

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Asoka Sarath Amarasinghe
of No. 32, Vidyalaya Road,
Gampaha.

PETITIONER

C.A(Writ) Application No. 347/1988

Ceiling on Housing Property Board
Of Review Appeal No. 1283

Commissioner of National Housing
File No. CH/0/1A/2351

Vs.

1. R. Wijeratne
No. 27/1, (27B), Sir Ernest de Silva
Mawatha, Colombo 7.

RESPONDENT
(Deceased)

- 1A. Ranjith Flavian Wijeratne of
No. 27/1, (27B), Sir Ernest de Silva
Mawatha, Colombo 7.

SUBSTITUTED-RESPONDENT

2. Sirimevan Bibile (Former Chairman)
- 2A. Dr. M. S. Jaldeen, (Chairman)
3. B. Bodinagoda (Vice Chairman)
(Former Vice Chairman)
- 3A. C. Ranawake (Member)
4. B. Gunasekera
(Former Member)
- 4A. J. M. S. Bandara (Member)
5. S. W. Gunewardena
(Former Member)

- 5A. R.W.M.S.B. Rajapakse (Member)
6. M. Samaraweera
(Former Member)

All members of the Ceiling on
Housing Property Board of Review,
of No. 10G, Vipulasena Mawatha,
Maradana, Colombo 10.

7. D. Weerappana
Former Commissioner of National
Housing, Department of National
Housing
Colombo 2.
8. Y. B. Pusedeniya
Former Commissioner of National
Housing, Department of National
Housing, 'Sethsiripaya',
Battaramulla.
- 8(A) M. Sritharan
The Commissioner of National
Housing, Department of National
Housing
'Sethsiripaya',
Battaramulla.
9. Hon. Premadasa, Minister of
Housing and Local Government and
Construction, Sethsiripaya, Sri
Jayawardenapura, Kotte,
Battaramulla.
10. Hon. Wimal Weerawansa
Minister of Construction,
Engineering Services, Housing and
Common Amenities,
2nd Floor, 'Sethsiripaya'
Battaramulla.

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: A. R. Surendra P.C., with M.J. Dinesh and M. Pushparaj
For the Petitioners

C.E de Silva 1(A) for Substituted -Respondent

A. Gnanadasan P.C., A.S.G with N. Wijesundara S.C.
and Ashika Dissanayake S.C for Added 7(B) and 9(A)
Respondent-Respondents

ARGUED ON: 30.9.2011, 03.10.2011 & 05.10.2011

DECIDED ON: 11.01.2012

GOONERATNE J.

This is an application for the issue of writs in the nature of writs of certiorari. By the Petitioner's application to this court dated 5.4.1988, he sought for a mandate in the nature of writ of certiorari to quash the orders dated 16.9.1982 of the 8th Respondent, (Commissioner of National Housing) marked P7 and annexed to the said application and also to quash the order dated 30.1.1988 of the Ceiling on Housing Property Board of Review contained in documents marked P9 and P11. It is very unfortunate that so many years have lapsed after the filing of this application in the Court of Appeal, and due to various reasons there had been no finality to this

application. It would not be incorrect to mention its brief history. At a certain point the application was dismissed for want of appearance (9.10.1995). The subsequent re-listing application was also dismissed on 5.3.1996, and that order was quashed by the Supreme Court with a direction to hear the parties and make an order on the application for re-listing. (probably the earlier dismissal of re-listing was dismissed without giving reasons). Thereafter the re-listing application was heard may be for the 2nd time and dismissed on 25.11.1996.

Petitioner sought Special Leave to Appeal from the Supreme Court from the above order of dismissal dated 25.11.1996. The Supreme Court on 10.12.1998 set aside the order refusing to re-list and directed the Court of Appeal to hear this application for Writ in Case 347/1988. As directed by the Supreme Court the Court of Appeal heard this case and on 4.2.2001 reserved the judgment to be delivered in due course but the judgment was not pronounced due to the reason that the Judge who was to deliver the judgment was elevated to the Supreme Court.

I will deal with the case of the Petitioner at the very outset. Petitioner became the owner of the premises in dispute situated at 27/1 (27B) Sir Ernest de Silva Mawatha, Colombo 7 by deed No. 491 dated 11.1.1975. (P1). Prior to such purchase the premises had been owned by one

Lalitha Rajapakse of No. 25 Sir Ernest de Siva Mawatha, Colombo 7. It was the position of the Petitioner that the said Rajapaksa assured the Petitioner that the 1st Respondent who was the tenant of the premises in dispute and in occupation of the premises refused to purchase the premises. Petitioner's position as pleaded and in the oral submissions before me by learned President's Counsel was that the aforesaid transfer of premises, by deed P1, was in compliance with the provisions of the Ceiling on Housing Property Law No. 1 of 1973. As such he had good title to the premises.

Thereafter the learned President's Counsel submitted to this court as pleaded, the following relevant and important matters which would have a bearing to the final out come of this case.

- (a) A written offer made by the above named Rajapaksa (hereafter called the 'previous owner') marked P3 & A13 to the 1st Respondent dated 3.8.1973. The 1st Respondent refused to accept the said offer to purchase. Attention of court drawn to document P4 (P52). It is recorded therein that 1st Respondent was offered the premises for Rs. 125,000/- but did not accept to buy at that price.
- (b) The previous owner made attempts to sell the property in compliance with the law (permitted to dispose the property within 12 month of the law coming into operation (Section 10). Previous owner given extension of time by Commissioner of National Housing. Vide P5 & P6 gazette notification which differ vesting due to failure to sell

within 12 months was due to reasons beyond his control, and was given time to sell.

(c) The premises thereafter was vested in the Commissioner of National Housing by gazette marked P7 of 24.9.1982 under Section 8(6) of the above law. The learned President's Counsel argued that the vesting had been done without affording the Petitioner the opportunity to show cause or Petitioner given an opportunity to be heard prior to vesting. Petitioner had no notice of vesting. Thereafter Petitioner appealed to the Board of Review. (P8)

(d) Learned President's counsel emphasized that the Petitioner was never a party in the proceedings before the Commissioner (8th Respondent) and as such no opportunity to be heard. This is clearly a violation of the rules of Audi Altar Partem. Breach of the rules of natural justice. Several authorities were cited by learned President's Counsel in this regard. He urged that 8th Respondent has violated Petitioner's vested rights.

At this point of this judgment I observe that it is a very basic and a Fundamental principle in public law that rules of natural justice should be observed by any Court, Tribunal or other body or person empowered by law to inquire into a matter affecting the rights of parties. As such this court need to consider in detail the case of each party and arrive at a reasonable conclusion in this regard.

(e) The learned President's Counsel submitted that the appeal to the Board of Review of the Ceiling on Housing Property Board of Review was heard by the Board of Review consisting of the 2nd to 6th

Respondent, and on 30.01.1988 three orders were delivered by the aforesaid Respondents who were members of the Board. The 2nd & 4th Respondents dismissed the Petitioner's appeal. (P9). The 5th & 6th Respondents allowed the Petitioner's appeal (P10). The 3rd Respondent by his order at P11 dismissed the Petitioner's appeal and affirmed the vesting of the house by the Commissioner of National Housing. It is mentioned in the petition filed before this court that the reasons given by the 3rd Respondent is that the 5th Respondent by letter of 8.5.1974 vested the premises and as such the 8th Respondent did not have a right to grant extension of time to purchase (vide P6). Learned President's Counsel for Petitioner submits it is an error of law on the face of the record. Petitioner's counsel argue that a premises cannot be vested under the law by mere letter written to another party. Further extension granted by P6 not canvassed or an appeal against P6. Petitioner contends that the order of the 3rd Respondent is without jurisdiction and that it is the same with regard to the orders made in P9. The Petitioner in support of his position has averred the following in the petition.

- (i) The order of the 2nd to 4th respondents in holding that 'P1' annexed hereto does not appear to be genuine and executed on 11.1.75 to defeat the law just two days before the expiry of the extension granted for their disposal, is unsupported by any evidence whatever and is ultra vires.
- (ii) The 2nd and 4th respondents have misconstrued and/or misapplied the provisions of Section 8(6) of Law No. 1 of 1973 (as amended) inasmuch as, inter alia, one of the pre-

conditions for the application of Section 8(6) is that there must be an application by a tenant to purchase a surplus house and in the instant case it has been established by evidence that the 9th respondent refused to accept the offer made by the Petitioner's predecessor in title to sell the property to him. In any event it is submitted with respect that where the Commissioner of National Housing grants an extension of time for the disposal of a surplus house under Section 11(1) of Law No. 1 of 1973 (as amended) it is granted on the basis that the tenant has not exercised his option to purchase under Section 9 and the buyer is not required to make any further inquiries with regard to that matter.

- (iii) Once the premises in question had been sold to the petitioner by 'P1' the petitioner acquired a vested right in the same and the 8th respondent could not in law have vested the same and accepted payment from the 1st respondent. 'P1' in fact had been executed within the time allowed by the 8th respondent himself. It was on the faith of this assurance as reflected in P6 that the Petitioner entered into the transaction contained in P1. Accordingly, submitted that having made his decision in pursuance of Section 11(1) of the Law the 8th respondent was estopped from making the aforesaid order dated 16.9.82 and/or the said order has been made without jurisdiction and/or in breach of the principles of natural justice.
- (iv) The 2nd and 4th respondents in effect holding that Law No. 1 of 1973 as amended by Act No. 18 of 1976 had with

retrospective effect invalidated the transfer contained in P1 have misdirected themselves in law inasmuch as it is established law that a statute shall not operate to defeat vested rights of parties retrospectively unless expressly so provided in the statute.

- (v) The 2nd and 4th respondents clearly erred in law when they held in effect that it was not necessary for the 8th respondent to have noticed the petitioner for the inquiry which led to the 8th respondent's order dated 16.9.82. It is submitted that any decision given in breach of the principle audi alteram partem is a nullity and/or void in law a proposition to which the 2nd and 4th respondents have failed to address their mind.

The order at P10 support the case of the Petitioner. In the oral submissions before me the learned President's Counsel for the Petitioner stressed his two fold argument on breach of the rules of natural justice i.e not notified by the 8th Respondent Commissioner of National Housing about the inquiry on the sale of the house in question to the petitioner was in contravention of Section 8(6) of the Ceiling on Housing Property Law, nor was he given a hearing by the Commissioner who at a certain stage recorded the fact that if necessary the present owner may be summoned for the inquiry and as stated by two members of the Board of Review (5th & 6th Respondents) in their order that at the conclusion of the inquiry held on

11.9.1982 the parties were informed by the Commissioner that the inquiry was being postponed for 2nd October for further hearing on which date the Petitioner would be heard. But the petitioner the present owner was never summoned. In support of his contention. Learned President's Counsel cited a long line of authorities.

The following submissions of learned Counsel for substituted 1st Respondent may be noted.

The 1st Respondent (now deceased) was the tenant of the premises in dispute. He was tenant from 1965 to 5.12.2003 up to the point of his demise. Mrs. Lalitha Rajapaksa was the owner of the said premises with several other premises situated at Sir Ernest de Silva Mawatha, Colombo 7. Mrs. Lalitha Rajapakse was the wife of Mr. George Rajapakse who died on or about 18.6.1976. On the Ceiling on Housing Property Law coming into operation or the relevant date in terms of said law Mrs. Rajapakse owned excess house.¹ In this regard attention of court is drawn to Section 2(1), 2(2) & 2 (5) of the Ceiling on Housing Property Law, and Section 8(2) of the said Law. It was the learned counsel's position that a declaration should be made to the Commissioner of National Housing within 12 weeks and send the declaration in compliance with Section 8 of the Law. According to learned counsel 12 week period would end by 7th April 1973. Counsel emphasized

the fact that declaration should be made in compliance with the law by the male spouse, and if he is deceased, thereby the female spouse could attend to it. He also pointed out that the declaration was made by Mrs. Lalitha Rajapaksa subsequent to the time limit available to send the declaration. It was dated 3.8.1973, and simultaneously informed the tenant 1st Respondent, that she does not propose to retain the ownership of the house occupied by tenants. It was learned counsel's position that Mrs. Lalitha Rajapaksa was in breach of Section 8(4) of the said law. However it was also submitted that the Commissioner had accepted the declaration made as aforesaid, although it is not a reasonable cause contemplated under Section 8(4) for delay in sending declarations. In this way learned counsel sought to explain the lapses or breach of the law committed by Mrs. Rajapaksa. Counsel further submitted, in law the above declaration made by Mrs. Lalitha Rajapaksa was illegal or not valid in law.

The house in question was sold by Mrs. Lalitha Rajapaksa in breach of the law, to the Petitioner by deed No. 491 of 11.1.1975. According to the material made available the learned Counsel submit that sale price was Rs. 40,000/-. Rs. 1000/- was paid by the Petitioner and the balance of Rs. 39,000/- is due. Counsel further submits that when the above deed of sale was executed the owner Mrs. Rajapaksa had not given notice of sale to the

Commissioner of National Housing. The notice of sale is mandatory according to learned counsel and he refers to Section 10 of the said law. The learned counsel for 1st Respondent emphasis that the above transfer of premises is not a genuine transaction. It was a transfer done by flouting the law. Transfer was done to overcome the Ceiling on Property Law. Counsel also emphasis on Section 8(6) of the said law. I have also incorporated in this judgment the following paragraphs obtained from the written submissions of the 1st Respondent filed in this application, and I would test it's validity and accuracy in this judgment itself.

1. On representations made by the Petitioner about the said sale, the Commissioner of National Housing held an inquiry on 11.09.1982 at which the Petitioner, the 1st Respondent and the said Mrs. Lalitha Rajapakse and Roshan Peiris were present. After the conclusion of the said inquiry the Commissioner of National Housing by his order published in the Government Gazette dated 24.09.1982 vested the said house formerly bearing assessment No. 27/1 and presently bearing assessment No. 27B and the house formerly bearing assessment No. 27 1/1, and presently bearing assessment No.27 D, Sir Earnest de Silva Mawatha, Colombo 7 with effect from 16.09.1982. (This paragraph obtained from the written submissions is strictly not correct. The Petitioner was not present at the inquiry at any stage before the Commissioner. This is confirmed according to the objections file by the 1st Respondent. Paragraph 23 of objections)

According to the said Gazette notification the Commissioner had obtained the prior approval in writing of the Minister of Housing for the said vesting.

The said vesting had been done by the Commissioner of National Housing in compliance with the provisions of Section 8(6) of the Ceiling on Housing Property Law No.1 of 1973 and by virtue of the powers vested in the Commissioner by the said section.

2. Although the said section 8(6) came into operation by Amendment Act No. 18 of 1976 on 30.07.1976, the words “has been transferred” in the said section is clear as it implies a transfer done in the past and is not restricted to transfers done on or after 30.07.1976.

3. The Commissioner of National Housing held the said inquiry on 11.09.1982 in order to ascertain and decide whether the owner Mrs. Lalitha Rajapakse had complied with the provisions of Section 8(2) of the Ceiling on Housing Property Law No. 1 of 1973 in transferring the said houses. For this the only party necessary is the owner Mrs. Lalitha Rajapakse and the Petitioner who was the tenant of the said house formerly bearing assessment No. 27/1 and presently bearing assessment No. 27B and the tenant of the other house. At the said inquiry before the Commissioner no point had been made by the said owner Mrs. Lalitha Rajapakse about notifying the Petitioner of the inquiry. For this reason it was submitted that it cannot be said that the Commissioner had violated the principle of audi alteram partem. (Some of the details in this paragraph are again not so accurate. The following in paragraph 26 of the 1st Respondent's objections are noted).

This Respondent states that in the course of the said inquiry Mrs. Lalitha Rajapakse's Counsel requested that the transferees of the said two premises should be noticed to appear and the said inquiring officer undertook to summon the transferees only if the Commissioner felt it necessary to do so.

In the objections of the 1st Respondent it is pleaded that the inquiry was concluded on 11.9.1982. It is further pleaded that order P9 by the Commissioner of National Housing is redundant as the premises in question has vested by operation of law.

As regards the Board of Review and this Respondent contends that the majority view of the Board of Review prevails. The 5th & 6th Respondent of the Board of Review held with the Petitioner. The 1st Respondent urge in his objections that the order of the Board marked P10. (referred as X10 also in the objections) is illegal and null and void for the following reasons.

- (a) the said vesting Order made by the Commissioner of National Housing is not a “decision” or “determination” of the Commissioner of National Housing within the meaning of Section 39(1) of the Ceiling on Housing Property Law and/or that the said Vesting Order was final and conclusive and as such not appealable. In the circumstances the Ceiling on Housing Property Board of Review had ex facie no jurisdiction to hear and determine the said matter. In the circumstances the said Orders have been made without jurisdiction;
- (b) The said premises No. 27/1 had been vested in the commissioner by operation of law. In the circumstances the Board of Review had no jurisdiction to make the said Orders and as such the said Orders are vitiated by the fact that the said premises had been vested in the Commissioner by operation of law,

- (c) The 3rd Respondent had held that the said premises No. 27/1 tenanted by this Respondent had been vested on 13.1.1974;
- (d) The said Order 'X10' had been made by the 5th and 6th Respondents on the basis that –
- (i) the said inquiry held by the Commissioner had been postponed for the 2nd October 1982, and that the Vesting Order had been made without giving an opportunity of being heard to the transferees and as such had been made in violation of the principles of natural justice, and
 - (ii) the Commissioner had failed to give an opportunity to Mrs. Lalitha Rajapakse to appeal against his decision or determination before making the said Vesting Order.
- (e) The Commissioner had undertaken to summon the transferees only if he felt it necessary to do so. The said inquiry was concluded on 11.9.1982 and there was no evidence that it was postponed. In any event Mrs. Lalitha Rajapakse who had to warrant and defend title in respect of the said premises was fully heard on the matter and there was nothing that the transferees could add and as such it was not necessary to hear the transferees in the matter. The Commissioner had made the Vesting Order in terms of Section 8(6) of the said Law and not on the basis that the said sales were fictitious;
- (f) In the circumstances the 5th and 6th Respondents had misdirected themselves and had misconstrued the law in making the said order and as such the said order 'X10' is vitiated by error of law.

At this point of this judgment I have to observe that the Hon. Attorney-General though appeared and represented 7 and 7A & 9A Respondents (the Commissioner of National Housing and the relevant subject Minister) did not file objections on their behalf. May be for good reasons. However learned Additional Solicitor General and President's Counsel appeared in court and assisted this court on very many aspects of this case. There is a very basic and a fundamental issue raised by learned President's Counsel for the Petitioner i.e denial of a right to a hearing. A breach of rules of natural justice entitles a party for relief in a writ application unless by law a hearing is denied (even then a court of law need to be very cautious).

The inquiry held by the Commissioner of National Housing on 11.9.1982 on the question of contravention of Section 8(6) of the Ceiling on Housing Property Law where the house relevant to the inquiry was sold to the Petitioner by Lalitha Rajapakse would be an inquiry important to the Petitioner. The Petitioner was by then the owner of the house on a deed bearing No. 491 of 11.01.1975. As such the Petitioner was entitled in law, and had every right to be heard. Inquiry conducted by the Commissioner in the absence of the Petitioner is a flagrant violation of the Rules of Natural Justice. I would also observe it is also a breach of fundamental rights.

Admittedly the house relevant to this application is a surplus house, under the above law. The original owner Mr. Rajapakse applied to the Commissioner of National Housing for an extension of time to dispose of the house. The Commissioner of National Housing granted Rajapakse an extension of time by gazette No. 119/10 of 12.7.74, time till 13.1.75. There is also material to the effect that Rajapakse offered the house to Mr. Wijeratne the then tenant of Rajapakse and he declined the offer as the sale price was Rs. 125,000/- and as it was excessive. This position has not been denied. The sale was done within the extended period. If the 1st Respondent to this application urge that the sale price was low and the sale was fictitious, it was open to whoever who had a right, to complain elsewhere. I am also of the view that the Commissioner has acted contrary to the dicta in 'cadiragamapillai' case. No opportunity given to Mr. Rajapaksa to appeal against his decision in terms of Section 39 of the law. (This may not be a ground to be considered in this writ application)

It appears to court that when the inquiry was held on 11.9.1982, the inquiring officer was informed that the transferees be notified and be heard before a decision is made by the Commissioner of National Housing and it appears that the inquiry was postponed to enable the transferees to be

present on the next date, but without holding an inquiry to grant an opportunity for the petitioner to be heard, Commissioner made a recommendation to the Minister to vest the house. This is nothing but a deliberate violation of the rules of natural justice.

Where rules of natural justice are concerned one cannot make excuses by referring to the position of the previous owner (Mr. Rajapakse) and take up the position that since Rajapakse was heard fully and who had to warrant and defend title, the transferees need not be heard. I also reject the argument that the premises in question had vested in the Commissioner by operation of law. Whether this 'so called vesting' by operation of law is valid or not need to be tested, and that opportunity to test such argument should be made available to the Petitioner. One cannot be permitted to assume or presume, when an inquiry is held especially concerning a persons vested rights. Authority concerned is bound to grant an opportunity to the party concerned to present his case however weak or strong his case may be. One should not be permitted to hide behind the law and take advantage. The Petitioner is a necessary party.

I wish to place the following material and refer to the several authorities to demonstrate that the Commissioner's decision cannot be entertained and need to be quashed.

Sri Lanka Courts as well as the U.K and very many developed legal systems all over the world follow the Adversarial System. This system would permit and elaborate on the rules of Natural Justice. I would quote from the text on Lawyers and Precedents by David Pugsley pgs 1/2 to succinctly state that in any legal profession worth the name the members have a duty towards justice and it is a matter of professional pride to maintain a high standard of justice. It does not follow that there is necessarily a duty to court, and in fact such duty does not exist or does not exist to the same extent, even in all modern western legal systems. The French Advocate represents his client only. He may have a duty to justice but he has no duty to the court. Hence the full burden of investigating the case and reaching a decision falls on the judiciary. That is what is called a inquisitorial system. The English advocate has a duty to court (so is in Sri Lanka). The Judge relies on him for the facts and law (see *Rondel Vs. Worsley* (1969) 1 AC 272/3 Judge may have not studied the case before hearing. To give a decision at the end of it the Judge relies on the Barristers to present the two sides of the case fully and fairly, and they had a duty to do so. That is the Adversarial (accusatorial) system. It is central to the adversarial system that each party should have a fair opportunity to put his or her case and to know the other parties case, and the

final decision need to be based on Justifiable in terms of the cases put by the parties.

There is a general right for both sides to a proper hearing. Fair hearing which should be unbiased would embrace legitimate expectation to this it should be added a proper and sufficient notice of the case against a party. Such notice would enable a party to be prepared and contest contrary positions. Very often the ordinary court procedure would guide a litigant in this regard and civil and criminal procedure would regulate such procedure.

In *R vs Chancellor of the University of Cambridge* (1723) 1 Str 557 Mandamus was issued on the ground when Dr. Bentley had his degree taken away by Vice Chancellors Court without being given any notice.

R Vs Board of Visitors of Hull Prison. (1979) 31 All ER 545. Prisoner before Board of Visitors would be entitled to a proper hearing – Admission of unsupported statements of Prison Officer were challenged as it amounts to hearsay evidence. Applicant denied an opportunity to bring direct evidence. Certiorari was issued and finding quashed; right to call witnesses is a further aspect of a right to a hearing.

On the other hand a right to a full hearing was considered in *R Vs Parole Board* 1996 (COD 327. An offender serving a longer fixed term sentence had no right to an oral-hearing before the Parole Board. This is

because the existing process afforded a prisoners 'sufficient and fair opportunity to put his case. This decision is no comparison to the case in hand. Nor should the Petitioner be compared with the standard of a condemned prisoner.

ANZ Grindlay's Bank vs. Ministry of Labour ..1995(2) SLR pg. 61/2

Per H.W. Senanayake J.

The Commissioner is a creature of the Statute and he has no inherent powers as that of a Court of Law. The Commissioner is exercising powers under the statute and it is in his own interest and the public interest that he should give reasons so that the parties would know the basis of the determination – there must be transparency of the acts done by public officers.

In Attorney General vs. Chanmugam ..71 NLR 78

Held, (i) that a Commission appointed under the Commissions of Inquiry Act is master of its own procedure, and as long as the procedure adopted by it does not offend against one's sense of justice and fair play, it cannot be said that there has been a violation of the principles of natural justice. Nor is the Commission bound to adhere strictly to the provisions of the Evidence Ordinance.

Kahatagaha Mines Ltd. Vs. Fernando Chief Valuer.. 78 NLR 273

The procedure contemplated by the Legislature in Section 64 subsection (2) of the Mines and Minerals Law No. 4 of 1973 was that each side should call witnesses or produce documents and that the other side would be entitled to cross-examine

such witnesses. The expression “adduce ... evidence” means testifying subject to being questioned by the party against whose interest such evidence may operate in the mind of the Tribunal, and by the person called upon to make the final determination.

“There can be no question that the Chief Valuer is required by law to act judicially. He must deal with the question referred to him without bias and must give each of the parties the opportunity of adequately presenting his case”.

Vadamaradchy Hindu Educational Society Ltd. Vs. the Minister of Education.. 63 NLR 323

Held:

That the power to make an Order under section 11 does not depend on any consideration of public policy, nor upon the existence of facts on account of which such considerations may render a decision necessary or desirable. On the contrary, the power depends on the Minister’s satisfaction that facts exist which establish a contravention of the Act or its Regulations, which contravention (by section 15) would itself be a punishable offence. The question, therefore, in the present case was whether there was an “inquiry conducted with due regard to the rights accorded by the principles of natural justice to the petitioner against whom it was directed”. (See *The University of Ceylon v. Fernando*, 6 N.L.R 505 (P.C)).

The denial of a “fair opportunity” to the petitioner “to correct or contradict any relevant statement to his prejudice” and the failure of the Director to inspect the School and hold an inquiry on the spot through an officer of his Department entitled the petitioner to a writ of certiorari quashing the Order of Minister.

I have to emphasis the other point involving the 2nd and 4th Respondents and the orders dated 30.1.1988 of the Ceiling on Housing Board of Review contained in Orders P11 & P9. It is a clear error of the

Board of Review to take up the position that it was not necessary for the 8th Respondent to have noticed the Petitioner. I observe that decisions given in breach of the rules of natural justice is a nullity and void in law. The 2nd and 4th Respondents have failed in their judgment to address their mind to this aspect, of the case. Further the decision to grant extension by gazette (P6) was never challenged by those interested to push the authorities to vest the house in question. The Board of Review expressed the view that the Commissioner had no right to grant extension appears to be an error, and the comment made on deed P1, being not genuine and executed merely to defeat the law is baseless and unsupported by cogent reasons or evidence. It is conjectural in nature. Board could not have recoded such decision in P9 & P11. The case of *Maginona vs. Commissioner of National Housing & Others* is somewhat relevant. 1977(3) SLR 131.

On an allegation made by the original appellant (the tenant) that the house occupied by him was an excess house, the Commissioner for National Housing held an inquiry and decided to vest the house. On an appeal by the owner of the house, the Board of Review under the Ceiling on Housing Property Law decided that it was not a “house” within the meaning of Section 47 of the Law and set aside the Commissioner’s decision.

Held:

1. The evidence led before the Commissioner and the Board of Review showed that the premises in question fell clearly within the definition of “house”; the decision of the Board of Review was plainly invalid, and one which no tribunal

could possibly have reached. The decision therefore is not protected by section 39(3) of the Ceiling on Housing Property Law.

2. The original appellant who admittedly was in occupation of the premises with his family since 1958 had “sufficient interest” to apply for certiorari.

3. A prosecution for an offence under Section 8(4) of the Ceiling on Housing Property Law is not a condition precedent to a penal vesting under that section.

I also wish to rely on the following decided case to fortify the view as regards tenants application to purchase a house and requirement to communicate Commissioner’s decision connecting rules of natural justice.

In *Nelia Silva Vs. Commissioner for National Housing & Another* 1999(1) SLR 291.

Writ of certiorari – Tenant’s application to purchase a house – Section 13 and 17(1) of the Ceiling on Housing Property Law – Requirements of a valid vesting order under section 17 (1) of the Law

In 1976 the respondent who was the tenant of a house owned by the appellant made an application under section 13 of the Ceiling on Housing Property Law to purchase the house let to him. The parties were not properly heard. However on 20.10.1976 the Minister had made a minute in the file which was regarded as a “vesting” of the house under section 17(1) of the Law. The purported “vesting” was communicated to the parties on 07.02.1977. Thereafter in 1982 the Commissioner for National Housing held a proper inquiry and refused the tenant’s application. That decision was communicated to the tenant. On an appeal by the tenant the Board of Review reversed the Commissioner’s decision on the ground that the Commissioner had no jurisdiction to have held an inquiry in 1982 in view of the “vesting order” made in 1976.

Held:

1. There was no valid vesting of the house in 1976, in that firstly there was no vesting order published in the Gazette at that point of time, as required by section 17(1) of the Ceiling on Housing Property Law; secondly the Commissioner's decision under section 17 had not been communicated to the owner of the house prior to the 'vesting'.

2. A publication of the purported "vesting order" in the Gazette in 1996 after the owner had applied to the Court of Appeal for a writ of certiorari was of no force or avail in law in that the said publication was founded on an illegal decision 'to vest' the premises.

The Commissioner of National Housing has not explained his position by way of an affidavit to this court. I have already stated in this judgment that for good reason no objections have been filed by the 7th to 8th Respondents. Is the Commissioner playing a dual role? On one hand the Commissioner grants time to dispose the property and gives extensions of time by gazette 119/10 of 12.7.1974. Time period extended till 13.1.1975. On the other hand the authorities concerned urge that by operation of law the house is vested? This is an anomalous position. The Board of Review or any other person pushing the Commissioner to vest a house illegally cannot be heard to say that by operation of law the house is vested. I reject all arguments in this regard put forward by the 1st Respondent and nor can any reasonable person come to any conclusion that the Petitioner would have

been aware of the inquiry and that the Petitioner should have taken steps to participate. I regret very much to observe that these arguments cannot be entertained in this manner. One should not argue merely for the sake of argument.

I heard arguments in favour and against the retrospective operation of Section 8(6) of the Ceiling on Housing Property Law which came into force in 1976. The said Section reads thus:

“Where the ownership of any surplus house has been transferred by way of sale, gift, lease or other alienation, without the owner thereof having intimated in writing to the tenant thereof, as required by subsection (1) or subsection (2), that the ownership of such house is not proposed to be retained by him, and such tenant makes an application to the Commissioner to purchase such house the Commissioner may, with the approval in writing of the Minister, by Order published in the Gazette vest such house in the Commissioner with effect from such date as may be specified in such Order.”

Generally a statute operates prospectively. In *Sivarajasingham Vs. Sivasubramaniam* 78/79/8 (1) SLR 327 at 330 – generally an enactment would apply to facts and events that come into effect after it becomes law. In *Maxwell Interpretation of Statutes* 12th Ed. 216 ... Retrospective operation is not to be given to a statute so as to impair an existing right or obligation 1982(3) AER 833. In *Re 14 Grafton Street, Lond W1 De Havilland (Antiques) Ltd. Vs. Centrovincial Estates (Mayfair) Ltd.* 1971(2) AER 1 at 7

“where the legislature means to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so, or to put the same thing in a somewhat different form, if the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights”.

Whatever the effect of the above Section 8(6) of the law the inquiry was held by the Commissioner only in 1982 which is about 7/8 years after the date of purchase (P1) by the Petitioners, and a decision taken by the 7th & 8th Respondents would have a direct bearing on the Petitioner's rights and the Commissioner was obliged to hear the owner (Petitioner) who had by that time acquired rights by deed p1, and should have given a fair hearing prior to making an order under the said section. Further to make an order under section 8(6) of the law the Commissioner has to consider several aspects of the case especially the extension granted to Mr. Rajapakse by gazette notification etc. there is a need for a quasi judicial and or a Judicial approach to this type of inquiry.

On the question of the retrospective operation of Section 8 (6) of the above law, no doubt the section can be read either way, but retrospective operation should not be given to a statute unless intention to

that effect is expressed. The presumption should be against such operation. (except as to procedure in which nobody has a vested right). Cases in which the presumption against retrospective operation has been applied, the rule under discussion has been applied chiefly in cases in which the nature in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of past transactions, or would impair contracts, or would impose new duties or attach new disabilities in respect of past transactions R Vs. Reah (1968) 1 WLR 1508.

When I consider all the facts placed before me I am inclined to hold that Section 8(6) which was introduced to the main statute at a subsequent stage has no retrospective operation. I am very much convinced with the dicta in the case of Hussain Vs Wadood. The question in the case in hand is not merely procedure and with the execution of a deed, ownership is transferred (P1) and would affect the vested rights of the Petitioner.

In Hussain Vs. Wadood G.P.S. Silva J.

Held....

In terms of section 6(3) of the Interpretation Ordinance, a repealing Act, unless it expressly so provides, does not affect "any penalty incurred" under the earlier law. There is no such express provision in the Civil Procedure Code (Amendment) Act, No. 53 of 1980.

The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, Section 21 of Act No. 53 of 1980 is not a provision which relates merely to a matter of procedure but is one which has enhanced the quantum of liability in respect of costs of action. This section has no retrospective operation and is not applicable in the instance case to the costs payable by the 1st defendant.

In all the circumstances of this application I am of the view that the Petitioner is entitled to the relief sought in his prayer to the petition. As such I grant a writ of certiorari quashing the orders referred to in sub paragraphs (b) & (c) of the prayer to the Petition of the Petitioner with costs. (orders P7, P9 & P11 quashed).

Application allowed with costs.

JUDGE OF THE COURT OF APPEAL