

ASHOKAN
v
COMMISSIONER OF NATIONAL HOUSING

COURT OF APPEAL
SRIPAVAN, J.
CA 87/1995
MARCH 14, 25, 1996
JULY 1, 2003

Ceiling on Housing Property Law – Section 8 (4) – Special Provisions Act, No. 4 of 1988 – Section 4 – Limit removed – Surplus houses vested thereafter – Question regarding surplus houses not pending – Applicability of Section 4 – Delay – Nullity.

Held:

- (i) Act, No. 4 of 1988 came into operation with effect from 24.3.88. In terms of the said Act, there is no limit from or after 1.1. 1987 as to the maximum number of houses which may be owned by an individual etc.,
- (ii) A tenant shall not be entitled from or after 1.1.1987 to make an application for the purchase of such house.
- (iii) In terms of section 4, the provisions of the Act, shall not affect any action, preceding or thing commenced under the principal act and pending or incompleated on 1.1 1987.
- (iv) When the petitioner received the document dated 1.10.74 calling upon the petitioner to explain as to why the premises in question were not declared the 1st respondent acted ultra vires as the question whether the house was a surplus house was not pending or completed as at 1.1.87;.
- (v) The vesting therefore was without jurisdiction and is a nullity;
- (vi) It would be wrong to so construe section 8 (4) as to make a prosecution mandatory, a prosecution is not a condition precedent to a vesting.
- (vii) Question of delay does not apply where the proceedings are a nullity.

APPLICATION for a *writ of certiorari*.**Cases referred to:**

1. *Sithamparanathan v Premaratne and others* 1992 2 SRI LR 202
2. *MacFoy v United Africa Co. Ltd.*, – 1961 3 All ER 1169 at 1172.
3. *Schmidt v Secretary of State for Home Affairs* 1969 2 Ch. 149 at 170.
4. *R v Commission for Racial Equality* – 1982 AC 779
5. *Maginona v Commissioner for National Housing and other* – 1997 3 SRI LR 131 at 135
6. *Biso Menike v Cyril de Alwis* – 1982 1 SRI LR 368 at 379

A.K. Premadasa P.C., with *Kushan de Alwis* for the petitioner.

P.A.D. Samarasekera, P.C. with *C.W. Pannila* for 3rd respondent.

A. Gnanathan D.S.G., for 4th respondent.

August 25, 2003

SRIPAVAN, J

All Counsel agreed on 29th July 2003 that, this application should be disposed of on written submissions already filed on the preliminary objections by the parties. The petitioner is the Administrator of the estate of the late Eliyathamby Subramaniam appointed in Testamentary Proceedings No. 47/92 in the District Court of Mount Lavinia. The second respondent is the Administrator of the estate of the late Eliyathamby Shanmugam appointed in Testamentary Proceedings No. 33388/T in the District Court of Colombo. Both Eliyathamby Subramaniam and Eliyathamby Shanmugam were the owners in equal shares of the land and premises bearing No. 188, New Chetty Street, Colombo -13 and No. 166, Jampettah Street, Colombo -13 by virtue of deed No. 445 dated 27.11.1951 marked A3. The petitioner alleges that the third respondent was permitted by the late Eliyathamby Subramaniam to occupy a portion of the premises bought on document A3. As evidenced by the document marked A4, D.C. Colombo case No. 16617/L was instituted on 3rd March 1994 to have the third respondent ejected from the said premises. After the institution of D.C. Colombo case No. 16617/L the petitioner and the second respondent received letters dated 1st October 1994 from the first respondent calling upon the petitioner to explain as to why premises bearing assessment Nos. 166 Jampettah Street and No. 188 New Chetty Street were not declared under the provisions of the Ceiling on Housing Property Law. The second respondent through his Attorney at Law replied to the said letter A5 by a letter dated 20th October 1994 (A6) informing the first respondent that the said premises were not excess houses and as such the provisions of the Ceiling on Housing Property Law would not apply. However as evidenced by A8, the third respondent requested the first respondent to vest the said houses under the Ceiling on Housing Property Law. The first respondent by letter dated 22nd December 1994 marked A9 informed the petitioner that the said premises vested under Sec. 8 (4) of the Ceiling on Housing Property Law in the first respondent. The petitioner seeks to quash the first respondent's order dated 22nd December 1994 marked A9 on the basis that the

vesting of the premises was made without an inquiry, without observing the principles of natural justice and in any event the said premises were not excess houses in the hands of the late Eliyathamby Subramaniam and Eliyathamby Shanmugam.

Learned President's Counsel for the third respondent raised a preliminary objection that the petitioner has a remedy in terms of Sec. 39 (1) of the said Law in that, if he is aggrieved by any decision of the first respondent he has a right of appeal to the Board of Review within one month of such determination. It was the submission of the Counsel that since the petitioner has an alternative remedy before the Board of Review, his application for certiorari must be refused. 40

The second respondent by his affidavit dated 6th March 1995 informed court that he has no objections to the grant of the relief sought by the petitioner. As the first respondent retired from service on or about 31st December 1994, a motion was filed on 14th August 1995 by the fourth respondent informing that no objections would be filed on his behalf and that he would abide by any order the court may make. 50

The Ceiling on Housing Property (Special Provisions) Act, No. 4 of 1988 came into operation with effect from 24th March 1988. In terms of the said Act, there is no limit from or after 1st January 1987, as to the maximum number of houses, which may be owned by an individual, or a member of a family. A tenant of a house or any person succeeding to the tenancy **shall not be entitled from or after 1st January 1987 to make an application**, under the provisions of the principal enactment for the purchase of such house. For the avoidance of doubt, section 4 of the said Act declared that the provisions of Act, No. 4 of 1988 shall not affect any action, proceeding or thing **commenced under the principal enactment** and pending or incompleated on 1st January 1987. Accordingly, Act, No. 4 of 1988 removed the ceiling on housing property with effect from 1st January, 1987. When the petitioner received the document marked A5, dated 1st October 1994 from the first respondent calling upon the petitioner to explain as to why the premises in question were not declared under the Ceiling on Housing Property Law, the first respondent acted ultra vires as the question regarding ownership of the said premises and/or whether the said premises 60 70

es were surplus houses were not pending or incompleated as at 1st January 1987. [Vide *Sithamparanathan v Premaratna and others*.⁽¹⁾ In the circumstances, the vesting of the said premises by the first respondent as evidenced by A9 was without jurisdiction and is a nullity. When a person has acted without jurisdiction the vesting order marked A9 had no consequence in law. If an act is a nullity, it is automatically null and void and there is no need for an order of the court to set it aside though it is sometimes convenient or prudent to have the court declare it to be so. **“You cannot put something on nothing and expect it to stay there, it will collapse”** – Lord Denning in *Mcfoy v United Africa Co Ltd*.⁽²⁾ Therefore, the question of preferring an appeal against the decision of the first respondent does not arise.

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Assuming (without conceding) for the purposes of argument that Act, No. 4 of 1988 does not apply to the respective parties, then the first respondent should have held an inquiry before he made the vesting order marked A9. *Schmidt v Secretary of State for Home Affairs* ⁽³⁾. Lord Denning M.R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say. As Lord Diplock stated in the case of *R v Commission for Racial Equality*⁽⁴⁾ **“where an act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do so as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.”** The first respondent has failed to comply with the requirement that a decision must be made in accordance with the principles of natural justice and good faith.

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I do not agree with the learned President's Counsel for the petitioner that a prosecution for an offence under Sec. 8 (4) of the Ceiling on Housing Property Law is a condition precedent to a penal vesting under that section. In the case of *Maginona v Commissioner for National Housing and Others*.⁽⁵⁾ G.P.S. de Silva, C.J. observed that **“it would be wrong to so construe the section [Sec. 8 (4)] as to make a prosecution mandatory; a pros-**

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ecution is not a condition precedent to a vesting.” In any event Sec. 8 (4) is a penal provision which operated against the late Eliyathamby Subramaniam and Eliyathamby Shanmugam, if they had made incorrect declarations of houses owned by them. The petitioner could not be penalised for the alleged lapses of others.

The question of delay does not apply where the proceedings are a nullity. *Writ of certiorari* would lie in cases where the proceedings are considered to be manifestly erroneous or without jurisdiction. The court would be reluctant to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extra-ordinary reasons to justify such rejection. [Vide *Biso Menika v Cyril de Alwis*.⁽⁶⁾ at 379]. For the reasons stated, certiorari is issued to quash the decision of the first respondent dated 22nd December 1994 marked A9. There will be no costs. 120

Application allowed.