

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

**In the matter of an Application for a mandate in
the nature of *Writ of Certiorari and Mandamus*
under article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka**

R.B.L. Wijesooriya,
No. 43 2/2, Gregory's Road,
Colombo 07.

PETITIONER

CA/WRIT/92/2014

Vs,

1. Mr. Raja Goonaratne,
Commissioner for National Housing,
National Housing Department, Sethsiripaya,
Battaramulla.
- 1A. Dr. W.M. Karunadasa,
Commissioner for National Housing,
National Housing Department, Sethsiripaya,
Battaramulla.
2. Mr. O.R. Jansen
3. Miss. R.Y. Amarasinghe
4. Mr. J.M. Bandara
5. Mr. W.N.R.P. Wijepala
All members of the Ceiling on Housing Property
Board of Review,
No. G10, Sri Vipulasena Mawatha,
Colombo 10.

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

Counsel: C. Ladduwahetty with Keerthi Sri Gunawardena, for the Petitioner

Chaya Sri Nammuni SC for the Respondents

Argued on: 22.07.2016

Written Submission on: 09.09.2016, 21.09.2016

Judgment on: 02.12.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application R.B.L.E. Wijesuriya has come before this court seeking inter alia,

- b. Grant and issue a mandate in the nature of *Writ of Certiorari* quashing the order of the (Board of Review in Appeal No.2746 (X-10) and the decisions embodied in documents marked X-6 and X-6 (a) send to the Petitioner by the 1st Respondent.
- c. Grant and issue a *Writ of Mandamus* directing the 1st Respondent to grant permission to the Petitioner in terms of section 17C of the Ceiling on Housing Property Law to sell and dispose premises bearing Assessment No. 43-2/2 Gregory's Road, Colombo 07.

As submitted by the Petitioner he was a tenant in the premises 43 2/2, Gregory's Road Colombo 07 at the time the Ceiling on Housing Property Law No 1 of 1973 came into operation. The said property became vested with the 1st Respondent as an excess house of one R.A. Senanayake. The Petitioner being the tenant of the said premises had signed an agreement to purchase the said property.

However on representation made by the said R.A. Senanayake to the 1st Respondent, the said premise was divested on or around 05.08.1985. Being dissatisfied with the said decision to divest the property the Petitioner had gone before the Court of Appeal and by its order dated 11.02.2003 the Court of Appeal quashed the said divesting order. The said R.A. Senanayake appealed to the Supreme Court against the decision of the Court of Appeal but the Supreme Court by judgment dated 29.01.2009 affirmed the Judgment of the Court of Appeal. As revealed before this court the 1st Respondent had taken three years thereafter and finally on 02.07.2012 a transfer deed was executed in favour of the Petitioner.

After becoming the owner of the premises in question the Petitioner on 28.11.2012 had made an application under section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973, seeking permission from the 1st Respondent to sell the said property.

However the 1st Respondent had turned down the said application and the Petitioner had appealed against the decision of the 1st Respondent to the 2nd to 5th Respondents who functioned as Ceiling on Housing Property Board of Review. The said board by its order dated 21st January 2014 refused the appeal and the Petitioner had filed the present application before this court seeking the relief referred to above.

As observed by this court there is a statutory prohibition placed on the purchaser who purchased a property under the provisions of the Ceiling on Housing Property Law No 1 of 1973 to sell the said property until the laps of 05 years from the date of the execution of the deed. The relevant provision of law is found in section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973 and it reads thus,

17 (c) No house purchased from the Commissioner under this law may, for a period of five years from the date of such purchased, be sold, gifted or leased to any person other than a child or spouse of the purchaser thereof, except with the prior permission in writing of the Commissioner granted in case of extreme hardship; and where any such house is sold,

gifted or leased to any such child or spouse, such child or spouse shall not sell, gifted or lease such house to any person until after the lapse of a period of five years from the date of purchase from the Commissioner by the original purchaser.

Provided however that the preceding provisions of this section shall not apply to the sale of any house purchased by any person with moneys party or wholly provided by a prescribed state institution on a mortgage of such house created in favour of such institution where such sale is consequent one any default in the payment of the money due on such mortgage.”

In the said circumstances the Petitioner had to prove extreme hardship in order to invoke the discretion of the 1st Respondent. As observed by this court the Petitioner on 28.11.2012, four months after he become the owner of the said property had made the request for permission in order to transfer the property.

In his request which is produced marked X-4 before this court, the Petitioner had placed before the Commissioner of National Housing following grounds to establish extreme hardship for him to invoke the discretion,

- a) His present age is 81 years and six months
- b) His apartment is a second floor apartment and he had to climb 42 steps to reach his house
- c) There is no lift available in the flat
- d) He has undergone a Bypass Surgery in the year 1992 after a Heart Attack and since then he is on medication
- e) He is in and out of hospital for treatment and the last occasion being 7th November 2012
- f) With age catching up on him and gradual deterioration of the health, finds it almost impossible to climb 42 steps

- g) Consultant Cardiologist Dr. Mohan Rajakaruna has advised him to move to a ground floor house or apartment
- h) The house in question is the only asset he has, having spent his lifetime savings on his wife's illness over a period of 4 years prior to her death.

In support of his position the Petitioner had also annexed several medical reports including a letter from Dr. Mohan Rajakaruna Consultant Cardiologist, who had said that,

“He has developed..... now and find it different to climb to his apartment which is on the 2nd floor.... to climb 42 steps. I do not think he is in a position to do this on a daily basis and I have advised him to move out of that apartment.”

However after considering the said request the 1st Respondent had informed the Petitioner that, “Accordingly I regret to inform you that as you have not fulfilled all requirements of section 4 (c) [this has been corrected as 17 (c) by subsequent letter] of the Ceiling on Housing Property Law No 1 of 1973, I am unable to give my permission to dispose the said property.”

The petitioner who was aggrieved by the said decision of the 1st Respondent had preferred an appeal before the 2nd to 5th Respondents who are the members of the Ceiling on Housing Property Board of Review, and as observed by this court the Petitioner has stressed the same ground before the Board of Review in order to establish “extreme hardship” to invoke the Provisions of the Ceiling on Housing Property Law as follows;

“The Commissioner failed to appreciate that the appellant is 81 years of age and is a heart patient who occupy a house situated on the second floor of a condominium property of a building which has no lift and which has about 42 steps to reach the premises in question from the ground level and to dismount the same would cause extreme hardship to the appellant.”

However after a full inquiry before the Board of Review, the said Board of Review had confirmed the findings of the 1st Respondent and refused granting permission to dispose the property.

The Petitioner being aggrieved by the said decision had come before this court seeking the relief as referred to above.

As observed by this court, under the provisions in section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973 the 1st Respondent is empowered with granting permission to sell a property acquired by a tenant under the provisions of the said act but he has a statutory obligation to grant such permission only in the case of a extreme hardship. In other words the said 1st Respondent owe a statutory duty to consider the material placed before him by an applicant and evaluate the said material in order to ascertain whether, in fact the applicant had faced extreme hardship for him to come before the 1st Respondent.

However as discussed above the 1st Respondent had failed to evaluate any material placed before him by the Petitioner in reaching the said decision which was challenged before the Board of Review, but had only informed his decision to refuse the request since the Petitioner has failed to fulfill all requirements in section 17 (c), but failed to inform as to what are the requirements the Petitioner has failed to fulfill before him.

The Petitioner had thereafter gone before the Board of Review and challenged the said order. As observed earlier, an inquiry was held and in fact the Petitioner was permitted to submit written submissions before the Board of Review. Petitioner has produced marked X-10 the decision of the Board of review.

When going through the said decision I observe that the Board of Review was mindful of the statutory obligations of the 1st Respondent subject to the restrictions imposed under section 17 (c) of the Act and the said provisions were discussed as follows in their order,

“According to the above mentioned section it is very clear that, no house can be disposed for a period of five years from the date of purchase, unless otherwise the Commissioner granted permission to dispose the said premises.

However if the owner of the said premises satisfies the Commissioner extreme hardship undergone by him, the Commissioner has been vested with the power under section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973 to grant permission to dispose the premises in question.

The counsel appearing for the appellant explained extreme hardship under gone by the appellant with regard to his age, ill health, his inability to climb steps and all sort of weakness encountered by him to reach his premises in question. The members of the board were convinced by the counsel with the interpretation given in Oxford Dictionary with regard to extreme hardship.”

However having considered the hardships placed before the Board of Review by the Petitioner, without considering whether the said hardships comes within the term “extreme hardship” the Board of Review, after considering the proviso to the said subsection 17 (c) which deals with a situation where provisions of section 17 (c) will not apply when funds are provided by a state institution by way of a mortgage, had thereafter concluded as follows,

“It is settled law that, when a property belongs to someone he attributes all rights inter alia to sell gift, lease, mortgage and whatever he wishes, however, when that property is subject to any relevant law, the right of the owner of the property has to be often uncounted with entire gamut of rights recognized by the law.

Hence, it is very clear that the above mentioned proviso to section 17 (c) refers to grievances with regard to monetary hardships encountered by the purchaser. It does not refer states of health” and concluded that the extreme hardships referred to section 17 (c) only refers to monetary hardships but not otherwise and therefore the board affirmed the decision of the 1st Respondent.

However as observed by this court the proviso to section 17 (c) does not restrict or limit the provision in the above section and the said section is only an exception to the above rule where it has provided when the house was purchased with moneys partly or wholly borrowed from prescribed state institutions, in such a situation the property could be transferred consequent to a default and therefore the proviso has nothing to do with the extreme hardships faced by the purchaser within five years after purchasing the property.

In the said circumstances the two situations, referred to in section 17 (c) and its proviso cannot be interpreted as connected to each other and in the said circumstances it is clear that the 1st Respondent and the members of the Ceiling on Housing Board of Review had used their discretion when deciding the “extreme hardships” faced by the Petitioner arbitrary. The said 1st Respondent and the Board of Review had failed to evaluate the extreme hardships faced by the Petitioner in its proper context and therefore this court is of the view that this is a fit and proper case to grant a Writ of *Certiorari* to quash the decisions referred to in documents marked X-10, X-6 and X-6 (a) as averred by the Petitioner.

From the material already discussed in this Judgment it is clear that the 1st Respondent has a statutory duty under section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973 to decide, “extreme hardships” when allowing a purchaser to permit the sale of a property comes within the said law within 5 years of the transfer.

In order to decide the extreme hardships faced by the Petitioner, he has to provided sufficient material to establish the hardships he faced due to his ill health, age etc. As revealed before this court the Petitioner who had under gone a Bypass Surgery several years ago is presently reached the age of 85 years. With the complications he had with his illness he is forced to climb 42 steps every time he comes out of his house. The Consultant Cardiologist who treated the Petitioner has observed the danger of climbing these 42 steps on daily basis, and if a person is confined to a house due to his health reasons that itself is sufficient to establish “extreme hardship” on that person. In the said circumstances this court of the view

that the term “extreme hardship” should be given a vider interpretation without restricting it to monetary hardships faced by that person. Under these circumstances this court is in favour of granting a Writ of *Mandamus* directing the 1st Respondent to grant permission to the Petitioner in terms of section 17 (c) of the Ceiling on Housing Property Law No 1 of 1973 to sell and dispose the premises referred to in this case since the Petitioner has fulfilled the requirements under the said provision.

Application allowed. Relief as prayed in paragraphs (B) and (C) are granted.

PERESIDENT OF THE COURT OF APPEAL