

1978 Present: Samarawickreme, J., Wimalaratne, J. and Sharvananda, J.

MRS. ALICE JAYAWARDENA Petitioner *and*
COMMISSIONER OF NATIONAL HOUSING and Others, Respondents

S.C. Application No. 849/77

Ceiling on Housing Property Law – Vesting order – Section 17(1) – Divesting order – Subsection (1) of section 17A – Direction of Minister. – Failure of Commissioner to exercise discretion.

A vesting order was made under section 17(1) of the Ceiling on Housing Property Law vesting the premises in suit in the Commissioner of National Housing. Subsequently upon the written direction of the Minister, the Commissioner divested the ownership of the said premises acting under subsection (1) of section 17A of the said Law.

Held, that the divesting order is not valid because the Commissioner failed to exercise the discretion to make a divesting order, but has merely carried out the direction of the Minister.

Section 17A postulates that the proper authority for exercising the discretion to make a divesting order is the Commissioner of National Housing. The prior approval of the Minister is only to give legal efficacy to the decision of the Commissioner to divest the ownership.

“The discretionary power which has to be exercised judicially can and must be exercised only by the authority to whom the power is committed”.

APPLICATION for a writ of certiorari and/or mandamūs.

K. S. Mahesan for the Petitioner.

K. M. M. B. Kulatunga, Actg. Solicitor-General, with *S. Alagaratnam*, State Counsel, for the 1st and 2nd respondents.

K. Shanmugalingam for the 3rd respondent.

Cur. adv. vult.

July 25, 1978. SHARVANANDA, J.

According to the petitioner, she was the tenant of premises No. 237, Thimbirigasyaya Road, Colombo 5, holding under the 3rd respondent, Mrs. Jayanethi, and the said house and premises constituted an excess house of the said owner within the meaning of the provisions of the Ceiling on Housing Property Law, No. 1 of 1973, as amended by Law No. 34 of 1974 and Law No. 18 of 1976 (hereinafter referred to as ‘the Law’). She had made application to the Commissioner of National Housing, the 1st respondent, under section 13 of the said Law for the purchase of the said premises. The 1st respondent, by letter dated 20.1.77, informed the petitioner that the said premises had been vested in him (the Commissioner of National Housing) with effect from 1.11.76 and he requested the petitioner to deposit one-fourth of the purchase price of the premises. In compliance with the said letter, the petitioner paid, on or about 20.1.77, a sum of Rs. 3,833/-, being one-fourth of the purchase price. By another letter dated 10.2.77, the 1st respondent wanted the petitioner to pay monthly instalments of Rs. 102/- towards the balance purchase price. In compliance with the said letter, the petitioner paid Rs. 102/- on 10.2.77, Rs. 306/- on 10.3.77, Rs. 102/- on 18.4.77, and Rs. 204/- on 17.6.77.

According to the notification appearing in the Government Gazette dated 4.2.77, Mr. P. B. G. Keuneman, the then Minister of Housing and Construction, had made a vesting order in terms of section 17(1) of the Law vesting the house bearing assessment No. 237, Thimbirigasyaya Road, Colombo 5, in the Commissioner of National Housing with effect from 1.11.76. The petitioner states that she thereafter entered into a preliminary sale agreement with the Commissioner for the sale of the said premises to her and that after the said agreement was entered into and the aforesaid payments made by her, there were certain Cabinet changes which resulted in Mr. Pieter Keuneman, Minister of Housing and Construction, being succeeded by Mr. Chelliah Kumarasuriar. By her present application, she complains that the 1st respondent, viz. the Commissioner of National Housing, had, behind her back and on the direction and instance of the new Minister of Housing and Construction, made order dated 10.6.77 under subsection (1) of section 17A of the Law divesting the ownership of the said house bearing assessment No. 237, Thimbirigasyaya Road, Colombo 5. This divesting order, purporting to be made under section 17A of the aforesaid Law, appears in the Gazette dated 20.6.77. The relevant notification appearing in the Gazette under the hand of the Commissioner of National Housing reads as follows:—

“Order under subsection (1) of section 17A

WHEREAS the house described in the Schedule hereto has been vested in me under section 17(1) of the Ceiling on Housing Property Law, No. 1 of 1973, as amended aforesaid, I, Mahabalage Gemunu Dunstan Jayawardene, Commissioner of National Housing, upon being directed in writing by the Minister of Housing and Construction, do by this order divest the ownership of the said house.

SCHEDULE

1. House bearing assessment No. 237, Thimbirigasyaya Road, Colombo 5”.

The divesting order appears to be the sequel of an adverse report by the Secretary of the Ministry who, on a complaint made by the 3rd respondent, probed into the circumstances of the original vesting of the said house. This report exhibits grounds which would have justified the Commissioner making an order of divestment under section 17A of the Law had he considered the report and decided to take action under section 17A. The Secretary, however, suggested to the Minister that “the Commissioner may be directed to divest himself of the ownership of this house under section 17A(1)”. In pursuance of the report, the Minister (Mr. C. Kumarasuriar) made the following order dated 26.5.77:—

“I agree – please divest”.

In pursuance of this direction, the 1st respondent Commissioner, without reviewing the report himself and taking his own action, made the impugned order under section 17A in compliance with the Minister's direction. This section reads as follows:—

“17A(1) Notwithstanding that any house is vested in the Commissioner under this Law, the Commissioner may, **with the prior approval in writing of the Minister**, by Order published in the Gazette, divest himself of the ownership of such house, and on publication in the Gazette of such Order, such house shall be deemed never to have been vested in the Commissioner”.

The section gives no guidance whatever as to the basis on which the discretion to make a divestment order is to be exercised and imposes no limit as regards the grounds on which the discretion is to be exercised. But it definitely postulates that the proper authority for exercising the discretion to make a divesting order is the Commissioner of National Housing. The prior approval of the Minister is only necessary to give legal efficacy to the decision of the Commissioner to divest the ownership. The Minister superimposes his sanction on the determination made by the Commissioner. Before reaching that decision, the Commissioner has to direct his mind to the matter and bring an independent judgment of his own to bear on the issue. It is manifest from the tenor of the Gazette notification P9 dated 20.6.77 referred to above that the Commissioner made his order of divestment “upon being directed in writing by the Minister of Housing and Construction”. The petitioner in the application before this Court states that the direction given by the Minister, referred to in the aforesaid Gazette, amounts to a dictation by the Minister and that in the circumstances the Commissioner did not make the order in the exercise of his discretion, but was unduly prevailed upon by the Minister to do so. Counsel for the petitioner contends that the 1st respondent acted in automatic obedience to the Minister's instructions and had, in effect, abdicated the discretion vested in him and allowed it to be exercised by the Minister.

Under section 17A of the Law, the function of the Minister would appear to be confined only to giving approval to the divesting order of the Commissioner and not giving executive instructions to him. The entries in the relevant office file and the Gazette notification P9 tend to show that the Commissioner had surrendered his discretion to the Minister and had not exercised his own personal judgment in deciding whether a divesting order should, in the circumstances, be made or not and that he did not bring to bear his mind at all upon the issue. As stated earlier, the section predicates the

Commissioner determining the question with the approval of the Minister and not carrying out the directions of the Minister. In this case, it appears that the 1st respondent-Commissioner did not address his mind to the propriety of making a divesting order but was content to submit himself to the Minister.

In the proceedings before this Court, the 1st respondent has not chosen to file any affidavit in this Court owning responsibility for the impugned order.

Counsel for the 3rd respondent in this Court submitted that the Commissioner of National Housing is an executive officer and is subject to the general and special directions of the Minister of Housing and Construction and referred us to section 8(2) of the National Housing Act (Chap. 401) which provides as follows: "In the exercise, discharge or performance of the powers, functions or duties assigned or imposed on him under this Act, the Commissioner shall be subject to the general or special directions of the Minister", and that it was lawful for the said Minister to issue directions to the 1st respondent as to how the latter should exercise the power conferred on him by section 17A of the Law. One short answer to this submission is that the power or discretion to make the divesting order referred to above is vested in the Commissioner by section 17A of the Law and not under any provision of the National Housing Act. Hence, *ex facie* section 8(2) of the latter Act does not apply to control the exercise of power by the Commissioner under section 17A of the Law. Section 8(2) of the National Housing Act, in any event, will not apply to the quasi-judicial determination of the Commissioner which is founded on his own personal judgment. The discretionary power which has to be exercised judicially can and must be exercised only by the authority to whom the power is committed. Section 8(2) of the National Housing Act can appropriately apply only to executive orders and not to judicial or quasi-judicial orders grounded on the subjective satisfaction of the repository of that power as to the existence or non-existence of circumstances which justify the exercise of the power. The judicial element involved in making the order militates against any suggestion that, in the exercise of his power under section 17A of the Law, the Commissioner can be subject to the directions of anyone. The vice of the Minister's decision, thus vitiates the order attributed to the 1st respondent.

The petitioner further complains that she was not heard before the divestment order P9 was made. Failure to give a hearing to her, who had acquired an interest in the premises by virtue of the sale agreement and deposit of part purchase price and was hence concerned in opposing the

divestment order, is also a good ground to set aside the impugned order of divestment. Before any order prejudicial to a party is made, principles of natural justice require that he should be heard.

Though I set aside the divestment order in question, I should place on record the following before I part with the record.

It is to be noted that premises No. 237, Thimbirigasyaya Road, Colombo 5, is in extent of over 41 perches with a five-roomed upstairs bungalow on it and is situated in the residential area of Thimbirigasyaya, Colombo. According to the petitioner herself, in her statement to the Inquiring Officer, the 3rd respondent had purchased these premises in 1969 for a sum of Rs. 100,000/-. The letters P1 and P3 show that the price at which the petitioner is to purchase the premises is estimated to be Rs. 15,332/- only. It is incredible that the National Housing Department could have, with any sense of realism, computed the market value of the premises at Rs. 15,332/- only. This valuation is ridiculously low and can in no sense represent the market value of the premises in question within the meaning of section 23 of the Law. The 3rd respondent-owner has ground for legitimate complaint. Justice and fairness requires that a revaluation of the premises by a competent valuer should be done to determine the price payable for the said house and premises vested in the Commissioner. Further, the report of the Secretary, Ministry of Housing and Construction, dated 24.5.77, refers to a number of irregularities connected with the original vesting and makes certain disclosures respecting the circumstances of the vesting which call for an investigation into the genesis and propriety of the vesting order. It is desirable that the Commissioner should inquire into the history of the vesting order and also satisfy himself as to the validity of the Secretary's criticism and decide whether circumstances justify that an order should be made by him under section 17A of the Law. Before he makes any order under the section which will affect the petitioner, the petitioner should be heard on her objections, if any, to the order of divestment. Though the present order, purporting to be made under section 17A and referred to in the Gazette notification P9, is set aside for the reasons set out above, the quashing of same will not bar the 1st respondent-Commissioner from looking into the whole matter afresh.

The application for a writ of certiorari quashing the divestment order contained in P9 is allowed. Each party will bear his own costs of this application.

SAMARAWICKREME, J. – I agree.

WIMALARATNE, J. – I agree.

Application allowed.