

**WIJEBAHU**  
**v.**  
**SUMANASEKARA AND OTHERS**

SUPREME COURT  
AMERASINGHE, J.,  
ANANDACOOMARASWAMY, J. AND  
GUNAWARDANA, J.  
S.C. APPEAL NO. 148/96  
C.A. APPLICATION NO. 688/93  
30 SEPTEMBER, 13 OCTOBER, 21 NOVEMBER, 1997  
19 JANUARY AND 4 MAY, 1998.

*Ceiling on Housing Property Law – Writ of Certiorari – Tenant's application to purchase the house let to him – Failure to make the owner of the house a party to the application – S.13 of the law – Repeal of the right to purchase houses – Act No. 4 of 1988 – Owner's right to negate the sale of the house.*

On 16.4.86 the tenant applied to the Commissioner for National Housing under S.13 of the Ceiling on Housing Property Law, No.1 of 1973 to purchase the house let to him. To the knowledge of the tenant, the appellant was the owner of the house. But the tenant made the appellant's predecessor in title who had died in 1982 the respondent to the application. The appellant having learnt about the inquiry appeared before the Assistant Commissioner on 30.3.89 by which date the right of tenants to purchase houses in terms of S.13 of the law had been removed by Act No. 4 of 1988 with effect from 1.1.1987. The Commissioner decided to recommend the vesting of the house to enable its sale to the tenant.

**Held:**

The owner had acquired a right under Act No. 4 of 1988 that the house is not liable to be sold to the tenant in terms of the Ceiling on Housing Property Law. The application of the tenant was *void ab initio* as it had been made against a non-existing person and the provisions of the amending Act barred the application after the specified date.

**Case referred to:**

1. *Teyabally v. Hon. R. Premadasa* SC Appeal No. 69/92 SC Minutes 5 November, 1993.

**APPEAL** from the judgment of the Court of Appeal.

*Faiz Musthapha*, PC with *S. Mahenthiran* for the appellant.

*A. K. Premadasa*, PC with *C. E. de Silva* for the 1st respondent.

June 17, 1998.

**A. DE Z. GUNAWARDANA, J.**

This is an appeal from a judgment of the Court of Appeal dismissing an application made by the appellant for a Writ of Certiorari seeking to quash, (a) the decision of the 2nd respondent, the Commissioner for National Housing recommending the vesting of residential premises No. 35, Dutugemunu Street, Dehiwala, belonging to the appellant, on an application made by the 1st respondent to purchase it, and (b) the order made by the Board of Review, consisting of the 3rd to the 6th respondents dismissing an appeal taken by the appellant against the said decision.

The subject-matter of this appeal is the premises bearing No. 35, Dutugemunu Street, Dehiwala, where the 1st respondent is the tenant. It is common ground that one Dr. Fonseka was the original owner of the said premises. Dr. Fonseka and his wife had adopted the appellant as a son, although there is no formal adoption order, made under the Adoption Ordinance. Upon the death of Dr. Fonseka the premises had devolved on his widow. Mrs. Fonseka had by her lastwill bequeathed the property to the appellant. Mrs. Fonseka died on the 15th of December, 1982 and, upon the will being admitted to probate, by executor's conveyance bearing No. 1120 dated 6.9.1996, the appellant became the owner of the said premises.

The 1st respondent's father who was the original tenant under Dr. Fonseka, died in 1975, and thereupon the 1st respondent's mother became the tenant of the said premises. She died in 1982 and the 1st respondent became the tenant of the said premises.

The 1st respondent made an application under section 13 (1) of the Ceiling on Housing Property Law, on 16.4.1986 (X1) to purchase the said house. The said application was made on a form issued by the Commissioner of National Housing. It is pertinent to note that in cage 3 where it is required to give the name of the owner, it is stated as follows: "Said to be, Mrs. Indra Fonseka (deceased)" In consequence of the said application the Commissioner issued a notice dated 22.3.1989 (X2) addressed to Mrs. Indra Fonseka, who was deceased at the time.

The learned counsel for the appellant submitted that upon receipt of said notice at the appellant's address, the appellant appeared before the 2nd respondent, the Commissioner, on 30.3.1989, with a view of informing the Commissioner that Mrs. Fonseka is dead. The Commissioner recorded answers to a number of questions directed at the appellant on that occasion (vide X3). It is recorded therein that: " Mr. Mohan Wijayabahu, the respondent's adopted son, present". Thereafter his statement has been recorded, where he has asserted that he is the present owner of the said premises, and that the tenant, the 2nd respondent has accepted him as the landlord, and paid rent to him. He has further stated that he is not consenting to the said premises being vested and sold to the tenant. He has not been cross-examined. This version of the facts spoken to by the appellant was not disputed by the Commissioner, and has not filed an affidavit controverting this position.

The Commissioner by his letter dated 24.4.1990 (vide X4) informed the appellant of the decision to recommend the vesting of the said premises. The appellant appealed from the said decision to the Board of Review. The Board of Review by its Order dated 17.7.1993 dismissed the appeal. Thereupon the appellant sought to challenge the said Order by way of an application for a Writ of Certiorari in the Court of Appeal. The Court of Appeal dismissed the said application by its Order dated 7.2.1996.

The learned counsel for the appellant submitted that the said application to the Commissioner having been made against a deceased person, viz Mrs. Fonseka, as stated above, was void and barred by the provisions of the Ceiling on Housing Property (Special Provisions) Amending Act No. 4 of 1988. He contended that since it is stated in the application itself that the owner Mrs. Indra Fonseka is dead, the said application to the knowledge of the 1st respondent was made against a deceased person. He submitted that the proviso to section 13 requires that the application must be made against a named owner. The said proviso states that where the application is made to purchase a house described in section 14 (1) "the Commissioner shall not take any action in respect of the application made unless owner of such house consents to the sale of such house". In other words, without further inquiry, at the threshold itself, the Commissioner has to stay his hand, if the owner does not consent. Section 14 stipulates that the house should *inter alia* be a house in respect of which ownership of such house was acquired by construction or purchase before the specified date or purchased before the

specified date or by gift or inheritance from a grandfather, a parent or spouse who had acquired ownership before the specified date. The term "specified date" is defined as the date on which the tenant for the time being or the tenant upon whose death the current tenant succeeded to the tenancy came into operation. In order to determine these requirements, there must necessarily be a disclosure in the application itself of the identity of the owner.

The learned counsel for the 1st respondent submitted that the only requirement under section 13 of Ceiling on Housing Property Law is to make an application to the Commissioner informing the Commissioner that the tenant desires to purchase the house let to the tenant. He stressed that under the said law, there is no provision prescribing the form in which the application has to be made. He cited the case of *Mariam Nurban Hussain Teyabally* (now Mrs. M. A. Mansoor) vs. *Hon. R. Premadasa*<sup>(1)</sup> where at page 5 it is stated as follows:

"It is relevant to note that the law does not stipulate a time limit within which the application has to be made. Nor is there a prescribed form in which the application has to be forwarded".

Although the said law does not prescribe a form in which to make the application, it is nevertheless essential to state the relevant particulars in the application, to enable the Commissioner to make a decision, because the provisions of section 13 states that certain requirements have to be satisfied, before the Commissioner makes a recommendation to the Minister. For example, in the instant case, the Commissioner had to ascertain whether the owner would consent to the sale of the said premises to the tenant, because if the owner did not consent, he could not have proceeded any further with this application. Thus it was necessary in this case that the name of the present owner should have been given in the application, so that he would be made the respondent to the application. Instead of that, what the respondent had done was to give the name of Mrs. Indra Fonseka, who to the knowledge of the respondent, was deceased by then. The respondent has made the issue further uncertain by adding the words, "said to be". Whereas by the time the respondent made the said application, according to her own evidence before the Commissioner, on 30.03.1989 (X3), the present owner, is the appellant. Further in the earlier application filed by her in the Rent Board, seeking permission to renovate the house, she was accepted as the tenant by the appellant. Thus it appears that, the respondent has, for reasons

best known to her, omitted to mention the name of the appellant as the owner of the said premises.

The resulting position is that the respondent has failed to make the appellant, a respondent to the said application. In this context, whether the participation of the appellant in the proceedings before the Commissioner on 30. 3. 1989 would regularise the proceedings, also arises for consideration. In my view this question must be considered in the light of the provisions of the Ceiling on Housing Property (Special Provisions) Amending Act No. 4 of 1988. It is pertinent to note here the provision in section 3 of the said amending Act which states as follows:

Section 3. – Notwithstanding anything in the principal enactment, the tenant of a house or any person who may succeed to the tenancy thereof under section 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 a house.

Thus by virtue of the above provision, the right that a tenant had to make an application to purchase a house ceased to exist, with effect from 1.1.1987.

However the learned counsel for the 1st respondent submitted that the said application was made prior to the said date, and the provisions of section 4 (c) of the said amending Act would apply to save such pending applications. The said section 4 (c) states that:

Section 4 (c) Any action, proceeding or thing commenced under the principal enactment, and pending or incompleated on January 1, 1987, which action, proceeding or thing may be carried on and completed as if the principal enactment had not been amended by this Act.

The learned counsel for the appellant contended that to attract the said provision, the application or thing should have been duly "commenced" and "pending or incompleated". It was submitted that, in the present case, there was no application at all, and as such there was no proceeding or thing "commenced" under the Act or "pending or incompleated" on 30.3.1989, and as such the provisions of section 4 (c) have no application.

It is to be observed from the facts of this case that there was no pending application before the Commissioner against the present owner, the appellant, as at 1.1.1987. Therefore, at the time the appellant appeared before the Commissioner on 30.3.1989, by virtue of the said provisions of section 3, he had acquired a right that the said premises are not liable to be sold to the tenant, in terms of the Ceiling on Housing Property Law. In this regard it may be noted that, the doctrine of "acquired rights" or "vested rights" has gained recognition as a general principle of law. (Lord McNair, "The General Principles of Law Recognised by Civilised Nations", 33 B.Y.I.L. (1957) p.16.). Although there is no uniformity in various municipal legal systems in regard to the character and content of acquired rights, broadly 'rights', may be divided into two categories, viz, 'property' rights and 'personal' rights. 'Property' rights in general will not be limited to only real or moveable property but will also include rights *in rem* in tangible and intangible goods and contractual rights whose content is economic. 'Personal' rights relate to moral or political matters. The concept of 'acquired rights' deals with the sanctity of property rights under a particular municipal legal system. Acquired rights has been defined by O'Connell as follows: "Acquired rights are any right, corporeal or incorporeal, property vested under municipal law in natural or juristic person and of an assessable monetary value." (O'Connell, International Law, vol. 2 (second edition – London, 1970) p. 763). Therefore, as the appellant has acquired a right, as aforesaid, it is a violation of a recognised general principle of law, to have permitted the respondent to proceed with the said application before the Commissioner.

The learned counsel for the 1st respondent relied on the observation made in the case of *M. N. H. Teyabally v. Hon. R. Premadasa and others*<sup>(1)</sup> (*Supra*), which states as follows: "The submission of Mr. de Silva, that the tenant must make a fresh application every time there is a change of ownership, is not well-founded," The learned counsel for the appellant pointed out that the said case is distinguishable from the present case, as the application of the provisions of the amending Act No. 4 of 1988 did not arise for consideration, in the said case. Furthermore, in that case the application had been made against the current owner and there was a change of ownership thereafter. It was in that context that the learned Chief Justice made the comment that the proceedings could have been continued without a formal substitution. It has no bearing at all on the present case where the application, *ab inito* is void as having been made against a non-existing person, and the provisions of the amending Act barring applications after the specified date.

For the reasons stated above, I hereby set aside the judgment of the Court of Appeal dated 7.2.1996, and allow the appeal of the appellant, with costs fixed at Rs. 2,500.

AMERASINGHE, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

*Appeal allowed.*

*Tenant's application declared void ab initio.*

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