DESMOND DE PERERA AND OTHERS

v.

KARUNARATNE, COMMISSIONER FOR NATIONAL HOUSING

SUPREME COURT.
G. R. T. D. BANDARANAYAKE J.,
P. R. P. PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 67/93
C.A. APPLICATION NO. 33/92
JANUARY 25, 26 AND MARCH 21, 1994.

*Writ of certiorari – Ceiling on Housing Property Law, Sections 2, 8, 9 and 17A – Excess houses owned by a company – Rights of non-employee tenants to purchase excess houses vested in the Commissioner – Divesting of vested houses – Natural Justice.*

The Commissioner for National Housing decided that houses belonging to A. Baur & Co. Ltd. which had been let to non-employees had been excluded in

computing the permitted number of houses, in terms of Section 2 (3) Proviso (C) of the Ceiling on Housing Property Law. Such houses vest in the Commissioner. On an appeal by the Company, the Board of Review under the Law, affirmed the Commissioner's decision. The Company then challenged the decision of the Board by an application to the Court of Appeal. Whilst that application was pending, the Commissioner, without prior notice to the tenants, made an order divesting himself of the ownership of the houses.

**Held:**

(1) The disputed houses were excluded (by operation of Law) from the count of houses which the company could claim to retain. They were excess houses which vested in the Commissioner. The tenants failed to apply to purchase these houses within the time prescribed by Section 9 of the Law; hence they had no legitimate expectation of becoming owners of the same. As such there was no duty to notice them prior to divesting and no failure on the part of the Commissioner to observe the principles of natural justice.

(2) In the context of the failure by the tenants to duly apply to purchase the houses in terms of Section 9 of the Law, the decision to divest the property after the Ceiling on Housing property was removed by Act No. 4 of 1988, was not made *mala fide* or in defiance of the connected application pending before the Court of Appeal. In his affidavit, the Commissioner also set out good reasons for his decision in view of which the divesting of property was justified.

**Cases referred to:**

1. *MC Innes v. Onslow Fane* (1978) 3 All ER 211.
2. *GCSU v. Minister of Civil Service* (1984) All ER 935. 943. 944.
3. *O' Reilly v. Mackmea* (1982) All ER 1124.

*P. Nagendra P.C.*, with *Jacolyn Senevirtne* and *S. M. Senaratne* for appellants.

*Douglas Premaratne P.C. Addl. S. G.* with *Mrs. Murtu Fernando* for 1st and 2nd responders.

*P. A. D. Samarasekara P.C.*, with *J. A. De Gunaratne* and *Brito Mutunayagam* for 3rd respondent.

*Jacolyn Seneviratne* with *S. M. Senaratne* for 5th and 6th respondents.

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

*Cur. adv. vult.*

* 1994 - 3 SLR 316

July 14, 1994.

**G. R. T. D. BANDARANAYAKE, J.**

The background of this case first needs to be set out. For convenience the Ceiling on Housing Property Law will be referred to in this judgment as the CHP law.

**1. (A) Primary Facts:**

The 3rd respondent Baur & Co. Ltd. owned a building situated at Upper Chatham Street, Colombo Fort. There was a commercial area in the building used as its Head Office. There were also several apartments used for residential purposes. The appellants and the 4th to 6th respondents were tenants of the 3rd respondent occupying some of the said apartments.

The Ceiling on Housing Property Law No: 1 of 1973 became operative on 13.01.73. Part I of that law regulated the ownership of houses.

The 3rd respondent Company had extensive interests in the agricultural and industrial sectors in this country and had constructed a large number of houses in the industrial and plantation sectors. These houses were for the occupation of the Company's employees and functionaries except a few units either temporarily unoccupied or occupied by overstaying employees. The five storied building in Upper Chatham Street aforesaid was primarily used as its Head Office but had residential facilities in the upper floors for the Company's senior staff and foreign and local guests and friends. Some of these residential units were tenanted by the petitioners appellants and 4th to 6th respondents as aforesaid who were not employees or functionaries of the 3rd respondent Company. A feature that has been repeatedly stressed on behalf of the 3rd respondent was that these residential units did not have all its constituent parts in one place. For instance, the living and dining areas could be one floor, the bedrooms on another, staff quarters were in a different building as were the store rooms. Car parking was in the basement. Access to all units were controlled by the main doors under the control of the Company as were the lifts and staircases. Electricity and services found their way to the apartment through the main building etc:

By a notice published in the news papers all Corporate bodies owning houses were required to furnish a declaration under Law No. 1 of 1973 before 28.02.73. This the 3rd respondent did under date 26.02.73 but contended to the Commissioner of National Housing, the 1st respondent, that the apartments at Upper Chatham Street did not come within the definition of houses or flats as set out in Section 47 of the law. The Commissioner however determined that they did come under the said definition of residential units in that section and by letter dated 14.8.74 required the 3rd respondent to furnish a return within 14 days. The 3rd respondent complied with this directive. The 1st respondent thereafter by letter dated 5.7.78 – referred to as P8 informed the 3rd respondent of the determination of the respondent under paragraph 2(3) of the law, that the number of houses permitted to be owned by the 3rd respondent was 54 and that the houses the 3rd respondent had rented to non-employees had been excluded from the computation of the permitted number of houses in terms of Section 2(3) (C) of the said law; and among those residential units so excluded were the units Nos. 7 1/3, 7 1/5, 7 1/6 and 7 1/12 (tenanted by the appellants) and 7 1/7, 7 3/15 and 7 3/21 (tenanted by the 4th 5th and 6th respondents.)

The 3rd respondent appealed from that decision of the 1st respondent to the Board of Review. The 1st respondent, replying to the Board letter of 3.7.84 informed the Board of the houses vested from the 3rd respondent. Among those vested were the apartments occupied by the appellants and the 4th to 6th respondents vide letter P 20. The Board thereafter noticed the petitioners appellants and the 4th to 6th respondents and several others who were tenants in the premises to be present at the hearing in those appeal proceedings. The 3rd respondent objected to their presence on the ground they had no standing at that stage. On 16.10.80 the Board overruled the objection and made order permitting the petitioners appellants to come in. The 3rd respondent thereupon sought a Writ of Certiorari from the Court of Appeal in C.A. Application No. 194/81 to quash the interim order of the Board of Review and for a Writ of Mandamus and/or Prohibition directing the Board to hear the appeal without making the tenants parties to the appeal. After enquiry the Court of Appeal affirmed the order of the Board of Review and refused the Writ sought. Special leave to appeal from that judgment of the Court of Appeal was also refused by the Supreme Court.

After hearing the appeal before it the Board of Review dismissed the appeal of the 3rd respondent on 9.11.85. The 3rd respondent thereupon challenged that decision of the Board of Review in C.A. Application No: 1460/85. A stay order was sought and obtained by the 3rd respondent against implementation of the said Board of Review decision of 9.11.85. That stay order is still operative and that application still pending.

We next find that by Divesting Order made under Section 17 A (1) the 1st respondent with the written consent of the 2nd respondent published in Government Gazette No. 516/90 dated 19.10.90 divested the ownership of the residential houses described in the schedule which included Nos. 17 1/3, 17 1/5, 17 1/6 and 17 1/12 tenanted by the petitioners appellants and those tenanted by the 4th – 6th respondents. Such houses are deemed never to have vested in the 1st respondent.

No notice of the proposed divesting had been given to the appellants by the 1st respondent. The appellants and 4th – 6th respondents had been taken completely by surprise when they learnt of the divesting order quite by chance. The 1st appellant had got the assistance of the Government Printer to trace the relevant Gazette notification publishing the 'divesting' Order. That order is referred to as X8. The appellants challenged that order of divesting in C.A. Application No. 33/92 and asked for a Writ of Certiorari to quash it. The grounds on which the appellants challenged the divesting order were (a) that no opportunity was given to those affected by the order of making any representations or being heard; and (b) the 1st respondent acted *ultra vires* and in excess of his powers. The Court of Appeal refused the application. The petitioners appellants then prayed for special leave to appeal to the Supreme Court from the judgment of the Court of Appeal on several questions of law they formulated in a written statement. The Court of Appeal granted leave on the questions of law set out in that statement. This appeal considers them.

The questions of law as found in that statement are:-

(1) Should not the provisions of Section 9 of the Ceiling on Housing Property Law be interpreted to mean that an application for the purchase of a 'surplus house' could be

made within four months of the house **becoming a 'surplus house'** within the meaning of sections 8 (1) and 8 (5) of Law No. 1 of 1973 ?

(2) Did the petitioners have expectant rights and/or legitimate expectations of becoming the owners of the houses they occupied as tenants?

(3) Is the failure on the part of the 1st respondent to give notice to the petitioners of any proposed divesting of vested premises under Section 17 (A) of Law No 1 of 1973 and/or hearing the petitioners before making his decision under Section 17 A (1) aforesaid to divest the houses amount to a denial of the principles of natural justice?

(4) Should the 1st respondent have exercised the power of divesting the houses under the said powers given by the statute before the determination by the Court of Appeal in C.A. Application No. 1460/85 as that case was pending and a stay order remained in operation?

(5) Could the exercise of such power of 'divesting' under the said Section 17 A (1) before the determination of C.A. Application 1460/85 prejudicially affect the expectant rights and/or legitimate expectations of the appellants of becoming the owners of the houses they occupied as tenants?

(6) Has the power of divesting conferred by Section 17 A (1) of Law No. 1 of 1973 as amended been exercised *mala fide*?

(7) Has the said power of divesting been duly exercised in accordance with the law by the 1st Respondent?

**1. (B)**

It is necessary at this point to refer to certain facts and matters of law. These facts are not in dispute. Part I of the Ceiling on Housing Property Law lays down provisions for the regulation of ownership of houses. We are here concerned only with houses which may be owned by a body of persons corporate or incorporate. Section 2 (3) declares . . . quote . . . "the maximum number of houses which may be owned by any (such) body of persons shall be such number . . .

as is from time to time necessary for the purpose of providing residence to employees and functionaries of such body." The appellants or the 4th to 6th respondents were not employees or functionaries of the 3rd respondent company. That fact is not in dispute.

We next find a Proviso to section 2 aforesaid. Proviso (C) declares . . . quote . . . "a house owned by a body of persons which is let by such body to a person other than an employee or functionary of such body **shall not be taken into account** in determining the number of houses necessary for the purpose of providing residence to the employees and functionaries of such body . . . .". Proviso 2 (C) has therefore to be applied. The resulting position is that the appellants and the 4th – 6th respondent were tenants of houses owned by the 3rd respondent that had to be excluded (by operation of law) from the count of houses which the 3rd respondent could claim to retain as being needed for housing of its employees and functionaries. Those houses thus tenanted by the appellants would necessarily come in the category of **excess houses** recognised by the statute over which the owner could lay no claim in law. Once excluded as excess those houses vested in the 1st respondent and the 3rd respondent was so informed on 5.7.78 by P8.

**2. Question of point of time when an application for purchase should be made by a tenant.**

Perhaps the most important question affecting this case addressed to this court is the question as to when a tenant of a house ought to make his application to the 1st respondent in terms of the statute for the purchase of that house being one in excess of permitted number of houses that may be owned by the owners. This is what is reflected in question no: (1) addressed to this Court. Should he wait, perhaps many years as in this case, until the declarations of owners of houses in excess of the permitted number of houses specifying those which the owner proposes to retain have been made in terms of Section 8 (1) and simultaneous intimation given by the owner to his tenant that ownership of such tenanted house is not proposed to be retained so that the tenant has notice of such excess house so as to enable him to apply to the Commissioner to purchase the house tenanted by him? Should he wait until the provisions of Section 8 (5) can be applied to what is now called a "surplus" house

tenanted by him? It has been strenuously contended both in oral and written submissions on behalf of the Appellants that the tenant's obligation and opportunity to apply to purchase a 'surplus' house can only arise after the provisions of Section 8 have been complied with by the owner and determination made by the Commissioner and any appellate proceedings before the Board of Review concluded when it becomes known as to whether the house which is tenanted by any particular tenant is available for purchase by the tenant it being a 'surplus' house as defined in section 8 (5) of the Law.

In fact some of the other contention of appellant's Counsel in the course of submissions stem from the proposition that Section 8 determines the point of time from which the time frame of four months set out in Section 9 of the Law begins to run for making the application to purchase a surplus house. In fact it was even contended by the appellants that Section 9 contains a mistake when it used the expression ... "within four months from the date of commencement of this Law." ...

It is therefore necessary to address oneself to this question whether the provisions of Section 8 overide the provisions of Section 9.

Section 9 reads thus . . . "The tenant of a surplus house or any person who may succeed under Section 36 of the Rent Act No. 7 of 1972 to the tenancy of such house may, within four months from the date of commencement of this law, apply to the Commissioner for the purchase of such house . . .". It is observed that taken by itself, the language of this Section is plain, clear and unambiguous and ought generally to be given its ordinary sense and meaning unless it leads to an inconsistency or is repugnant to the rest of the instrument. Learned Counsel for the appellants contended that to give the section its plain grammatical meaning would result in an absurdity, it being inconsistent with the provision of Section 8. Counsel contended that within four months of the coming into operation of the law tenant would not be in a position to know that he was occupying a 'surplus' house and therefore Section 9 was unworkable and quite inconsistent with the provisions of the earlier Section 8 where time frames for doing certain acts required by the instrument were variable depending on the facts of each situation. Therefore Counsel contended, to interpret Section 9 within its own terms and give effect

to its plain unambiguous language would be repugnant to the purpose and object of the legislation which included giving an opportunity to a tenant to purchase the house and occupy it as owner.

We have therefore to look at the general policy of the statute, identify the evil at which was directed to ascertain whether there is in fact an inconsistency between Sections 8 and 9 and/or other provisions of the instrument. If so, should the grammatical sense of a section be abridged or modified to avoid such inconvenience?

The preamble identifies the law as one ". . . to regulate the ownership, size and cost of construction of houses and to provide for matters incidental thereto or connected therewith . . .This law was promulgated at a time when there was an acute shortage of housing in the country and went hand in hand with the Rent Act No. 7 of 1972. It sought to ease the inconvenience of the shortage of housing in general, to make a more equitable distribution in regard to ownership of existing housing stock. It set down time frames to enable the Commissioner of National Housing to get to know the ground situation in regard to housing as early as possible so that the provisions of the instrument may be implemented expeditiously. Again, it must be borne in mind that sections are the enacting part of a statute. Each section is a substantive enactment in itself and depends on its own language, context and setting for its true meaning and effect. Every section must be considered as a whole and self contained with the inclusion of subsections, saving clauses and provisos. All the parts of a section are an interdependent integral whole and should be so constructed. A Section has only one interpretation and one scope. Is there another section which cuts down its meaning?

Thus we approach the provisions of sections 8. To my mind it contains the nuts and bolts for the working of the enactment:

Section 8 (1), (2) and (3) requires declarations to be made to the Commissioner by owners.

Section 8 (3A) and (4) deals with situations where owners or others have failed to make declarations they are obliged to make.

Section 8 (5) declares what is a 'surplus' house.

Section 8 (6) deals with a situation where an owner has omitted to do something required of him, and provides for the vesting of houses in this category in the Commissioner. Subsection 7 enables the Commissioner to call for further particulars about declarations from owners.

Section 8 is thus not dealing with the position of tenants as such. It is found in the early part of the enactment and is more concerned with the relationship imposed by law between house owners and the Commissioner. It will take its course within its own terms.

Section 9 on the other hand creates the opportunity for the tenant to opt to purchase the house he lives in. So the Section categorically requires him to do only one single thing – namely, to apply to the Commissioner for the purchase of a house. This he must do within the stipulated period of four months from the date of commencement of the law – which was 13.1.73. The language suggests a clear mandatory provision. Such a clear imperative provision indicates that the legislature had just that in mind when promulgating this law so that the Commissioner would know within the space of 4 months the tenants who have opted to purchase houses so that for example he would bear that in mind when owners of excess houses made application to sell or dispose of those houses to others under the provisions of Section 10.

The information so provided by tenants would also make the Commissioner aware of the ownership of such houses which would in turn enable him to take steps under, for example – Section 8 (4) or (6) or (7). Thus it is seen that the provisions of Section 9 are consonant with those of Section 8. Section 9 is quite capable of implementation. If the tenant considers himself to be in occupation of a surplus house, all that he has to do is to apply to the commissioner to purchase such house. He need not further investigate at that stage whether in fact it is surplus or not. Even if it was surplus, the Commissioner can still use his discretion and decide to transfer it in terms of Section 12 (1) to a Local Authority, Government Department etc: instead of permitting the tenant to purchase it. But an application to purchase in the hands of the Commissioner may well induce him to sell to a tenant, instead of transferring under Section 12 (1).

Indeed there must surely have been applications made to purchase houses by tenants in full compliance with the provisions of Section 9. There is no material to suggest the contrary. The owner too has rights. He has a right to know if the tenant wishes to purchase the house. (vide Section 10). The owner has a right to dispose of an asset with the permission of the Commissioner. Thus it is seen that the provision of Section 9 can be integrated into the object and purpose of the instrument. It is also to be noted that the use of the word 'surplus' in Section 9 should not be misunderstood. It is a grammatical necessity in the context of the enactment to give it sense and meaning as it is only a surplus house that may be purchased by a tenant under the enactment and not one which is not surplus.

I therefore hold that the provisions of Section 9 are clear and unambiguous and are mandatory and contains no mistake and are not inconsistent with or repugnant to the provisions of Section 8 or other provisions of the enactment; and that the application to purchase by the tenant of a house should have been made within 4 months from the date of commencement of Law No. 1 of 1973. The appellants have failed to prove that Section 9 contains any mistake. The application of the 1st petitioner appellant to purchase premises No. 7 1/3 Upper Chatham Street. Colombo 1 is dated 27.3.81 but has been presented to the Board of Review and not even to the Commissioner, nearly 8 years after the time frame stipulated by Section 9 aforesaid lapsed. It is the finding of this Court that the other appellants have so far not made any application to purchase premises tenanted by them. Their affidavit to the Court of Appeal affirming that they had made such application is denied by the 1st respondent and is not supported by any other documentary evidence and is therefore unconvincing. The 4th to 6th respondents likewise have not made any application to purchase premises tenanted by them. They are therefore all out of time. I will refer more specifically to their situations in a later part of this judgment.

Before I pass on to consider other matters that have been raised, I ought also to state, that the reference to a tenant making an application for the purchase of a house contained in section 10 of the CHP law is with reference to an application for purchase made in terms of section 9 of the law. Section 10 does not create a separate head under which an application for purchase may be made.

**3. Question of Law regarding Expectant Rights/Legitimate Expectations:**

The appellants claim with the coming into force of Law No. 1 of 1973 the appellants acquired expectant rights of becoming the owners of the houses they occupied as tenants?

Section 2 (3) of the CHP Law declares that bodies of persons can only own such number of houses as the Commissioner determines is necessary for the residences of its employees and functionaries or of carrying out the objects of such body (other than letting the houses out on rent.)

Under proviso (C) to Section 2 (3) the 3rd respondent cannot own houses let to the petitioners or 4th – 6th Respondents who it is agreed are not employees or functionaries of the said 3rd respondent.

Section 9 of the CHP Law requires a tenant within four months of the commencement of the law to apply to the Commissioner for the purchase of such house. That is the finding of this Court in this appeal (ante).

Section 10 of the CHP Law requires a tenant who has made an application for the purchase of the house as aforesaid, to give simultaneous notice of his application to purchase, to the owners of such house.

Section 12 (1) permits the Commissioner to transfer a house vested in him to a local authority, Government Department or public corporation on terms.

Section 12 (2) provides that if the Commissioner proposed to sell a house vested in him it shall be offered for sale in the first instance, to the tenant if any, of such house and where the tenant does not accept such offer, sell such house to any other person.

It has been argued on behalf of the 1st and 2nd respondents (whilst supporting the decision on this point made by the Court of Appeal) that the petitioners can have expectant rights or legitimate expectations of becoming owners only if the Commissioner elects or proposes in terms of Section 12 (2) to sell the house and the offer is made to the tenant. It was submitted that stage must be reached

before a tenant could lay any claim to a right to purchase. That stage had not been reached.

Likewise the contentions of the 3rd respondent on this question of an "expectant right or" "legitimate expectation" to purchase the houses is as follows:

(a) the terms of Section 12 (2) offers no more than a 'hope' (to a tenant) of purchase. A 'hope' cannot amount to a "legitimate expectation"

(b) The appellants have put themselves beyond their power to purchase by failing to make an application in terms of the law – the controlling section in this regard being Section 9 of the law. The only interest or right the appellants could therefore have in the premises are their tenancy rights. Those tenancy rights are not affected by the divesting order.

(c) Even if there had been a proper application to purchase before the 1st respondent, he is not bound to offer to sell the premises to the tenants. The 1st respondent is given certain options in terms of Section 12 of the law and it is then a matter for the exercise of his discretion.

(d) There has not been in this case any decision to sell the houses in terms of Section 12 which decision must first be made by the 1st respondent before any question of purchase by a tenant could arise.

The appellants on the other hand in their written submissions contended that:

(a) Under proviso (C) to Section 2 (3) the 3rd respondent cannot own the houses let to the appellants.

(b) Under Section 8 (1) (a) (b) and (c) a body of persons owning houses in excess of the permitted number should within six weeks of the determination of the Commissioner or the Board of Review as the case may be, of maximum number of houses that may be owned by such body, make the declarations required by Section 8 (ii) (a) (b) and (c) and the proviso. Thereafter Section 8 (5) declares what surplus houses are. In this case the decision of the Board of Review was on 9.11.85 – P26.

The 3rd respondent however filed C.A. Application No: 1460/85 against the said decision of the Board and obtained a stay of further action. Consequent to that decision there is still time for the 2nd, 3rd and 4th appellants to make their application to purchase the houses; (this submission has not included the 1st appellant on the assumption that the 1st appellant has made a valid application to purchase in 1981.)

**Alternatively:**

(a) If the houses occupied by the appellants are excess houses in terms of Section 10, then the tenants could make their applications for purchase of the houses **at the appropriate time**. The Court of Appeal should have followed the principles set out in (1) *Mc Innes v. Onslow Fane* [1], (2) *GCSU v. Minister of Civil Service* [2], which held: quote – "but where a person claiming some benefit or privilege has no legal right as a matter of private law he may have a legitimate expectation of receiving the benefit or privilege and if so the Courts will protect his expectation by judicial review as a matter of public law." It was submitted that the decision to divest would fall under the grounds of irrationality and procedural impropriety set out in that case to justify judicial review.

(b) The Court of Appeal should not have distinguished the judgment in C.A. 194/80. The fact that the Supreme Court refused special leave to appeal in that case, thereby affirming that judgment has been overlooked by the Court of Appeal.

Other authorities cited were *O' Reilly v. Mackmea* [3]; H. W. R. Wade – "Principles of Administrative Law" 5th Edition p. 464:496.

The above submissions were crystallised in the following manner:

(a) Did the CHP Law create an expectation or benefit or privilege that a tenant could in certain circumstances become the owner of the house he tenanted?

(b) By the act of divesting, has Governmental power under Section 17 A been exercised in an unfair and inconsiderate manner to the disadvantage of the appellants;

(c) Have the principles of natural justice been observed before divesting?

The appellants were neither informed of an intention to divest nor were heard. The divesting had taken place whilst a stay order imposed by the Court of Appeal was in force.

In these circumstances the act of divesting was not rational or resonable or fair. The Court should therefore protect the said benefit or privilege conferred on the tenant by the law by judicial review and strike down the act of divesting made and published by the respondent.

It does appear to the Court upon a consideration of the relevant provisions of the CHP Law that whilst regulating the ownership, size and cost of construction of houses, the legislature did intend to make available to tenants the opportunity to purchase houses tenanted by them if such were available. This would be a matter incidental to the primary aim of the enactment, as, consequent to the ceiling on ownership, there could vest in the Commissioner those houses owned by a person in excess of the permitted number which remained undisposed of by the owner (who had been permitted to dispose of such excess number of houses by the Commissioner by virtue of the provisions of Section 10.) Such excess houses vested in the Commissioner under the provisions of section 11 could be transferred for use by public sector institutions in the discretion of the Commissioner under Section 12 (1) or sold to tenants in occupation who wished to purchase them, or if not, sold to any other person under Section 12 (2). Thus, subject to the exercise of the Commissioner's discretion, the statute indeed provided for purchase of an excess house by a tenant who was given priority over other persons recognised by Section 12 (2). In that sense, the appellants did have a benefit or privilege of purchasing houses they tenanted. That was the intention of the legislation – of providing that opportunity to a tenant to purchase although subject to the Commissioner's discretion:

The objections of the 1st to 3rd respondents on the footing that the terms of Section 12 (2) offers no more than a 'hope' which does not amount to a 'legitimate expectation' to purchase or that the exercise

of the Commissioner's discretion to their disadvantage would nullify their chances and therefore they could not be said to have derived any benefit or legitimate expectation of purchase are therefore unacceptable and are rejected; but the statute also prescribed the steps he should take if the tenant decided to purchase a house. The willingness of the tenant to purchase a house had to be communicated to the Commissioner by the tenant by way of an application. That duty was placed squarely on the tenant by Section 9. This is a common sense approach.

The statute could not be worked otherwise. The statute went further and set a time limit for such a communication – a time of four months for such an application – again Section 9.

Thus there was cast on the tenant a duty, to make the opportunity to purchase or the benefit he could receive under the law, a reality, although it was subject to many imponderables such as the exercise of the 1st respondent's discretion. So, even though the statute in broad terms recognised that a tenant who could afford it, may wish to purchase the premises and made provision for such an event, subject of course to the exercise of discretion by the Commissioner, still, if the tenant neglected to perform his duty as prescribed by the law, (ie) the duty to apply for purchase within time, his right to be considered a possible future owner ceased to exist. That is the sum and substance of the content of Section 9 and morefully discussed and decided in an earlier part of this judgment. As the Appellants had failed to comply with the provisions of Section 9, there was no application as aforesaid before the Commissioner. The appellants accordingly lost their opportunity to be considered as would – be purchasers.

It is too late now to complain as the 1st respondent was under no statutory duty after the lapse of four months from 13.1.73 to consider or entertain any claims of the appellants to purchase these premises.

There is therefore no question of any failure on the part of the 1st respondent to observe the principles of natural justice. In the absence of proper applications before him, the 1st respondent was under no administrative duty to notice the appellants or give them a hearing prior to divesting. (The question of the operation of a stay

order in CA Application 1460/85 will be considered in another part of this judgment.)

The appellants therefore fail in their application for judicial review on this ground.

**4. Questions arising out of decision in C.A. Application 194/81 dated 3.12.82 – P 18 and the legal position arising from proceedings which are pending in C.A. Application 1460/85 and matters incidental there to:**

The applicants argue that:

(a) the Court of Appeal decided in C.A. No: 194/81 that the appellant had a right to participate in the proceedings before the Board of Review which heard the appeal of the 3rd respondent against the determination of the 1st respondent limiting the number of houses that could be owned by the Company whilst excluding the houses tenanted by the appellants from consideration as houses needed for the occupancy of the 3rd respondent's employees and functionaries. The 3rd respondent had contended that the CHP Law did not apply to its flats in Upper Chatham Street and that these flats had not vested in the 1st respondent. The appellants were allowed to participate on the ground that they as tenants had an interest under the CHP law. Leave' to appeal from that decision of the Court of Appeal was refused by the Supreme Court. That, it was submitted, amounts to an acceptance by the Supreme Court of the legal position. The appellants therefore argue that the findings of the Court of Appeal in that case have a bearing on the instant case and that that decision should influence and be followed when deciding whether the Divesting Order should be permitted to stand when it was made without notice to the appellants and without affording them a hearing, in disregard of the rules of natural justice. Consequent to the divesting order the appellants lost their privileges recognised by the statute. The divesting order should therefore be struck down.

It is the view of this Court that as the scope and application of Section 9 of the law had not been raised or considered in that case, the grant of a hearing to the appellants before the Board of Review can in no way affect the question whether the divesting was done in a lawful manner. The Supreme Court's refusal to grant leave in that

case may have been for one or more of several reasons which are not expressed in the orders and are therefore not known to this Court. Had section 9 of the CHP Law been considered, the absence of applications to purchase the premises made within time may well have resulted in a decision adverse to the respondents appellants. Furthermore, no order of divesting was in issue in that case. This Court therefore does not consider the decisions in C.A. Case No. 194/81 of any relevance to the issues in the instant case.

(b) In C.A. case No. 1460/85 the 3rd respondent Company once more sought to challenge the decision of the Board of review upholding the decision of the 1st respondent in regard to the determination of the number of houses that could be owned by the 3rd respondent. Notice issued on the respondents and an order of stay of proceedings was – obtained by the 3rd Respondent on 20.12.85 and was extended and is still in force. That case is therefore sub-judice. The appellants complain, that in the face of the stay order, the 1st respondent secretly and without notice to the appellants of his intention to divest, and without affording them a hearing, divested all the houses they tenanted and had expected in due course to purchase. They have therefore been prejudiced as they have been deprived of the said benefit. Furthermore the appellants submit that the circumstances of secrecy accompanying the divesting process and a disregard of the rules of natural justice and in contempt of the Court's order suggest *mala fides* on the part of the 1st respondent. The appellants complain that the *mala fide* act of the 1st respondent has deprived them of the privilege to wit: a chance of owning a house in Upper Chatham Street, Colombo 1. Which they could have pursued had the houses remained vested in the Commissioner.

In the view of this Court the question whether the appellants had made applications for the purchase of houses in compliance with Section 9 of the law once more comes up for consideration. It is a recurring question of law pervading all aspects of this case arising as it does upon the facts.

The 1st petitioner appellant has dated his application 27.3.81 but it has only been handed over by his attorney-at-law at the Board of Review office on 5.5.81 – vide receipt X 3A.

Therefore for one thing, it has not been tendered to the proper authority the 1st respondent in the first instance. In any event, according to the view I have taken that it should comply with the provisions of Section 9, it is out of time.

The 2nd petitioner appellant states at paragraph 24 of her affidavit filed in this case on 20.1.92 that ... quote ... "I have also made an application to purchase the apartment I am occupying as tenant. The said application has not been determined yet and is pending." Strangely enough, although she annexes copies of the 1st appellant's application as X3 and its acknowledgment X3A she does not annex a copy of her own application or any acknowledgement of its receipt. Nor does she explain why not.

The 1st respondent by his affidavit denies any receipt of an application by the 2nd appellant. No other material has been furnished by the 2nd appellant in support of her assertion of sending an application.

The 3rd appellant in his affidavit dated 20.01.92 has stated at paragraph 24 as follows . . . quote . . . "I have also made an application to purchase the apartment **they occupy** as tenants. The said application has not yet been determined." It is not clear from this statement whether the 3rd appellant has stated that he has applied to purchase the apartment he occupies or has applied to purchase some other apartment occupied by someone else.

If the latter is true he does not come within the law in any case. The 1st respondent denies the aforesaid paragraph 24 of the 3rd appellant's affidavit and denies that he has received any application to purchase a house from the 3rd appellant. It is also observed that this 3rd appellant was the 12th respondent in C.A. Application No. 1460/85 aforesaid and in his affidavit dated 25.4.86 filed in that case he has not stated that he had made an application to the Commissioner to purchase the house he tenanted. The 3rd appellant has not furnished any other material or supporting evidence in support of his assertion that he had indeed applied for purchase although he has provided copies of X3 and X3A aforesaid.

Similarly the 4th appellant too, apart from a bare statement in his affidavit that he has applied for purchase of the house he tenants has

not referred to any supportive evidence of such fact. The 1st respondent by paragraph 13 of his affidavit has denied receipt of any application to purchase from the 4th appellant.

Considering the denials of the 1st respondent of the receipt of any applications for purchase by the 2nd, 3rd and 4th appellant's, this Court is unable to accept these appellants statements though contained in affidavits, that they did indeed applied to purchase the houses they tenanted in terms of the law. It is apparent that they became aware of the proceedings before the Board of Review for the first time only upon receipt of notice from the Board in 1989 – vide para 10 of the affidavit of the 12th respondent (who is 3rd appellant in this case) in C.A. case No. 1460/85 aforesaid; that was nearly 7 years after the time limit imposed by section 9 expired. It is noted that the1st appellant's application has been dated 27.3.81. In the circumstances this Court unhesitatingly accepts the denial of the 1st respondent that he received any applications from the 2nd, 3rd and 4th appellants for purchase of the houses they tenanted. We hold that the 2nd, 3rd and 4th appellants have failed to satisfy this Court that they applied to purchase the houses they tenanted.

In the absence of applications to purchase houses tenanted by them in terms of the law, these appellants cannot be heard to complain of dereliction of duty by the 1st respondent. In the aforesaid situation, there is no administrative duty to notice the tenants of houses vested that those houses are to be divested. It is an administrative step the Commissioner can take, but with the written approval of the Minister. The 1st respondent affirms that he got that permission on 1.8.90 and he divested on 19.10.90. We have no reason to doubt the truth of that statement. It is highly unlikely that the 1st respondent would intentionally flout the law in this regard and to what purpose?

We are therefore satisfied that the divesting order was not made *mala fide* to the detriment of the appellant's interests and in disregard of the rules of natural justice or in defiance of an order of Court or without the permission of the minister. The 1st respondent in the several affidavits filed in this case has repeatedly set out the reasons for his decision to divest this property after the ceiling on housing property was removed by Act of Parliament No. 4 of 1988 in the absence of any applications to purchase.

Those reason are that:

(i) The architectural design of the building led to many problems in management.

(ii) Constituent parts of an apartment were scattered in many places. Only a part of Baurs flats at Upper Chattam Street vested in the Commissioner; as such some apartments remained with the Company. The situation led to many legal problems and continuous litigation. The National Housing Department was unable to exercise its rights of ownership.

(iii) There were certain common facilities such as – lifts service, removal of garbage, maintenance of common areas, security both during day and night, the maintenance of an uninterrupted supply of water which is done by a system of high pressure pumping from the basement without overhead tanks. These common elements were not entirely vested in the National Housing Department.

(iv) Security considerations, as part of the building has a common wall with President's House and a part adjacent to Naval Headquarters. For the above reasons 1st respondent says he formed the view to divest whatever residential units had vested and give back all these heavy responsibilities to the former owner the 3rd respondent. We are of the view that the 1st respondent has amply justified his decision to divest this property. It is clear that decision has been taken *bona fide* in the circumstances.

In the result the appeals must fail. The 4th respondent did not participate in these proceedings.

The order of the Court of Appeal refusing to grant or issue an order in the nature of a writ of certiorari to quash the said divesting order made by the 1st respondent is affirmed. The appeals of the appellants are dismissed with costs both in this Court and in the court below.

**PERERA, J.** – I agree.

**WIJETUNGA J.** – I agree.

*Appeal dismissed.*