgement revised by the Court of Appeal.

On 17.5.1987 the appellant sought to challenge the validity of the consent judgement in the District Court itself but did not pursue his application. The issue of writ was however stayed till 31.11.1987.

On 30 November 1987 the appellant wrote a letter to the Commissioner of National Housing, stating that the 1st respondent had made an incorrect section 8 declaration of the number of houses owned by him under the Ceiling on Housing Property Law and supported his letter with an affidavit and moved that early steps be taken to transfer the house No. 3 Rockwood Place to him (the appellant) as these premises were deemed to have vested in the Commissioner as a surplus house.

The appellant next moved for order of *restitutio in integrum* in the District Court to restore the *ante status quo* before the consent decree but on 6.12.1988 the District Court dismissed that application and ordered writ to issue. An application to the Court of Appeal to revise the order was refused but the issue of writ was put off for 31 May 1989 and later extended till 30 June 1989.

On 10 July 1989 the Commissioner of National Housing made a determination that six of the 1st respondent's houses including No. 3 Rockwood Place vested in him. An appeal (No. 2263) was preferred to the Board of Review but the 3rd respondent (Commissioner of National Housing) made a determination on 8 September 1989 cancelling his earlier determination vesting the six houses. The 1st respondent then withdrew his appeal to the Board of Review.

The appellant moved for a writ of certiorari in the Court of Appeal to quash the second determination of the Commissioner. The Court of Appeal reserved its order for 14.9.90. In the meantime on an appeal to it, the Board of Review on 11 September 1990 set aside both determinations of the Commissioner and directed an order to be made after hearing both sides.

When the "Court of Appeal was about to deliver its order on 14.9.1990 the appellant moved to withdraw his application in view of the order of the Board of Review. The Court of Appeal refused the application to withdraw the certiorari application and delivered its order refusing application for certiorari. The appellant appealed to the Supreme Court.

Held:

- (1) Once the consent decree was entered in D.C. Colombo 5639/RE (on 4.6.1984) the appellant ceased to be a tenant of the premises and merely enjoyed the status of an occupier permitted by the Court to do so.
- (2) The application to purchase the house had been made by the appellant after the right to purchase a house under any provisions of the Ceiling on Housing and Property Law had been specifically removed by section 3 of the Ceiling on Housing Property Law (Special Provisions) Act, No. 4 of 1988. The appellant had no right to apply for the purchase of the house.
- (3) An appeal cannot be withdrawn except with the leave of the court. So also the appellant cannot claim, as a matter of right to withdraw his application for certiorari. The discretion to allow the withdrawal was in the Court of Appeal and it was rightly exercised in this instance.
- (4) The law as to *locus standi* to apply for certiorari may be stated as follows. The writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public he must have sufficient interest to make the application. Since the appellant is no longer a tenant, he has no preferential claim to purchase the house in the event of a sale by the Commissioner. He is reduced to the position of "any person" to whom the Commissioner is free to sell the house (s. 12(2)). In other words he is in no better position than any other member of the public. The "expectation to purchase" the house is one which he shares with every member of the public. This could scarcely be described as a "legitimate expectation". Accordingly the appellant has no sufficient interest to apply for a writ of certiorari.

Cases referred to:

1. *Tod-Heatley v. Barnard* (1890) W.N. 13 C.A.
2. *R. V. Fulham Rent Tribunal, ex parte Zerek* (1951) 2KB 1,11
3. *Reg. v. Greater London Council, ex parte Blackburn* (1976) W.L.R. 550

APPEAL from judgment of the Court of Appeal.

Faiz Mustapha, P.C. with *M.M. Saheed* and *Amarasiri Panditharatne* for appellant.

T.B. Dillimuni with *Miss P. Malalasekera* for 1st and 2nd respondents.

P.G. Dep, Senior State Counsel for 3rd respondent.

Cur. adv. vult

01 October 1991

TAMBIAH, C.J.

This appeal is from an Order of the Court of Appeal dismissing the application for a writ of certiorari on the ground that the appellant had no locus standi to apply for a writ.

The appellant came into occupation of premises No. 3 Rockwood Place, Colombo 8, as a tenant under the 1st respondent on 1st February, 1973. Thereafter, the 1st respondent gifted the said premises to his son, the 2nd respondent, by deed of gift No. 61 of 8th December, 1979, and the 2nd respondent became the present landlord of the appellant.

The Ceiling on Housing Property Law, No. 1 of 1973, came into operation on 13th January, 1973. On this date, the 1st respondent owned 19 houses including premises No. 3.

On or about 4th May, 1983, the 2nd respondent instituted action against the appellant in the District Court of Colombo in Case No. 5639/RE and sought ejectment on the grounds of arrears of rent and that the said premises were reasonably required by him for occupation as a residence. A settlement was recorded in the said case on 4th June, 1984, and the parties agreed, inter alia, that the appellant consented to judgment being entered against him but that the writ was to be stayed till 31st March, 1987, and that the appellant should pay a sum of Rs. 500/- monthly as damages.

Thereafter, on or about 19th March, 1987, the appellant made an application to the Court of Appeal, bearing No. 373/87, seeking to revise and set aside the consent order entered in the District Court. Notice of the said application was refused by the Court of Appeal and the said application was dismissed. Again, on the 17th May, 1987, when the said case No. 5639/RE. was called in the District Court of Colombo, the appellant challenged the validity of the said consent order made on 4th June, 1984. However, the appellant did not pursue the said objection and the issue of the writ was stayed by the District Court till 31st December, 1987.

According to the appellant, in or about November, 1987, he became aware that the 1st respondent had in his declaration to the Commissioner of National Housing under s. 8 of Law No. 1 of 1973, made an incorrect declaration of the houses owned by him at the time Law No. 1 of 1973 came into operation. The appellant then wrote the letter (P1) dated 30th November, 1987, to the Commissioner of National Housing and also forwarded an affidavit (P1A) dated 30th November, 1987, by him. In the said letter (P1), the appellant stated, *inter alia*, "In view of the matters set out in my affidavit, I shall thank you to take early steps to transfer the ownership of premises No. 3, Rockwood Place, Colombo 10, to me as a tenant which premises is deemed to have vested in you by operation of law in terms of Ceiling on Housing Property Law, No. 1 of 1973, as the said L.A. Wijewardene is trying to eject me from this house having suppressed these facts." In the said affidavit (P1A), the appellant declared, *inter alia*, "I became the tenant of premises No. 3, Rockwood Place, Colombo 10, under L.A. Wijewardena. On 13.1.73 the said Mr. L.A. Wijewardena owned several 'surplus houses' in excess of the permitted number of houses, as contemplated by the said Law, in that he owned *inter alia* the following 19 houses." The appellant then itemised the 19 houses including premises No.3. Rockwood Place, Colombo 10. The appellant proceeded to state that as the 1st respondent had two children, the 2nd respondent and a daughter, of the 19 houses, at least 15 houses, including premises No. 3 of which he is tenant are deemed to have vested in the Commissioner of National Housing by operation of law under the provisions of Law No. 1 of 1973, assuming that his two children were dependants. Otherwise, as many as 17 houses are deemed to have vested in the Commissioner. The appellant further added, "I therefore state that premises No. 3, Rockwood Place, Colombo 10, of which I am tenant too had vested

in the Commissioner in addition to the other surplus houses. I state that in view of the matters set out above, since premises No. 3, Rockwood Place, Colombo 10, of which I am tenant is deemed to have vested in the Commissioner of National Housing, steps be taken to transfer the ownership of this house to me as a tenant, as I am in law entitled to."

The appellant again moved the District Court for an order for *restitutio-in-integrum* restoring the *ante status quo* of the parties prior to the entering of the said consent decree. On 6th December, 1988, the District Court dismissed the appellant's application and made order directing the issue of writ. The appellant then made an application bearing No. CA 1205/88, to the Court of Appeal to revise this order. The Court of Appeal in the course of its order dated 15th December, 1988, stated, "The settlement was a pure and simple matter to vacate the premises in suit and gave the plaintiff time. We find the learned Judge had intervened and extended this time. We now find in the course of his submission, Counsel for petitioner states that they are prepared to vacate the premises and moves for more time till 31st May, 1989. It is also brought to our notice that the petitioner had made an application to the Commissioner of National Housing to vest this premises. We hope that the inquiry in this regard would be expedited before the date of the issue of writ. However the issue of writ would not have any relationship to the inquiry. Writ be issued on the 31st of May 1989. This order will not affect the rights of any of these parties under the Ceiling on Housing Property Law."

On 5th June, 1989, the Court of Appeal, on being informed by the appellant that the Commissioner had not concluded the inquiry, stayed the writ until 30th June, 1989, and added that no further time would be granted.

The Assistant Commissioner of National Housing concluded the inquiry into the appellant's complaint (P1 & P1A) and the Commissioner of National Housing, who is the 3rd respondent, made a determination on 10th July, 1989 (P10) under s. 8 (4) of Law No.1 of 1973 to vest in him 6 houses including premises No. 3, Rockwood Place. The 1st respondent appealed to the Ceiling on Housing Property Board of Review in Appeal bearing No 2263. On 8th September, 1989, the 3rd respondent made a determination cancelling his earlier determination (x) vesting the said 6 houses.

Thereupon the 1st respondent withdrew the appeal lodged by him to the Board of Review.

The appellant then applied to the Court of Appeal for the issue of a writ of certiorari to quash the determination cancelling the earlier determination to vest 6 houses on the ground that the determination to cancel the earlier determination has been made without affording the appellant an opportunity of being heard, and that the said order had been made *mala fide* and for a collateral purpose, in that, the said order was made at the instigation of the purchasers who had purchased some of the other houses mentioned in the appellant's affidavit (P1A).

When the application came up for hearing before the Court of Appeal, Counsel for the respondents took a preliminary objection to the *locus standi* of the appellant and the maintainability of the application. The Court of Appeal reserved its order for 14th September, 1990. On 11th September, 1990, the Board of Review made order (X9) allowing the appeal of the appellant and set aside the order (X) made by the 3rd respondent. The Board of Review in its order stated that the complaint of the 1st and 2nd respondents was that the vesting order was made without hearing; likewise the complaint of the appellant was that the order cancelling the vesting order was also made without hearing him. It set aside both orders (P10 and X) and directed the Commissioner to give a full hearing to both sides and to arrive at a decision on the application of the applicant.

In the morning of 14th September 1990, the appellant's attorney-at-Law filed a motion in the Registry of the Court of Appeal moving to withdraw the application for the issue of a writ of certiorari for the reason that the Board of Review had made an order on 11th September 1990, setting aside the order made by the 3rd respondent, and that it is not necessary to proceed with the application. The Appellant's Junior Counsel met Justice Palakidnar in his Chambers and submitted that the appellant had filed the said motion in the Registry seeking permission to withdraw the application. When the said application was called on that day for delivery of judgment, the appellant's Junior Counsel moved to withdraw the application. The proceedings of that day are recorded as follows:

"Judgment delivered in open Court and Counsel for the petitioner states that the matter has been resolved by the Board of Review of National Housing. He wishes to withdraw this application. The judgment has been delivered. Counsel for Respondent objects to the withdrawal at this stage. Court will consider this application when proper papers are filed. Application is dismissed with costs".

The Court of Appeal by its order took the view that after the consent decree entered in D.C., Colombo Case No. 5639/RE the appellant had ceased to be a tenant of the premises and was enjoying the status of an occupier permitted by Court to do so. The Court of Appeal also took the view that the appellant's letter (P1) drew the attention of the Housing Commissioner to an allegedly false declaration by the 1st respondent in regard to the number of houses he owns. The petitioner sought thereby to initiate moves to ultimately purchase the house. The application to purchase the house has been made after the right to purchase a house under any provisions of the Ceiling on Housing and Property Law has been specifically removed by s. 3 of the Ceiling on Housing Property Law (Special Provisions) Act, No. 4 of 1988, which states, "Notwithstanding anything in the principal enactment, the tenant of a house or any person who may succeed to the tenancy thereof under s. 36 of the Rent Act, No. 7 of 1972, shall not be entitled, from, or after January 1, 1987, to make an application, under any provision of the principal enactment, for the purchase of such house." The Court of Appeal held that the appellant had no right to make an application for the purchase of the house, and consequently cannot make cancellation of the order (X) as a prior step to request the Commissioner to sell the house.

Before us, the appellant's Counsel, Mr. Faiz Mustapha, P.C., submitted that the Court of Appeal had erred in refusing the application of the appellant to withdraw the application for the issue of a writ of certiorari on the morning of the 14th of September, 1990 as there was no live issue between the parties consequent to the order of the Board of Review on 11th September, 1990. To the question by this Court as to why the appellant had waited until the day fixed for delivery of judgment, to withdraw his application, the appellant's Counsel replied that the 11th of September may have been a Friday and as Saturday and Sunday were non-working days

the motion could have been filed only on Monday. However, I find that the 11th of September, 1990, was a Tuesday and the 14th of September was a Friday.

Mr. Faiz Mustapha, P.C., next submitted that the Court of Appeal had erred in holding that the appellant has ceased to be a tenant and therefore had no status in the matter; that the Court of Appeal has failed to consider the principles applicable to *locus standi* in public law remedies like certiorari and also failed to consider that the applicant had sufficient interest in the matter.

On the question of withdrawal of the application for issue of a writ of certiorari, the appellant's Counsel submitted that the appellant's prayer to the Court of Appeal was to quash the determination (X) made by the 3rd respondent. The Board of Review has set aside this determination before delivery of judgment by the Court of Appeal. There must be an order to quash at the time of delivery of judgment. The appellant's prayer ceased to be one which the Court of Appeal could grant.

Mr. T.B. Dillimuni, learned Counsel for the 1st respondent, on the other hand submitted that the appellant cannot claim a right to withdraw the application. The arguments in the case had been concluded and the Court of Appeal had reserved judgment and it was ready to be delivered. At the last moment, the Court is told not to deliver its judgment. This is an attempt to prevent the Court from performing its duty.

Learned State Counsel also submitted that judgment has been reserved by Court and a party can only withdraw with permission of Court.

Rule 38 of the Supreme Court Rules, 1978, states that an appellant may at any time apply to withdraw his appeal, and serve notice of such application to withdraw on every respondent who has entered an appearance at the Registry; and the Court may, after making an inquiry into the matter, permit the withdrawal of such appeal on such terms as to costs and otherwise as it may think fit. I also find this passage in *Annual Practice (1958), Vol. 1. at p. 1671:*

"An appeal cannot be withdrawn without the leave of the Court, even if the appellant offers to pay the respondent's costs; and the Court of Appeal will usually require to be informed of the reasons for withdrawal." *Tod-Heatley v. Barnard* (1)

The considerations should apply for withdrawal of applications. The appellant cannot claim, as a matter of right, to withdraw his application for certiorari.

The allowance or rejection of the appellant's application to withdraw his application for the issue of a writ, was a matter exclusively within the discretion of the Court of Appeal. The appellant's motion to withdraw his application merely contained his affidavit that the Board had made order on the 11th of September, 1990, setting aside the order made by the 3rd respondent. A certified copy of this order was not annexed to the motion. The Court of Appeal by its order of 14th September, 1990, quite rightly said that it would consider this application when proper papers are filed. On the material available, the Court has correctly exercised its discretion in not acceding to the appellant's application to withdraw the application for the issue of a writ of certiorari.

On the question of *locus standi*, Mr. Mustapha, P.C., submitted that the appellant is not relying on s. 9 of the Ceiling on Housing Property Law which enables a tenant to apply to purchase a "surplus house". Nor is he relying on s. 13 which allows a tenant to apply to purchase a house when the house is of such a category that an action cannot be maintained in respect of that house on the ground of "reasonable requirement", or on s. 13A under which a tenant can apply to purchase the tenanted house where the owner had left Sri Lanka and has ceased to be a citizen of Sri Lanka or resident abroad or the owner is not in existence or cannot be traced. The appellant is relying, he submitted, on s. 12 (2) of the Law.

S. 8 (4) states that where a person has made an incorrect declaration in regard to the number of houses owned by him or by his family, any such house owned by such person or by any member of the family of such person as may be specified by the Commissioner shall vest in him. Upon such vesting, the Commissioner has the power to deal with the vested houses in terms of s. 12. He may transfer such houses to a local authority, Government Department, or Public Corporation, (s. 12 (1)), or he may

sell such houses (s. 12 (2)). In terms of s. 12 (2)), if he decides to sell, he has to first offer such house to the tenant. If the tenant does not accept such offer, "the Commissioner may sell such house to any other person" (emphasis is mine).

It was Mr. Mustapha's contention that if he succeeds his application for certiorari, the determination of the Commissioner (P10) vesting premises No. 3, Rockwood Place, in him will stand. In terms of s. 15 (2), where a house is vested in the Commissioner, the Commissioner shall have absolute title to such house, free from all encumbrances. The appellant will, therefore, be freed of the tenancy, under the 2nd respondent. The appellant falls within the category of "any other person", and therefore has a legitimate expectation of the house being offered to him for purchase by the Commissioner. This gives him sufficient interest to maintain an application for certiorari.

The English Courts, in earlier decisions, took the view that an application for certiorari must be made by an "aggrieved party" and not merely by a member of the public. However, in recent years the English Courts seem to have become more generous in their interpretation of "person aggrieved", and have held that an applicant for certiorari need not show a personal legal right. As Wade says, (*Administrative Law, 4th Edn. p. 543*):

"One of the valuable features of the 'public' character of certiorari and prohibition, already emphasised, is that they may be awarded to a member of the public without any special personal right. In *R. v. Fulham and Rent Tribunal ex.p. Zerek* (2) Parker, L.J. thus stated the law as to certiorari:

"Anybody can apply for it - a member of the public who has been inconvenienced or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies *ex debito justitiae*."

In *Reg. v. Greater London Council ex parte Blackburn* (3) Mr. Blackburn complained that pornographic films were being openly shown in London and elsewhere, which were grossly indecent. He

applied for prohibition, in the public interest, to stop the Greater London Council from acting in breach of their statutory duty to prevent the exhibition of pornographic films within their administrative area. The order of prohibition was granted. Lord Denning M.R. observed (page. 558,559):

"It was suggested that Mr. Blackburn had no sufficient status to bring these proceedings against the G.L.C. On this point, I would ask: who then can bring proceedings when a public authority is guilty of a misuse of power. Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. Unless any citizen has standing, therefore, there is often no means of keeping public authorities within the law unless the Attorney-General will act which frequently he will not."

In England, in 1978, following a report of the Law Commission, a new procedure was devised by a new Rule of Order 53 by which, on an application for Judicial Review, the applicant could obtain from the High Court relief by way of prerogative writs or by way of injunction or declaration cumulatively or alternatively. Order 53 r.8 required that in all cases the test is one of "sufficient interest" in the matter to which the application relates. Thus the *locus standi* for all 3 remedies are the same.

The law as to *locus standi* to apply for certiorari may be stated as follows: The writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application.

In the application to the Court of Appeal for certiorari, the appellant in the forefront of the petition in paragraph (1) described himself as "the tenant of the premises". He relied on his position as tenant of the premises under the 2nd respondent to give him standing to apply for certiorari. His position now is that he is not relying on ss. 9, 13 or 12 (2), or 13 (a) as a tenant of the premises to give himself standing to apply for the writ. He now comes forward under the category of "any other person" in s. 12 (2), that is, as a "member of the public" with the expectation and hope that the Commissioner

would sell the house to him rather than to any other member of the public, in case he decides not to transfer the house to an institution enumerated in s. 12 (1).

Mr. Mustapha conceded that the consent decree in D.C. Colombo Case No. 5639/RE has wiped out the tenancy. The appellant enjoys no more than permissive occupation in terms of the decree of Court. Since he is no longer a tenant, he has no preferential claim to purchase the house, in the event of sale by the Commissioner. He is reduced to the position of "any person" to whom the Commissioner is free to sell the house - vide s. 12 (2). In other words, he is in no better position than any other member of the public. The "expectation to purchase" the house is one which he shares with every member of the public. This could scarcely be described as a "legitimate expectation". Accordingly, I hold that the appellant has no "sufficient interest" to make this application for a writ of certiorari.

In the result, the appeal fails and is dismissed with costs.

G.P.S. DE SILVA, J. - I agree.

RAMANATHAN, J. - I agree.

Appeal dismissed.