MOWJOOD

v.

PUSSEDENIYA

COURT OF APPEAL
BANDARANAYAKE, J. AND WIJETUNGA, J.
C.A. APPLICATIONS 73/86, 48/86, 127/86, 77/86 AND 81/86
JUNE 30, 1986, JULY 1, 2, 3, 4, 14 AND 25, 1986.

Landlord and Tenant – Rent Act No. 7 of 1972, s 22 (C) – Mandamus –Prohibition–Revision–Notification by Commissioner of National Housing to Registrar of District Court in terms of s. 22(1C) of Rent Act No. 7 of 1972–Can premises offered by notification of the Commissioner be regarded as "alternate" accommodation as contemplated by s. 22(1C) of the Rent Act? – Delegation – Agency – Ultra vires – Duty to act fairly – Guidelines to test suitability of alternate accommodation.

In five landlord and tenant cases judgment had been entered in favour of the landlord on the ground of reasonable requirement on the basis of single house ownership and notice of action having been given to the Commissioner of National Housing. Writ in every case was to issue only upon the Commissioner of National Housing (C/NH) providing alternate accommodation. The C/NH offered alternate accommodation in terms of section 22(1C) of the Rent Act No. 7 of 1972. After having on receipt of the notice of action the C/NH sent a questionnaire to the landlord asking for information about the number of houses he owns and his income, etc. The C/NH also called upon the tenant to furnish information on the following matters:

(*a*) whether married or not,

(*b*) the number of persons comprising his family living with him,

(*c*) monthly income,

(*d*) duration of tenancy,

(*e*) name of original owner,

(*f*) rent paid per month, and

(*g*) income from other sources such as spouse or child.

Thereafter C/NH furnished these particulars to the National Housing Development Authority (NHDA) and requested NHDA to reserve a house for the tenant. The NHDA informed C/NH with copies to the landlord and tenant of the reservations made. The C/NH thereupon requested the tenant in writing to attend and finalise matters with the NHDA and notified the Registrar of the Court that alternate accommodation has been found for the tenant and that the tenant has been asked to collect the papers pertaining to his tenancy. The notifications of C/NH to the Registrar of the District regarding alternate accommodation are being sought to be quashed by certiorari and/or mandamus and prohibition and in one case where writ had been already executed by

revision. The grounds advanced are that the C/NH has acted *ultra vires* and unfairly anc reached an unjust decision in the choice of accommodation offered. The premises offered could not be recognised as alternate accommodation as the term is used in the Rent Act (S. 22(1C)). The alternate premises were offered at a greatly increased rental, located too far away and unsuitable.

Held–

(1) Section 22(1E) stipulates that the court shall not inquire into the adequacy or the suitability of the alternate accommodation offered by C/NH but this does not mean that the C/NH is free to offer any house. He cannot for instance offer a slum-dweller a flat in Liberty Plaza. The following guidelines were suggested as criteria for saying whether the accommodation is or is not alternate:–

(i) *Health or business or other commercial undertakings and arrangements.*– Medical facilities however are available all over the country and business and commerce could be relocated. It would be unreasonable to give preference to these factors over the landlord's right to his house or it may mean that the tenant can never be dislodged.

(ii) *Education.*– This again is a factor carrying little weight because schools are available everywhere.

(iii) *Rent and age.*– A mere increase in rent is inconclusive. The primary criteria would be whether the new rent bears a reasonable relation to the old.

The age of the tenant is a material factor because the test should be whether the tenant could reasonably expect to benefit from the financial outlay. The criteria is not the increase of rent *per se* but the reasonableness of the expectation that the tenant would reap the benefit of the increased outlay.

(iv) *Racial identity.*– It may be unreasonable to require a tenant to accept as alternate accommodation a house situated in an area where communal tension would gravely prejudice the physical safety and peace of mind of the tenant. But the anticipation of fear should be reasonable.

(v) *Physical facilities.*– In the new house these must be approximately comparable taking account of the size of the tenant's family.

(vi) *Time for moving.*– The time given must be reasonable and adequate.

(vii) *Bona fides.*–Where the tenant has done nothing to ascertain the suitability of the facility offered his bona fides will be in question.

(viii) *Bad faith on the part of C/NH.*– If the C/NH has acted arbitrarily or capriciously or with bias in a discriminatory manner or in bad faith then the offer must be struck down.

(ix) *Conduct of the tenant.*– The tenant must not be seen to prevaricate or delay giving vacant possession.

The above criteria are not exhaustive but could serve as guidelines.

(2) The statute requires a just compromise between competing interests. The ultra vires doctrine cannot be applied because it would offer total protection to the tenant and result in total vulnerability to the landlord taken in the content of the realities in regard to housing in the country

(3) When the C/NH has been fair and adopted a fair procedure while the tenants made no effort to get in touch with the NHDA or inspect the premises offered or find out particulars of rent or any other conditions their silence touches on the question of bona fides.

In the matter of procedural fairness effective administration should be made possible while preserving a reasonable degree of fairness in executive action for the protection of the public.

Cases referred to:

(1) *Edirisinghe v. The Commissioner of National Housing – (1978) 79(2) NLR 268, 270, 276.*

(2) *Starkonski v. A. G. – (1954) A.C. 155, 170.*

(3) *National Bank of Greece and Athens S.A. v. Methis – (1958) A. C. 506, 525, (1957) 3 All ER 608, 612, 613.*

(4) *Seaford Court Estates Ltd. v. Asher – (1949) 2 KB 481, 489.*

(5) *Nakkuda Ali v. Jayaratne – (1951) A.C. 66; (1950) 51 NLR 457 (P.C.).*

(6) *Ridge v. Baldwin – (1964) AC 40.*

(7) *Hassan v. Controller of Imports and Exports – (1967) 70 NLR 149, 152.*

(8) *Fernando v. Jayaratne – (1974) 78 NLR 123, 130.*

(9) *A. G. v. Great Eastern Railway Company – (1880) 5 App. Cases 473 (HL).*

APPLICATION for certiorari or mandamus, prohibition and revision.

Faiz Mustapha with *M. H. M. Ashroff* for petitioner in CA 73/86 and CA 77/86.

Faiz Mustapha with *R. Yogendra* and *M. M. M. Saheed* for petitioner in CA 48/86.

H. D. A. Andrado for petitioner in CA 48/86.

S. Mahendiran for petitioner in CA 81/86.

A. S. M. Perera, S.S.C. with *Samith de Silva, S.C.* for 1st respondent in CA 73/86, CA 81/86 and CA 77/86.

N. R. M. Daluwatta, P.C. with *Wimal Kuruwita Bandara* for respondents in CA 48/86.

P. A. D. Samarasekera, P.C. with *A. L. M. de Silva* for 1st respondent in CA 127/86.

A. S. M. Perera, S.S.C. with *Samith de Silva, S.C.* for 2nd respondent in CA 127/86.

N. R. M. Daluwatta, P.C. with *U. G. Premasundara* for 2nd respondent in CA 73/86.

Iqram Mohamed with *Wijayadasa Rajapaksa* for 2nd respondent in CA 77/86.

2nd respondent absent and unrepresented in CA 83/86.

Cur. adv. vult

September 29, 1986.

BANDARANAYAKE, J.

The petitions in cases C.A. 73/86, 77/86, 81/86 and 127/86 have all been filed between 27th January 1986 and 3rd February 1986. All of them concern applications for the issue of Writs in the nature of Certiorari and/or Mandamus (and Prohibition in C.A. 77/86) on the Commissioner of National Housing in terms of Article 140 of the Constitution to quash the notification made by the said Commissioner to the Registrar of the District Court in terms of s.22(1C) of the Rent Act No. 7 of 1972 in each case that a house has been reserved for the defendant-petitioners and requesting the Registrar to so inform the Court. The main ground of challenge to the action of the Commissioner was that the premises so offered or adverted to in the notifications could not be recognised in law as "alternate" accommodation as the term was used in the Rent Act. The Commissioner had failed therefore to comply with an express provision of the statute which required *him* to furnish *alternate* accommodation to enable the landlord in whose favour a decree of the District Court had already been entered, reap the fruits of victory and obtain possession of his house. It was contended that the Commissioner's notification to the Court was in consequence of a determination he had made which decision transgressed the tenant's right under the Act to accommodation which could reasonably be regarded as alternate to that which he had so far occupied. This Court was asked to review the action of the Commissioner on the allegation that he had acted beyond his powers and reached an unjust decision in the choice of accommodation he offered and had so failed to comply with his public duty. The Court was asked to involve itself in statutory interpretation and was invited to measure what has been done, or not done, against the relevant statutory provision interpreted in accordance with any appropriate presumptions of legislative intent.

In case No C.A. 48/86 there was no application for the issue of a writ but an invitation to the Court to exercise its revisionary powers under s.753 of the Civil Procedure Code to stay the hand of the District Court from issuing a writ of execution of the decree already entered in favour of the landlord for the ejectment of the tenant from premises in the tenant's occupation arising out of the notification made by the Commissioner or for recall of a writ of execution if already issued and for such other and further relief as the Court shall determine. The same proposition that the notification made to the

Court that "alternate" accommodation had been found for the tenant was, having regard to all surrounding circumstances invalid in that the accommodation being offered, could not be reckoned as being "alternate" as envisaged by the provision of law and the Commissioner had therefore failed to act fairly within the law which fact provided exceptional circumstances enabling this Court to revise an order made by the Court below affecting the tenant in consequence of such notification.

These several applications were taken up for hearing together as the basic situation and the question to be determined was the same in all cases. Other important facts which may need to be considered in coming to a decision may only be found within the boundaries of each case. Our task may thus appear complex but the assistance the Court received from all learned counsel who appeared for the parties presented as oral and written submissions and the Departmental files of the Housing Commissioner offered for inspection by learned counsel for the State made its task easier. Different counsel understandably emphasized specific aspects in regard to the desired interpretation of the law in the course of their arguments. It is appropriate that the main arguments of counsel be set out in this judgment. But it is not convenient to record their arguments by individual reference. Instead I shall present the cases sought to be made out for and on behalf of the landlord and the tenant as to the meaning and application of what is referred to as "alternate accommodation" in s.22(1C) of the Rent Act which is the core question that has to be answered. The following abbreviations will be used–C/NH for Commissioner of National Housing and NHDA for National Housing Development Authority.

In introducing the issue that was before this Court reference has to be made to the setting in which disputes have arisen. The law of this country governing the relationship between landlord and tenant has become increasingly complex. The Roman-Dutch Common Law applied prior to 1942. A substantial body of statute law has however since been systematically enacted to meet the problems of housing caused by the flow of population into the cities causing new pressures on contemporary urban life. This factual situation no doubt compelled legislative intervention to protect tenants from exploitation by unreasonable demands of rent and to provide security of tenancy by limiting the circumstances in which proceedings in ejectment could be taken. Housing in urban areas was identified as a prominent concern

of government in the context of a welfare state and efforts were made to remove tenancy agreements from being subject to the sole influences of market forces. Consequently many statutory provisions were imposed on the Roman-Dutch Common Law base resulting in common law principles concerning the relationship between landlord and tenant giving way to statutory safeguards of tenants. Thus the cumulative effect of the new Rent laws have been to confer a substantial measure of protection for the tenants in areas governed by these laws. This trend of legislative activity is of significance in considering the question before us.

It is appropriate at this point to set out the provisions of law relevant to the issue before us. Section 22 of the Rent Act 1972 deals with proceedings for ejectment of the tenant. The section is divided essentially into two sub-sections dealing with premises the standard rent of which for a month does not exceed one hundred rupees–(s.22(1)) and where the standard rent exceeds this amount–(s.22(2)). All the instant cases are cases where the standard rent was under Rs. 100 per month and accordingly the provisions of s.22(1) apply. They are houses which may fairly be called houses lived in by economically disadvantaged tenants. Under s.22(1) (*bb*) introduced by Act No. 10 of 1977 a landlord may commence proceedings for ejectment "if the premises having been let to the tenant prior to the date of commencement of this Act (Rent Act No. 7 of 1972) are, in the opinion of the court, reasonably required for occupation as a residence for the landlord, or any member of his family...." Before proceedings could be instituted the landlord must give one year's notice in writing to the tenant of the termination of tenancy. However limitations were placed on the operation of s.22(1) (*bb*) by s.22(1A). A landlord could avail himself of it only if he was not the owner of more than one residential premises and he caused notice of such action or proceeding to be served on the Commissioner of National Housing. A further limitation was placed on such ejectment proceedings by s.22(1C). It is appropriate that it be set down:

> "When a decree for ejectment of the tenant of any premises referred to in paragraph (*bb*) of sub-section (1) is entered by any court on the ground that such premises are reasonably required for occupation as a residence for the landlord or any member of the family of such landlord, no writ in execution of such decree shall be issued by such court *until the Commissioner of National Housing has notified to such court that he is able to provide alternate accommodation to such tenant.*"

Proceedings for ejectment taken under paragraph (*bb*) were given priority over all other business of the court– vide sub-section (1B) of s.22. Provision was also made by s.22(1D) that where a writ in execution of a decree for ejectment of a tenant of premises referred to paragraph (*bb*) is issued by a court the execution of such writ shall not be stayed. Section 22(1E) stipulated that in any proceeding under sub-section (1C) *the court shall not inquire into the adequacy or the suitability of the alternate accommodation offered by the Commissioner of National Housing*. The above clause (*bb*) and sub-sections (1A), (1B), (1C), (1D) and (1E) to s.22 were all introduced into the law by Act No. 10 of 1977. Before that besides the situations recognised by s.22(1)(*a*) or (*c*) or (*d*) a landlord could under s.22(1)(*b*) institute proceedings for ejectment of a tenant when he reasonably required the premises for occupation as a residence either for himself or for a family member or for purposes of trade, business, profession, vocation or employment *only if the premises had been let to the tenant on or after the date of commencement of the Rent Act* of 1st March 1972. Thus the amendments brought about by Act No. 10 of 1977 extended the opportunity for a landlord to recover his premises for occupation as his residence or residence for a member of his family even though the premises were let prior to March 1972. That is to say, even tenancies of very long standing could be terminated if the conditions imposed by law were satisfied. Thus the amending legislation of 1977 made a significant change in the law to the advantage of a one house owner economically disadvantaged landlord.

A reference to similar general facts of the cases under review at this point would be helpful. In every case the landlord was a one house owner of a house the standard rent of which did not exceed Rs. 100 per month and had given one year's notice in writing of the termination of the tenancy to the tenant. Thereafter the landlord had given notice of the institution of action for ejectment before the District Court to the Commissioner of National Housing and instituted action. So the landlord had satisfied the conditions laid down by statute. At the inquiry before the Court the landlord would normally have had to satisfy the Court that the premises were reasonably required for his occupation etc. and if he succeded in doing so it would mean that the court had formed the opinion that the landlord's claim was superior to that of the tenant, i.e. in equity and in law the landlord had a better right to the house than the tenant. Except in Case No. C.A. Application

No. 7/86 where judgment was given by the court after a contest in favour of the landlord, in all the other applications judgment has been entered in favour of the landlord of consent. In every case, order has been made that writ of execution should not issue until the C/NH has notified the court in terms of s. 22 (1C) that alternate accommodation had been found for the tenant. A copy of the judgment of the court has been sent to the C/NH for his information in each case with the order that writ of execution will not issue until the Commissioner notifies Court that alternate accommodation has been found for the tenant. Upon receipt of the order of the Court in some cases the Commissioner has written to the landlord stating that he is unable to offer any alternate accommodation to the tenant as at present. In all the cases the Commissioner has finally notified the Court and the tenant that alternate accommodation has been found. It is these notifications that are being called in question at this hearing. It is also observed that in every case two (2) years or more have elapsed after judgment for the C/NH to respond with the offer of premises for the occupation of the tenant.

A consideration of the petitions and affidavits filed and an inspection of the Departmental files of the C/NH which were made available to counsel on both sides for inspection and the submissions of State Counsel disclose the following: Four of these actions in ejectment have been instituted in 1977 whilst C.A. Application 48/86 has been instituted in 1979. The decrees in three of the cases have been in 1982 whilst decree has been entered in the other two cases in mid 1983. The notifications have been sent to the court at end of 1985.

Upon receipt of the notice of action in ejectment the Commissioner has sent a questionnaire to the landlord asking for information about the number of houses he owns and his income etc. The Commissioner has also required the tenant to furnish him information regarding:–

(*a*) whether he is married,

(*b*) number of persons comprising his family living with him,

(*c*) monthly income,

(*d*) duration of tenancy,

(*e*) name of original owner,

(*f*) rent paid per month, and

(*g*) income from other sources such as spouse or child.

The next step taken by the Commissioner is that he has got in touch with the NHDA and given the income particulars of the tenants and has requested the Authority to reserve a house for the tenant. It would appear that in C.A. Application 81/86 the tenant has not given information of her income to the C/NH. At this point there appear to have been negotiations with the landlord about reserving premises belonging to the Authority for the tenants. In every case the landlords have deposited large sums of money with the Authority and reserved premises for each tenant. Premises have been reserved by the NHDA at the Ranpokunawatta Housing Scheme in Nittambuwa upon a deposit of Rs. 20,000 being made by the landlord and at the Mattegoda Housing Scheme upon a deposit of Rs. 32,000 being made by the landlord. The NHDA has informed the C/NH with copies to the landlord and tenant of the reservations made. The C/NH has thereupon requested the tenant in writing to attend and finalize matters with the NHDA and notified the Registrar of the Court that alternate accommodation has been found for the tenant and that the tenant has been asked to collect the papers pertaining to his tenancy. The Departmental files do not disclose the monthly rent payable for the premises. The petitions and affidavits declare that what has been offered are premises on hire purchase at rentals considerably higher than what they have paid the landlord.

Upon the foregoing facts and circumstances an attempt can now be made to summarize the arguments urged on behalf of the parties and recited in broad terms in the introduction to this judgment. The arguments of the tenant petitioners were largely based on the doctrine of *ultra vires*:–

(*a*) that the C/NH *himself* must make available a house *from his housing stock* so that the tenant will become a tenant now of the Commissioner and the characteristic of a tenancy will be retained. There was a duty cast on the Commissioner to retain control of giving accommodation. This suggested interpretation of s.22(1C) was based on arguments of syntax, grammar and the pronoun "he" used in the sub-section 22(1C) and the references to accommodation offered by the C/NH in sub-section 22(1E).

(*b*) that what has been offered, to wit: premises upon a Hire Purchase agreement belonging to a 3rd party, to wit: the NHDA, upon a greatly increased monthly hire purchase rental,

subject to a possible repudiation of the agreement by the Minister cannot be regarded as *alternate accommodation* to that which the tenant had so far enjoyed. It was argued that the C/NH cannot delegate the duty cast on him by law. He cannot act as a mediator or broker and merely put the tenant in touch with the NHDA. If such an offer is accepted the tenant would be contracting with the NHDA and the Commissioner would not be a principal to such a transaction.

It was pointed out that the Commissioner's power to provide a house is found in s.41(1) read with s.2(*a*) of the National Housing Act, Cap. 401 and the power to charge rent is contained in s.41(1) read with s.3(C) of that Act. The interpretation s.100(1) defines the housing objects and powers which the Commissioner may use. So whereas the Commissioner's powers and functions are found in the statute that creates his office namely the National Housing Act, the Rent Act merely casts extra functions on him such as those under s.22(1C) and s.22(1E) or for example under s.12(1) or s.18(A). The delegation of powers, duties or functions of the C/NH are governed by the provisions of s.44(A)(1) of the Rent Act. Such delegation of a power, duty or function cast on him by the Rent Act could only be to a Government Agent of an Administrative District or to his Assistant in a division. On this question of delegation reference was also made to the decision in *Edirisinghe v. The Commissioner of National Housing* (1). This judgment also dealt with the distinction between "delegation" and "agency"—p.276—an agent could be given detailed directions and does not have a wide area of discretion. In the instant cases however no directions have been given by the C/NH to the NHDA except to receive money. So the NHDA is not an agent of the C/NH either but is an independent functionary who acts as principal to any contract with the tenant. It is also to be noted that by virtue of s.82 of the National Housing Development Authority Act the provisions of law set out in the Rent Act shall have no application in relation to any property, business or activity of the Authority. (The Rent Act is a scheduled Act under the NHDA Act.) This means that the C/NH has no power or function vis a vis NHDA. Section 22(1C) was enacted in 1977 whereas the NHDA Act was enacted in 1979. So that when s.22(1C) was enacted the NHDA was not within the contemplation of the Rent Act. Again it must be noted that under regulation 2 of the schedule to the Rent Act any premises of which the landlord is the C/NH shall be excepted premises for the purposes of the Rent Act. Relying on Maxwell "Interpretation of Statutes"—12th Ed. p.85 the

Court was invited to apply the rule that the provision meant what it meant when Act was passed. This means that when the C/NH seeks the assistance of the NHDA to obtain a house he acts *ultra vires*.

To sum up the arguments taken on the *vires* point referred to in this paragraph, it was contended that the NHDA was neither an agent or a delegate of the C/NH, that the Rent Act has been taken out of the path of the operation of the NHDA, and therefore the Commissioner's conduct in notifying the Court that he has found alternate accommodation whilst relying on houses from the NHDA is *ultra vires*.

(*c*) alternate accommodation must be reasonably equal regarding rent and suitability in other respects. The means of the tenant, the needs of the tenant, proximity to his place of work, the dictates of the ethnic crisis presently confronting this country, the age and state of health of the tenant, amenities, were all factors that must be taken into account in determining whether accommodation offered was alternate. If what was offered was disproportionate in one or more such fundamental areas then the offer was ultra vires. It was submitted that all the tenants occupied premises in Wellawatta, Colombo 6 and that three petitioners were referred to accommodation in Nittambuwa, a distance of approximately 30 miles away and 2 petitioners referred to accommodation in Mattegoda also some miles away. In Case No. 81/86 the petitioner is a Tamil lady, widow of 69 years who was offered accommodation at Nittambuwa. In all the cases the rent payable on the new accommodation shows an increase.

(*d*) apart from the vires issue taken a. aforesaid, it was also contended by the petitioners that the C/NH had failed to act fairly. Even though a purely administrative act was envisaged by the section the law cast a duty on the administrative agency to act fairly. In converting tenancy into hire purchase, in offering accommodation at a higher rental in a different location of houses belonging to a 3rd party, in converting protected premises into excepted premises the C/NH was not acting fairly. Again, petitioners complained that there had been no inquiry at which they were present held by the C/NH. They were entitled to be heard. If they had been heard they would have better explained their difficulties in accepting what was being

offered. The notification had been made to Court. Before they agreed to take what was being offered and the C/NH had thus acted arbitrarily and capriciously without good faith. Furthermore there were terms of settlement implied in the consent decrees that the tenant would be found *alternate* accommodation. It was on these terms that the defendant did not proceed to trial. In all these circumstances the determinations of the C/NH should be struck down.

I will now deal with the contentions of the respondents. The State was a respondent in four of the applications so I will refer to positions taken on behalf of the State first. In C.A. Application No. 81/86 writ of execution had already issued before this application was registered. Consequently the tenant had already been evicted on 28.1.86 and the house given back to the landlord. The tenant now sought restoration. The petitioner had however invoked only writ jurisdiction and not the revisionary powers of the Court. So it was contended that even though this Court were to quash the determination of the Commissioner still a writ of ejectment issued by the District Court remains in force. So the issue of writ of certiorari quashing the Commissioner's determination would be futile. A writ of ejectment is an appealable order. There is no appeal filed. Petitioner must exhaust available remedies before asking for the Court's prerogative powers to be exercised—and there are no exceptional circumstances to exercise the revisionary powers of the Court. If the C/NH had done something ultra vires the District Court can go into the matter. It is my view that the District Court has no supervisory powers over the conduct of the Commissioner; and since the application for writ of execution has been made more than 1 year after the decree was entered—decree was entered on 1.6.82 and execution effected in January 1986—the provisions of s.347 of the Civil Procedure Code directs that an application for issue of writ should be by way of petition to which the judgment debtor is made respondent and a copy of the petition should be served on him. This has not been done. The petitioners were unaware that writ issued. *So if this Court holds that the Commissioner's act is ultra vires* that would constitute exceptional circumstances which would merit the intervention of this Court as the District Court could have exercised its jurisdiction only if the notification was intra vires. I will refer to this matter again once I deal with the vires point. But besides these arguments, it was also contended on behalf of the State that the C/NH has no houses to let and acts as agent for the State and he can only negotiate to make available houses belonging to the State or State

organizations. So if one gives a restricted meaning to the pronoun 'he' in s.22(1C) it would make the Act unworkable. The C/NH made available to him for possible disposal only two categories of houses belonging to the NHDA–

(i) where the initial deposit is Rs. 32,000,

(ii) where the initial deposit is Rs. 20,000.

These houses were located at newly developed housing schemes situated at Nittambuwa and Mattegoda. As a public servant he should be presumed to apply uniform criteria in respect of all cases. There is no allegation of bias or discrimination.

On behalf of the other respondents it was urged with a quotation from Lord Denning's book "The Discipline of Law", p.12 that this Court should set to work on the constructive task of finding the intention of Parliament not only from the language of the statute but also from a consideration of the social conditions which gave rise to it and supplement the written word so as to give "force and life" to the intention of the legislature. The tenants have been sued in ejectment on grounds of reasonable requirement. The trial judges have found in all the cases that the landlords hardship outweighs the hardships of the tenants. This view it was urged is justifiable even though the judgments (except one) have been with consent of the defendants. Then after the lapse of many years, the C/NH has finally been able to make an offer of a house. None of the tenants have bothered to visit the housing schemes and inspect the premises offered. Nor have they rejected the offers–nor have they informed the NHDA that they are not interested in the houses or that the houses are unsuitable. They have maintained a state of silence with no response whatsoever and then sought relief from the offer. The landlord has for the first time been given some consideration in the under Rs. 100 categories of houses rented out before 1972. The statute does not cast a duty on the C/NH to provide a house for the tenant. If he does not in fact provide a house for the tenant what it means is that the landlord will be unable to evict his tenant. Again the tenant need not look for title or ownership as to whose house he is being offered. All that is required is that the tenant be given vacant possession. The landlords, eager to reoccupy their houses have deposited monies with the NHDA to reserve houses for the tenants. There is no legal prohibition against such conduct. Those reservations are still valid and the offers open. The C/NH has a discretion in the choice of accommodation. The

Distict Court cannot go into the question of suitability of the house in view of the preclusive clause found in s.22(1E). All that has actually happened is that the landlord has been left out in all but one of the cases despite a decree in his favour.

Still another contention of these other respondents was that the notifications of the Commissioner were *intra vires*. This argument was based on the syntax and grammar of s.22(1C) as evidencing an intention of the legislature that the law is only concerned with the Commissioner's "ability to provide" a house and does not cast on him a duty to do so. The tenant's opinion as to the suitability of the offer is not relevant. The C/NH is authorised to give information to the Court which is what he has done by his notification. As he is so authorised his act is not ultra vires. It would be so if the information was given by an unauthorised person. These arguments seeking to portray the notifications as intra vires on the hypothesis that the C/NH is free to offer any house are unconvincing. It would mean that the C/NH would satisfy the statute if he offers a slum dweller a flat in Liberty Plaza.

I have adverted to contemporary developments where the effect of statutory provisions since 1942 has been to afford a greater protection to the tenant. In the case of this trend the provisions of s.22(1C) have been enacted recognising the right of a landlord owner of a single house the standard rent of which is under Rs. 100 per month to regain possession of his house even though let before 1972. It postulates a significant departure from the trend towards restricting the rights of the landlord and offers instead some measure of protection to the landlord. At the same time the section ensures that the tenant will have the benefit of alternate accommodation. The Court is thus called upon to give effect to these twin objectives of the legislature. These dual objectives have to be reconciled. It is my view that there is no criteria explicitly discoverable in the statute for the purpose of reconciling these competing interests of the landlord and of the tenant. Nor have I discovered any binding authority. It appears to me that there is a gap in the statute law. Now, the arguments for the tenant petitioners have been largely based on the doctrine of ultra vires, i.e.:–

(i) That the C/NH must give a house from his housing stock and not from those belonging to persons who are not his agent or delegate but has failed to do so;

(ii) That the house offered must be alternate to that he occupied, alternate should be regarded as very similar to that already enjoyed–be similar or approximate to the rent he had so far paid (not sharply increased) and located in an area where the tenant's vital interests lie and where the tenant can live without fear which obligation or duty the C/NH has failed to fulfil.

It is my view that the object of the provision providing that the tenant will have the benefit of alternate accommodation is to ensure that the tenant will not be deprived of premises he is occupying until he has *a firm assurance* of alternative accommodation. So the question of the ownership of premises is not of primary importance. The law has to be interpreted in the context of the social conditions which gave rise to it. The law here offers protection to the landlord in conditions where houses are in short supply and there has been a tremendous escalation in building costs in the last decade and new rentals on newly built houses could inevitably have no resemblance whatever to rentals paid prior to 1972. So the consequences of upholding the ultra vires point would be that it would not be possible to offer any protection whatever to the landlord. The Commissioner's housing stock being exhausted any new stock he may in the future acquire must of necessity attract much higher rents than those of rent controlled premises. The Commissioner's houses are 'excepted' houses, so that payment of nominal rents cannot be resurrected. Thus the objective of the legislature of protecting the landlord cannot be achieved if the ultra vires point is upheld. Section 22(1C) offers protection to both sides. You cannot do that by proceeding from an ultra vires standpoint. An acceptance and application of the ultra vires point would only perpetuate the occupation of the premises by the tenant. The mere fact that the Commissioner offers a house from the NHDA and not from his own housing stock does not establish conclusively that he is acting ultra vires. So it seems to me that the essential task of this Court is to adopt an empirical approach and establish proper indicia and balance the equities as between the parties.

In similar circumstances the courts in England and other jurisdictions have adopted such an empirical approach when having to decide between alternative rules of interpretations. In the case of *Starkonski v. A. G.* (2) per Lord Reid:

"If a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour."

Professor H. L. A. Hart in his book "The Concept of Law" refers to a penumbral area of a problem and when the court is dealing with such a penumbral area the court has to rely on intuitive concepts of justice and fair play. The popular notion of "justice" is based on a sense of equality either distributive or corrective. But justice may also help to decide between alternative rules or interpretations. In this situation says Viscount Simonds:

> "The question is simple: What does justice demand in such a case as this?..... If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice." –*National Bank of Greece and Athens S.A. v. Methis* (3)

Dennis Lloyd in his book "Current Legal Problems"–1948. p. 89: 101 says:

> ".....it is not only in the creation of statute law that the philosophy of a community declares itself. In filling the gaps left by precedent the judge will draw on those views which he considers are vital to the welfare of the community. English public policy shows a surprising swing from the individualism of the last century. English courts have not misunderstood the social experiments being carried out. There is a real willingness to interpret the statute in the light of its social purpose."

Again at page 89 he refers to the view expressed by Lord Denning in *Seaford Court Estates Ltd. v. Asher* (4):

> "The judge must work constructively by drawing the conclusion that fits the policy of the Act."

Again Dennis Lloyd in his book "Introduction to Jurisprudence" 2nd Ed. 1965–p. 301 refers to "the common sense of justice to develop the law and to fill in the gaps in the legal system".

One of the foremost exponents of the American movement in social jurisprudence–*Roscoe Pound*–expounds a technique in solving these problems and he describes it as the "Theory of Social Engineering", i.e. the reconciliation of competing interests in any society. His article titled *"The Call for a Realist Jurisprudence"*–(1931) 44 Harvard Law Review p. 697, took an illustration of the conflict between capital and labour. The essence of the theory is to "reach a just compromise between competing interests". A similar approach is found in the

writings of the Scandinavian jurist A. V. Lundstedt "Legal Thinking Revised"–(1956) in the chapter dealing with "Method of Justice". The instant cases provide an illustration of a similar conflict between divergent interests in the setting of the relationship between landlord and tenant.

It has been urged in the course of argument that the C/NH is under a duty to act fairly in discharging his statutory functions. I am in agreement with such a contention. The law in recent times has moved away from the classification of functions–the distinction between judicial, quasi-judicial and purely administrative powers does not today have the importance which was assigned to it in accordance with the *'Nakkuda Ali'* (5) tradition where it was held that natural justice with its concomitant right to a fair hearing had no part to play where a purely administrative decision was to be taken under a statutory procedure. If the function was judicial or quasi-judicial an objective test was applied. In other words, where objective goals were to be reached it was recognised as a quasi-judicial power and rules of natural justice must be followed; but if the goals were subjective the act was only administrative and there was no obligation to comply with the rules of natural justice. So it was held that the writ of certiorari was available only when rights were adversely affected and the administrative authority was under a duty to act judicially. If the decision was purely administrative the writ will not be available for failure to observe rules of natural justice–see *Nakkuda Ali v. Jayaratne* (5).

This narrow construction was however rejected in England in 1963 by the decision in *Ridge v. Baldwin* (6) and the principles for an order of certiorari was restored to its earlier scope and the way was paved for more recent developments. *Ridge v. Baldwin (supra)* (6) reinstated the right to a fair hearing as a rule of universal application–per H. W. R. Wade–"Administrative Law"– 5th Ed. p.471. Perhaps the only relevance of the *Nakkuda Ali* case today is that it confirms that in the field of Administrative Law English Law applies in Sri Lanka. A comparable approach to the *'Nakkuda Ali'* (5) tradition is reflected in a strand of Sri Lankan judicial authority–vide *Hassan v. Controller of Imports and Exports* (7). However the conceptual distinction between quasi-judicial and administrative functions has been strongly assailed from the standpoint of policy. In the case of *Fernando v. Jayaratne* (8) Sharvananda, J. (as he then was) had this to say:

> "If the purpose of the rules of natural justice is to prevent a miscarriage of justice it cannot be appreciated why these rules should not apply to administrative inquiries.

An *unjust decision* in an administrative inquiry in the context of a Welfare State may have greater effect than a decision in a quasi-judicial inquiry. This represents a direct attack on the dichotomy between 'quasi-judicial' and 'administrative' functions in the setting of the law of natural justice–see also Article by Professor G. L. Peiris in the journal of the Indian Law Institute titled "Natural Justice and the Classification of Powers–India and Sri Lanka Compared"–Vol. 25:1, pp. 18-19 (1983). An unjust decision can never be fair. So a *concept of fairness* has been recognised in recent times as applicable in the performance of administrative acts. In a series of Canadian judgments 'fairness' has been equated to no more than good faith in reaching a decision. Inherent in the postulate of good faith is the lack of bias, i.e. and impartial consideration of the relevant application. In contrast to the above meanings of fairness a procedural right to a fair hearing has also been developed. See Wade–"Administrative Law"–4th Ed. p.441 et seq. In New Zealand advertance to irrelevant considerations has been associated with unfairness. Vide article by Dr. G. L. Peiris on "Procedural Fairness in Relation to Administrative Decisions–Recent Trends in Canadian Law"–XV. CILS. 1982 pp. 58, 59. So the accepted view today casts a duty to act fairly when taking an administrative decision. I have dwelt at length on the aspect of 'fairness' because it provides the conceptual basis for resorting to the balance of equities exercise. To reach the goal of fairness it is desirable that one establishes the proper equities.

Writers on jurisprudence have said–

> "It is not interests as such but the yardsticks with reference to which they are measured that matter. It may be that some interest is treated as an ideal in itself in which case it is an ideal that will determine the relative importance between it and other interests..... The balancing metaphor is misleading..... If two interests are to be balanced that presupposes a yardstick with reference to which they are measured. One does not weigh interests against one another even on the same plane. But with reference to some ideal it is possible to say that the upholding of one interest is more consonant with another; which means that with reference to that ideal the one interest is entitled to preference over the other....."–R. W. M. Dias on "Jurisprudence", 4th Ed. p.602.

Further he says at p. 603–

> "All questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. The recognition of a new interest is a matter of policy".

In my view the policy of the law in enacting s. 22 and the ideal which the policy identifies is the landlord's right to the possession of his house.

Equities have already been balanced at stage of judgment in the District Court. The landlords need is acknowledged and we are at the point of execution of decree. So it would be grossly inequitable to deny the landlord possession because of some of the subjective factors urged by the petitioners. A satisfactory approach would be to identify primary criteria relating to comparability of accommodation. What are these primary criteria for saying that accommodation is or is not alternate? For example, *A* will be alternate to *B* only if fundamentally *A* is similar to *B*, e.g. a slum is not equal to a flat in Liberty Plaza. The answer seems to be that they must be roughly comparable. When identifying criteria the goal of 'rational justice' adopted by Lord Simmonds seems to me to be most appropriate. A convenient first step may be to decide what factors should be excluded:

(1) Personal idiosyncrasies of tenant with regard to preference may be ignored. If one were to look at each person's individual need it becomes too subjective and impractical. This would extend to needs of *health* or *business* and other commercial undertakings and arrangements. It is a fact that there are medical facilities such as hospitals, doctors, pharmacies etc., all over the country. This applies even to factors such as climate and altitude, except perhaps in the most extreme cases. The point is that health facilities are equally distributed in the country. Business and commerce could be relocated. It would be unreasonable to give preference to these factors over the landlord's right to his house as it would mean that the tenant can never be dislodged and the landlord will never get his premises back.

(2) Education.– The lament that dependants' schooling would be disturbed is without merit. There are Government schools (and private schools) all over the country and they produce students

qualified for higher education in the universities. So it is safe to assume that a child could attend another Government school within close proximity to his new home. Thus it is inequitable to say that the child must be afforded the opportunity to remain in the school where he is since this approach would stultify the legitimate protection conferred on the landlord by the statutory provision. Hence this cannot be appropriate criterion governing assessment of the competing equities.

(3) Rent and Age of the Tenant. – Is there a gross or striking disparity between rent so far paid and rent payable. Increase of rent may be relevant but to what degree? A most equitable approach would be to say that a mere increase in rent is inconclusive. One will have to consider whether the difference is equitable in all the circumstances and the primary criteria there would be whether the payment which the tenant is being asked to make bears a reasonable relation to the present market value of the premises. With regard to this the age of the tenant is a material factor; because the test should be whether the tenant could reasonably expect to benefit from the financial outlay which he is called upon to make because of the rent purchase foundation. So the criteria is not the increase of rent per se but the reasonableness of the expectation that the tenant would reap the benefit of the increased outlay on the basis of hire purchase. For example if the tenant is 40 years old it is unreasonable for him to continue to live for the rest of his life in the landlord's house. But at 40 years even though the monthly payment he is called upon to make is substantialy in excess of what he was earlier paying, the premises are nevertheless alternate because he has every expectation that he would acquire the advantage of the financial outlay he makes. But even if age is on the side of the tenant still his conduct incidental to his protest at the offer must be considered and the tenant must establish the bona fides of his protest. New housing stock of the C/NH will always be more expensive. You need new stock to replenish the old. Escalation in building costs makes a difference in rent unavoidable. So necessarily the tenant will be called up to pay more – that is part of the reality of the situation in regard to housing in this country. So even the lack of means of the tenant *in itself* cannot be recognised as a substantial ground for relief – it would be unacceptably harsh by the landlord.

(4) Racial identity. – Is it open to a tenant offered accommodation some distance away from where he has been living to say that he fears physical harm and will have no peace of mind if he is relocated at the place offered? It is a fact that prevailing conditions regarding relationships among communities in Sri Lankan society may justifiably give rise to such fears. It may be unreasonable to require a tenant to accept as alternate accommodation a house situated in an area where communal tensions could gravely prejudice the tenant – his physical safety and peace of mind. But it is a question of fact in each case. However this too can be open to abuse. The test is – Is the anticipation of fear reasonable? It may be less safe in Wellawatte than it is in Nittambuwa or Mattegoda in such circumstances. The bona fides of a protest on these grounds whatever community to which the tenant belongs should also be considered. The tenant should be given scope for establishing that the place of relocation is unsafe.

(5) Physical facilities in the new home must be approximately comparable taking account of the size of the tenant's family.

(6) Relevant also is the time given by the C/NH for the tenant to move. Is it adequate for a person with special skills to adjust and find earning capacity in the new location? The time given must be reasonable and adequate. The court should also consider this factor before issue of writ.

(7) The test of Bona Fides. – Where the tenant has done nothing to ascertain the suitability of the facility offered his bona fides is in question. The tenant is under a duty to make a sincere effort to secure suitable accommodation for himself. There must be an earnest and sincere attempt by him to do so. The tenant cannot have a closed mind on the matter so vitally affecting him. He cannot be disinterested in anything that is offered. So where there is evidence that the tenant has not even been willing to ascertain for himself the nature of premises offered, it is a tentative indication of a lack of bona fides on his part as such an attitude would nullify the statutory concession made to the landlord. On the other hand if the tenant examines the offer and for example says "I have six children of different sexes. I need three bedrooms but the house offered has only 1 bedroom", then what has been offered is not alternative provided that the

premises previously occupied were significantly more spacious. As stated earlier, physical facilities should be approximately comparable having regard to the reasonable requirement of the tenant.

(8) Has the Commissioner acted arbitrarily or capriciously or with bias in a discriminatory manner or in bad faith when making an offer of alternate accommodation. If so proved then his offer must be struck down on account of his failure to act fairly.

(9) When the C/NH offers an alternate house the tenant must not be seen to prevaricate or delay giving vacant possession to landlord. He must not indefinitely retain possession in the hope that the C/NH may in the future be able to offer cheaper accommodation from his housing stock in the event of a vacancy occurring as otherwise it will cause unconscionable delay in accommodating the landlord's rights. The landlord has a right to vacant possession of his house within a reasonable time of an alternate house being offered to the tenant.

The application of the above guidelines may provide provisional criteria in regard to the question whether the premises offered can be accepted as alternate. They are not meant to be exhaustive.

The basic objection to the application of the ultra vires doctrine to these instances is that it is not even handed – it would offer total protection to the tenant and result in total vulnerability to the landlord taken in the context of the realities in regard to housing in the country today. The statute requires a just compromise between the competing interests. I therefore reject the arguments of the petitioners that the Commissioner has acted ultra vires his powers or duties when he notified the Registrar of the District Court in all of these cases that he is able to provide alternate accommodation to the tenants.

When asking the NHDA to give a house in the context of the prevailing shortage of housing, the C/NH has acted in a manner reasonably incidental to the exercise of his powers under the statute. Statutes are interpreted as authorising not only those things expressly provided for, but also acts 'reasonably incidental' to those expressly stated. The classic formulation of this principle is that of Lord Selbourne in *A. G. v. Great Eastern Railway Company* (9).

It remains to consider whether the petitioners can succeed on the ground that the C/NH has been unfair in all the circumstances in making the notifications to Court. The available material shows that the tenants have not in any case made any effort whatsoever to get in touch with the NHDA or inspect the premises offered or find out particulars of rent or any other conditions. This silence touches on the question of the bona fides of their protest that the offers are unfair. The new rent payable upon relocation is uncertain. No information has been furnished by any of the petitioners what the purchase price would be. The NHDA is not a party to these applications. In C.A. 48/86 the petitioner's affidavit says that he is required to pay a rent of Rs. 240 per month for the new premises, whereas she has been paying Rs. 30 per month to her landlord. In C.A. 127/86 the petitioner's affidavit asserts that she fears and reliably understands that she will be called upon to pay Rs. 360 per month whereas she has been paying only Rs. 65.25 to her landlord. In C.A. 73/86 the new rental is not stated but the petitioner has said that he is presently occupying a house with 2 bedrooms, hall, sitting room and store room, verandah, two toilets on land in extent 9.80 perches and paying a rental of Rs. 63.67 per month to the landlord. He expects similar facilities for a similar price from the Commissioner. In C.A. 77/86 there is no information available about new rental but here again she is presently occupying a 3-bedroomed house with 2 toilets, sitting room, verandah, store room on 8.3 perches of land. She pays a rent of Rs. 71.92. There is no information available in C.A. 81/86 of what the new rental is.

In the absence of any dialogue with the tenants the question of justifiable fears on account of racial tensions cannot be considered. There are no instances of any extreme cases of ill health of the tenant discernible from the available facts. In C.A. 81/86 the petitioner a widowed Tamil lady claims she is 69 years and has been offered premises in Nittambuwa. Proceedings were instituted against her in 1977. On 14.5.78 the C/NH has called for particulars as set out in an earlier part of this judgment. She has not sent any reply. On 17.12.85 the C/NH has informed the tenant Mrs. Ponniah that a house has been reserved for her requesting her to get in touch with the NHDA. She does not do so. She does not ascertain the rent payable. On 20.1.86 after a delay of a month she petitions the C/NH and it is only in this petition that she claims for the first time to be 69 years old. There was material available to the C/NH that her deceased husband was a Post -

Master and that she is in receipt of a pension and that her son is an engineer and his wife a teacher both of whom are living with the tenant. This information has come from the landlord Mrs. Noorul Hidaya. The Commissioner's letter of 14.5.78 calls upon the petitioner to provide information regarding the earnings of any children. The petitioner could have contradicted the information supplied by the landlord if it was incorrect if she had taken a greater interest in the offer made. She has not done so. This naturally affects the evaluation of the equities on the two sides. In any event I have rejected the arguments of the petitioners that the Commissioner has acted ultra vires. This being so in Case No. 81/86 writ of ejectment has already issued and the landlord has been placed in possession and there is no appeal from that order. As I have held that the C/NH has not acted ultra vires there are no exceptional circumstances for this Court to exercise its revisionary powers and strike down the writ of execution, because even though the respondent was not noticed of the application for writ of execution, such a need to so notify the respondent under s.347 of the Civil Procedure Code is only directory.

In spite of Mrs. Ponniah's age I am of the view that her conduct belies her bona fides in protesting the offer of a house and does not entitle her to relief. In case No. 77/86 the tenant Mrs. Aboobucker is a widow and according to her affidavit she is 75 years old and is in receipt of a monthly income of Rs. 1850 on the information she furnished to the C/NH. Besides this the landlord has forwarded information to the C/NH by way of an affidavit that the daughters and sons-in-law of his tenant live with the tenant and they are in receipt of a monthly income of Rs. 10,000. This has not been refuted. She too may have been able to do so if she was vigilant. In the circumstances her age cannot be considered a criterion for holding that her interest predominates over that of the landlord who has a decree in his favour. It is my view that in none of the cases can it be shown by the petitioners that they have been dealt with unfairly by the C/NH applying the yardsticks of comparison and assessment I have adverted to in this judgment.

The question also arises whether the Commissioner has adopted a fair procedure in coming to a decision that alternate housing is available which prompted him to so inform the parties and the Court. The modern law recognises that to insist on observance of the totality

of the rules of natural justice in the performance of purely administrative functions might sometimes severely restrict the efficient performance of administrative action. So a concept of procedural fairness as distinct from the substantive fairness of the decision arrived at, has developed quite apart from the traditional rules in respect of natural justice.

Modern trends in Canada and the United Kingdom bear ample witness to this development–vide Article by Professor G. L. Peiris–Procedural Fairness in Relation to Administrative Decisions–Recent Trends in Canadian Law–XV. CILS 1982 p.58. It represents a useful tool in making effective administration possible whilst preserving a reasonable degree of fairness in executive action for the protection of the public. In the instant cases the Commissioner bided his time for over two years and then with the information supplied to him by the landlords and the tenants he sought the assistance of the NHDA to secure accommodation and he also did not discourage the landlord to help by making the initial deposit. The tenants were asked to communicate with the NHDA. It is my view that in the circumstances the C/NH has acted reasonably in discharging his duty and has adopted a fair procedure when considered in the context of the constraints placed on him in finding housing. For these reasons the petitioners also fail on the ground that the Commissioner's determination and notification that he is able to provide alternate accommodation has not been fair. I am of the view that the Commissioner's notifications should not be struck down. I accordingly refuse the applications for the issue of writs of certiorari and/or mandamus and of prohibition that have been made in these cases. The application for revision in C. A. Application No. 48/86 of the order the District Judge is also refused for the reasons given in this judgment. The applications in all these cases are accordingly dismissed. There will be no costs in any of the cases.

WIJETUNGA, J.–I agree.

Application dismissed.