**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 a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 344/2017**

Wilbert Jayanetti,
212/19, Puttalam Road,
Kurunegala.

**PETITIONER**

1) Shyamal Amith Kollure.

1A) Sarath Atukorale,

Commissioner of National Housing,
Ministry of Housing and Construction,
Sethsiripaya, Battaramulla.

2) Kanthi Kannangara (Chairman).
3) W.G.Nimalaratne.
4) Sarath Soysa.
5) U.L.G.Bandara.
6) R. Chandrasiri.
7) Priyadharshini Illukpitiya.
8) H.S.H.L.Senaratne.

Members of the Ceiling on Housing
Property Board of Review,
Parisara Mawatha, Colombo 10.

9) Sajith Premadasa,
Minister of Housing and Construction,
Sethsiripaya, Battaramulla.

9A) Mahinda Rajapakse,
Minister of Urban Development, Water Supply and Housing,
Sethsiripaya, Battaramulla.

10) M.S.M.Samsudeen,
61, 68 Bazaar Street, Kurunegala.

11) G.H.M.Nivithigala,
29/2, Samagi Mawatha,
Depanama, Pannipitiya.

12) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**RESPONDENTS**

**Before:** **Arjuna Obeyesekere, J / President of the Court of Appeal**

**Counsel:** C.E. De Silva for the Petitioner

Ms. Nayomi Kahawita, Senior State Counsel for the 1st – 9th Respondents

Lakshman Perera, P.C., with Ms. Shalini Fernando for the 10th Respondent

**Written Submissions:** Tendered on behalf of the Petitioner on 26th November 2018, 9th July 2019, 25th October 2019 and 12th August 2020

Tendered on behalf of the 10th Respondent on 28th November 2018, 18th July 2019 and 1st November 2019

**Decided on:** 19th February 2021

**Arjuna Obeyesekere, J., P/CA**

When this application was taken up for argument on 14th July 2020, the learned Counsel appearing for all parties moved that this Court pronounce its judgment on the written submissions that had already been tendered on behalf of the parties. Thereafter, on 30th September 2020, the parties were directed to tender their

written response to certain matters that I wished to clarify, arising from the pleadings. This has been duly complied with by all parties.[1]

The Petitioner has filed this application seeking *inter alia* a Writ of Certiorari to quash the decision of the Board of Review appointed under the Ceiling on Housing Property Law No. 1 of 1973, as amended marked '**X15**' (**the CHP Law**). By this decision delivered on 29th August 2017:

(a) The Board of Review had rejected the application of the Petitioner to be substituted in place of the tenant of premises No. 212/19, Puttalam Road, Kurunegala in the proceedings that were pending before the Board of Review;

(b) The Board of Review had arrived at the decision that what has been vested in the Commissioner of National Housing is only the house situated at the aforementioned premises and not the appurtenant land.

Therefore, there are two issues that I am called upon to consider in this application. The first is whether a tenant who has made an application under Section 13 of the CHP Law to purchase the house he or she is living in, could be substituted in the event of his or her death, and if so, whether the Petitioner can be substituted on behalf of the tenant. The second issue is, what exactly is vested with the Commissioner of National Housing when the Minister makes a vesting order in terms of Section 17 of the Act.

The Act of Parliament that must be considered in determining the above issues is the CHP Law and in particular the provisions of Sections 13, 16 and 17 thereof. However, prior to doing so, and in order to place in proper perspective the applicability of the said Sections, I would at the outset discuss the structure of the CHP Law.

The CHP Law was enacted *inter alia*, to regulate the ownership of houses, as stated in the long title to the Law, and came into operation on 13th January 1973. Section 2 specifies the maximum number of houses which may be owned by an individual who

[1] Vide motion dated 12th October 2020 filed by the Attorney-at-Law for the Petitioner, motion dated 13th October 2020 filed by the Attorney-at-Law for the 10th Respondent and the motion dated 11th January 2021 filed by the Attorney-at-Law for the 1st Respondent.

is a member of a family as well as an individual who is not a member of a family. Section 2 further sets out the manner in which the maximum number of houses that could be owned by a body of persons could be determined. This maximum number of houses is referred to as the '**permitted number of houses**' that a person may own after the introduction of the CHP Law.

Section 8(1) requires each of the persons referred to above, to submit a declaration setting out the number of houses owned by such persons and the houses that such persons propose to retain. Section 8(1) further requires such persons to "*simultaneously intimate in writing to the **tenant**, if any, of each house the ownership of which such individual or body does not propose to retain, that the ownership of such house is not proposed to be retained*."

The purpose of giving such notice is to enable the tenant of such house to act in terms of Section 9 of the CHP Law, which reads as follows: "*The tenant of a surplus house or any person who may succeed under section 36 of the Rent Act to the tenancy of such house may, within four months from the date of commencement of this Law, apply to the Commissioner[2] for the purchase of such house*."

Section 10 sets out the steps that a person may take in respect of the houses which are in excess of the permitted number of houses. In terms of Section 10, any person who owns any house in excess of the permitted number of houses, may, within the time periods specified therein, dispose of such house with notice to the 1st Respondent, the Commissioner of National Housing, unless the tenant of such house or any person who may succeed to the tenancy of such house under section 36 of the Rent Act, has made an application with simultaneous notice to the owner for the purchase of such house.

Section 11(1) provides that, "*Any house owned by any person in excess of the permitted number of houses which has not been disposed of within the period within which such person may dispose of such house in accordance with the provisions of section 10 shall on the termination of such period vest in the Commissioner*". In terms of Section 12(3), when the Commissioner of National Housing proposes to sell any

[2] The reference to Commissioner is to the Commissioner of National Housing, the 1st Respondent in this application.

such house vested in him, he shall in the first instance offer to sell such house to the tenant, if any, of such house.

The above provisions of the CHP Law contain the mechanism to *extract* the excess number of houses that a person may own at the time the CHP Law came into force and to sell such house to the tenant occupying such house, thereby achieving the object of the CHP Law, namely the regulation of the ownership of houses.

Section 9 as well as Section 10 of the CHP Law refers to Section 36 of the Rent Act, which contain provisions regarding the continuation of the tenancy upon the death of the tenant. Section 36(2) of the Rent Act provides *inter alia* that any person who in the case of residential premises which has been let prior to the date of commencement of the Rent Act is the surviving spouse or child of the deceased tenant and who was a member of the household of the deceased tenant during the period of three months preceding the death of the tenant, shall be deemed for the purposes of the Rent Act to be the tenant of the premises. Thus, the legislature, by specifically referring to Section 36 of the Rent Act in Sections 9 and 10 of the CHP Law have extended the right of a tenant to make an application to purchase a house in terms of the CHP Law, to the heir of such tenant, in the event of the death of the tenant, provided that the application to purchase the house is made by the heir of the tenant during the period specified in Section 9 and provided further that such heir was a member of the household of the deceased tenant during the period of three months preceding the death of the tenant.

It is perhaps important to mention that the above provisions contained in Sections 8, 9, 10 and 11 of the CHP Law deals with houses which are in excess of the permitted number of houses.

As pointed out by Sarath Silva, J (as he then was) in **Kathiresan vs Sirimevan Bibile, Chairman, Board of Review and Others**,[3] the CHP Law contained two principal methods of regulating the ownership of houses. The first was *the imposition of a ceiling on the number of houses that may be owned by individuals or other bodies*, which is provided for in Section 2 and is given effect to by the procedure that I have discussed above. The second is *by giving a right to any tenant to make an application*

[3] [1992] 1 Sri LR 275 at 279.

*to the Commissioner for the purchase of a house rented to him*. The statutory provisions for the latter are found in Sections 9 and 13 of the CHP Law.

Section 13 of the CHP Law specifies that, "*Any tenant may make application to the Commissioner for the purchase of the house let to him where no action or proceedings may under the Rent Act be instituted for the ejectment of the tenant of such house on the ground that such house is reasonably required for occupation as a residence for the landlord of such house or for any member of his family*".[4]

The fact that an application cannot be made in terms of Section 13, if such house is reasonably required for occupation as a residence of a landlord or a member of his family makes it clear that Section 13 does not, on the face of it, relate to the houses which are in excess of the permitted number of houses. Section 13 is therefore an alternative to the provisions discussed earlier, by which a tenant has been given the right to purchase the house he is living in. I must however say, in order to avoid any ambiguity, that there can be instances where a landlord does not inform the tenant of his decision as required by Section 8(1), which may then prevent the tenant from making an application under Section 9. In such a situation, it appears to me that the tenant may still make an application under Section 13.

The effect of Section 13 has been considered by this Court in **Kathiresan v. Sirimevan Bibile, Chairman, Board of Review, Ceiling on Housing Property Law and Others**[5], where this Court, having considered the provisions of the CHP Law, stated as follows:

> **"***Section 13 was introduced as a measure of regulating ownership. It remained in operation until the amendment effected by Act No. 4 of 1985 which provided that no application could be made for the purchase of a house after 1.1.1987. The ceiling also ceased to be in operation from that day. The policy of the law up to that point was that a tenant who was in occupation of a house let to him at the time the present landlord became owner and who continues as tenant under the present landlord, is entitled to apply for the purchase of that house. This*

[4] Section 22(1)(b) of the Rent Act stipulates that proceedings for the ejectment of the tenant of any premises where the rent does not exceed Rs. 100 per month shall not be instituted unless where such premises are in the opinion of the Court, reasonably required for occupation as a residence for the landlord, or any member of the family of the landlord.

[5] Supra; at page 283.

*policy also involves the vesting of such house without the consent of the landlord*."[6]

There is a significant difference between the two methods set out in Sections 9 and 13 – i.e. Section 13 does not contain a reference to Section 36 of the Rent Act. Thus, a surviving spouse or child of a tenant who was a member of the household of the tenant was not considered a tenant for the purposes of making an application under Section 13. The position therefore is that in terms of Section 13, the **right to make an application** to purchase a house is limited to the tenant. In the event of the death of the tenant, the right to make an application does not extend to his spouse or child.

I shall now endeavour to set out as briefly as possible, the facts of this application. I say *briefly as possible* for the reason that the facts of this application span over a period of 45 years, several appeals to the Board of Review appointed under the CHP Law and two applications to this Court. I must however admit, rather sadly, that this is not unusual in contested matters under the CHP Law.

It is not in dispute that premises No. 212/19, Puttalam Road, Kurunegala was owned by S. Kanagasabai, and subsequently by V. Sinnadurai. The tenant of the house situated on the said premises at the time the CHP Law came into force was B.F. Nivithigala. It is admitted that B.F. Nivithigala made an application under Section 13 on 10th May 1973 to the 1st Respondent, to purchase the said premises. Sinnadurai had passed away in August 1977.

The procedure that should be followed by the 1st Respondent, on receipt of an application under Section 13 is set out in Section 17 of the CHP Law, which reads as follows:

"*Where an application has been made under this Law for the purchase of a house, and the Commissioner is satisfied-*

*(a) that such house is situated in an area which in his opinion will not be*

[6] The right given by section 13 to a tenant is not in absolute terms. It is available only "where no action or proceedings may under the Rent Act No. 7 of 1972 be instituted for the ejectment of the tenant of such house on the ground that such house is reasonably required for occupation as a residence for the landlord of such house or for any member of his family.

*required for slum clearance, development or redevelopment or for any other public purpose;*

*(b) that it is feasible to alienate such house as a separate entity; and*

*(c) that the applicant is in a position to make the purchase,*

*the Minister may, on being so notified by the Commissioner, by Order (hereinafter referred to as a "Vesting Order") vest such house in the Commissioner with effect from such date as may be specified therein.*"

The Minister, acting in terms of Section 17(1) of the CHP Law had made an Order on 29th September 1984 vesting the said premises in the 1st Respondent. This Order has been published in Gazette No. 325 dated 23rd November 1984, marked '**X2**'.

The effect of a vesting order has been set out in Section 15(2) of the Law, which reads as follows:

"*Where any house is vested in the Commissioner under this Law,* ***the Commissioner shall have absolute title*** *to such house and free from all encumbrances, and such vesting shall be final and conclusive for all purposes against all persons whomsoever, whatever right or interest they have or claim to have to, or in, such house .....*"

By letter dated 16th February 1985 marked '**X5**', the 1st Respondent had informed B.F.Nivithigala of the aforementioned vesting order and requested him to deposit a sum of Rs. 12,000 being ¼ of the purchase price, and a sum of Rs. 280 per month until the transfer deed is executed in his favour. Nivithigala has paid the said sum of Rs. 12,000 on 20th February 1985, as borne out by the receipt marked '**X5a**'.

The said vesting order had been challenged in CA (Writ) Application No. 355/85 by Gnanawathie Rajanayagam, who by then had purchased the said premises,[7] on the basis that the decision of the 1st Respondent contained in the letter dated 23rd February 1984 and the vesting order of the Minister are bad in law since the tenant,

[7] Upon her death, Gnanawathie Rajanayagam had been substituted by Jeevananthan Rajanayagam.

Nivithigala had not amended his application to reflect the change in ownership. This Court, having rejected the said argument presented on behalf of the owner dismissed the said application by its judgment delivered on 1st August 1995 as the petitioner had filed the said application after a period of six months had lapsed since the publication of the vesting order.[8]

While the above application was pending before this Court, the 10th Respondent, M.S.M.Samsudeen had purchased the said premises from Gnanawathie Rajanayagam on 25th January 1989, by Deed of Transfer No. 2797, marked '**X3**'. It must be noted that by the time '**X3**' was executed:

(a) The said premises including the house situated on the said premises had been vested with the 1st Respondent – vide '**X2**' dated 23rd November 1984;

(b) Absolute title to the said premises was with the 1st Respondent – vide the provisions of Section 15(2).

With the delivery of the judgment of this Court in CA (Writ) Application No. 355/85, and in the absence of any appeal to the Supreme Court in August 1995, there was a closure to the challenge of the Vesting Order '**X2**'.

Once the premises are vested in the 1st Respondent, he is required to follow the provisions of Section 16(1), which reads as follows:

> "*Where any house which is not a flat or a tenement is vested in the Commissioner under this Law,* ***there shall also be vested*** *in the Commissioner* ***such extent of land*** *as is in the opinion of the Commissioner* ***is reasonably appurtenant to the house***."

Thus, while in terms of Section 17(1) the house is vested in the 1st Respondent in terms of an Order made by the Minister, the extent of land that is appurtenant to the house is also vested in the 1st Respondent, but by operation of law as provided for in Section 16. The cumulative effect of Sections 16(1) and 17(1) is that the house and the extent of land appurtenant thereto, are vested in the 1st Respondent.

[8] Vide judgment of this Court dated 1st August 1995, marked 'X4'.

The Petitioner states that Plan No. 1385 dated 4th July 1997 marked '**X6**' was prepared for the purpose of ascertaining the extent of land that was appurtenant to the house. '**X6**' shows that the house has taken much of the land, a fact which is contested by the 10th Respondent. By letter dated 5th December 1997 marked '**X7**', the 1st Respondent had informed Nivithigala and Rajanayagam that the **entire extent of land** is appurtenant to the said house. It is admitted that neither Rajanayagam nor the 10th Respondent to whose address '**X7**' has been delivered, filed an appeal against '**X7**'[9] with the Board of Review as provided for by Section 39 of the CHP Law,[10] within the stipulated time period.

The next step that needs to be taken by the 1st Respondent is set out in Section 20 of the CHP Law, which reads as follows:

> "*Where any house is vested in the Commissioner, the Commissioner shall, by notice published in the Gazette and in such other manner as may be determined by him, direct every person who was interested in such house immediately before the date on which such house was so vested to make, within a period of one month reckoned from the date specified in the notice,* ***a written claim to the whole or any part of the price payable under this Law in respect of such house****, and to specify in the claim-*
>
> *(a) his name and address,*
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> *(b) the nature of his interest in such house,*
>
> *(c) the particulars of his claim, and*
>
> *(d) how much of such price is claimed by him."*

[9] Vide the written clarification provided to this Court by the motion filed on behalf of the 10th Respondent on 13th October 2020.

[10] Section 39(1) of the CHP Law reads as follows: Any person aggrieved by any decision or determination made by the Commissioner under this Law may, within one month of the date on which such determination is communicated to such person, appeal against such decision or determination to the Board, stating the grounds of such appeal.

The notice under Section 20 had accordingly been published in Gazette No. 1034 dated 26th June 1998, marked '**X8**'. In my view, the vesting order '**X2**', together with '**X7**' and the absence of any challenge to '**X7**' as provided for by the CHP Law, should have brought to an end, all challenges with regard to the vesting of the house and the land appurtenant thereto, leaving only the issue of *payment of the price payable* for the house to be determined by the 1st Respondent pursuant to the response received to '**X8**'.

The finality that was expected by '**X7**' was not to be. The 10th Respondent, who had purchased the said premises in 1989, and who did not challenge '**X7**' within the stipulated time period set out in Section 39, lodged an appeal dated 18th July 1998 with the Board of Review regarding the decision in '**X8**'.[11]

The complaint of the 10th Respondent is as follows:

> "ඥාණවති රාජනායගම් නැමැත්තිය මිය යාමෙන් පසු දේපල සඳහා කොළඹ අභියාචනාධිකරණයේ පැවැති නඩුවෙන් පසු එම දේපල නිව්තිගල යන අයට පැවරීමට කටයුතු කරමින් ඊට පෙර එම දේපල මැන පිඹුරත් පිළියෙල කර එහි එම නිවාසයට අදාල නොවන හිස් ඉඩම් තිබේද? ඒ බව පැහැදිලිව පිඹුරකින් පෙන්නුම්කර වාර්ථාවක් සමග ඉදිරිපත් කරන ලෙස ගරු නිවාස කොමසාරිස්තුමිය විසින් බලයලත් මිනින්දෝරු ටී.එස්. සිරිවර්ධන මහතාට කොමිසමක් නිකුත් කරන ලදි.
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> මෙම පිඹුර හා වාර්තාව අනුව කිසියම් ප්‍රමානයක් ඉඩම් හිමියාට ලබා දිම සුදුසු යයි පෙන්වා දි ඇත. එම පිඹුර හා වාර්තාව මෙයට අමුනා ඇත.
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> මෙම පිඹුරේ පෙන්වා දි ඇති පරිදි ඉඩම දෙපස තාවකාලික ඉදිකිරිම් 02 ක් පෙන්වා දි ඇත. මෙම තාවකාලික ඉදිකිරිම් කුලි නිවැසියා විසින් අනවසරයෙන් ඉදිකර ඇති ඉදිකිරිම්ය. මෙම ඉඩමේ පෙර අදින ලද මුල් 1 2 (10-12-1987) පිඹුරු වල මෙම අනවසර ඉදිකිරිම් පෙන්වා දි නැත. තවද මානක වරයාගේ වාර්ථාවේ 6 වෙනි ඡේදයෙන් ප්‍රකාශිත කරුණු අනුවද, පෙන්වා දි ඇත්තේ තාවකාලික ගරාජයක් හා මැට කුස්සියක් කුලි නිවැසියා විසින් තනා ඇත යනුවෙන්ය. මේ අනුව අනවසරයෙන් හෝ තාවකාලිකව හෝ ඉදිකරන ඉදිකිරිම් නිත්‍යානුකූල නොවන නිසා ඒවාසේ සැලකේ. ඒවා ඔහුට තවදුරටත් අවශ්‍ය වන්නේ නම් එම මැටිකුස්සි වෙනුවට ස්ථිර කුස්සිය හා ගරාජයක් ඉදිකර ගැනිමට වෙනත් ස්ථාන හිස්ව ඇති බව එම පිඹුරෙන් පෙන්නුම් කර ඇත.

[11] The said appeal is at page 632. This appeal has been registered before the Board of Review as Appeal No. 2649.

කරුණු මෙසේ හෙයින් **ගොඩනැගිල්ලට අදාල බිම් ප්‍රමාණය අතහැර** ඉතිරි බිම ප්‍රමාණය මා වෙත ලබා දෙන ලෙස ගරු නිවාස කොමසාරිස්තුමයගෙන් ඉල්ලුම් කලෙමි. එහෙත් ඊට පැහැදිලි පිලිතුරක් එතුමයගෙන් මා වෙත ලැබී නැත.

කෙසේ වෙතත් එතුමිය විසින් දැනටමත් ගෙන ඇති තීරණය වන්නේ සම්පුර්ණ ඉඩමම නිවාසයට අදාල ඉඩම බවයි. මානක නිලධාරියාගේ වාර්තාව අනුව එහි ඇති හිස් බිම් ප්‍රමාණය මා වෙත ලබා දෙන ලෙස ඉල්ලා සිටිමි.”

The relief sought by the 10th Respondent was therefore very clear. All that the 10th Respondent wanted was any extra land which was not appurtenant to the house, to be released to him. However, by then, the 1st Respondent had already determined that the entire land is appurtenant to the house, which decision, as I have noted earlier, had not been challenged before the Board of Review as provided for by Section 39 of the CHP Law within the stipulated time period. Whether the Board of Review can now consider the aforementioned relief sought by the 10th Respondent is however a matter the Board of Review would have to decide.

The issue that eventually culminated in this application arose in May 2000. While the above appeal of the 10th Respondent was under consideration by the Board of Review, Nivithigala passed away on 25th May 2000. It is not in dispute that Nivithigala had left the Last Will marked ‘**X19**’, which reads as follows:

“*I do hereby devise and bequeath all that allotment of land and house bearing assessment No. 212/19 Puttalam Road, Kurunegala depicted in Plan No. 1385 CH/15/15914/163 dated 04.07.1997 made by T.S. Siriwardena Licensed Surveyor relating to the vesting Order No. CH/15/15914/163 with the National Housing Commissioner in the following manner.*

1. *An undivided 1/3rd share in extent should devolve in equal shares to my two grandsons – Ashane Navinka Andarawewa and Shanil Chamathka Andarawewa both of 212/19 Puttalam Road, Kurunegala subject to the life interest of Mrs. H. M. Nivitigala.*

2. *An undivided 2/3rd share should devolve on my two sisters Miss Deepika Kalyani Nivitigala and Mrs. Gerty Jayaneththi of 212/19 Puttalam Road, Kurunegala in equal shares*.”

The 10th Respondent had objected to the application to substitute Nivithigala on the basis of the judgment of the Supreme Court in **Leelawathie vs Ratnayake**.[12] I shall discuss later in this judgment the applicability of the said decision to this application, but let me state at this point that the Supreme Court had held in that case that a tenant who makes an application under Section 13 cannot be substituted.

The objection for substitution had been taken up for the first time before the Board of Review in Appeal No. 2649. By its decision delivered on 10th November 2000 marked '**X10**', the Board of Review having correctly analysed the applicability of the judgment in **Leelawathie vs Ratnayake**[13] had allowed the substitution of a fit and proper person in place of Nivithigala in order to proceed with the aforementioned appeal of the 10th Respondent regarding the appurtenant land.[14] I must note at this stage that the Board of Review has observed in '**X10**' that, '*the appellant has waived his rights to contest the vesting of the house in the Commissioner. He agitates only for the appurtenant land in respect of the vested house (vide paragraph 10 of Applicant's petition dated 14th October 1999)*'. '**X10**' was not challenged by the 10th Respondent, and thus, **Nivithigala stood to be substituted by a fit and proper person**.

It is not in dispute that in his last will, Nivithigala had appointed the Petitioner, who was his brother-in-law as the executor. The Petitioner had therefore sought to be substituted in place of Nivithigala, to which application the 10th Respondent had objected, once again, on the basis of the judgment in **Leelawathie vs Ratnayake**.[15] The Board of Review, having referred to the provisions of Section 36 of the Rent Act, had by its decision dated 11th December 2003 marked '**X11**' rejected the application of the Petitioner on the basis that he is not a fit person to be substituted in place of Nivithigala.

The cumulative effect of '**X10**' and '**X11**' is that the Board of Review did not think that the judgement in **Leelawathie vs Ratnayake** was an impediment to the substitution of Nivithigala, but took the view that the Petitioner was not a fit and proper person to be substituted in place of Nivithigala.

[12] [1998] 3 Sri LR 349.
[13] Vide page 2 of 'X10'.
[14] Vide the appeal lodged by the 10th Respondent at page 632.
[15] Ibid.

Aggrieved by the latter decision of the Board of Review, the Petitioner filed CA (Writ) Application No. 536/2004 seeking a Writ of Certiorari to quash '**X11**'. In the course of the oral submissions, the Petitioner and the 10th Respondent had agreed that the question of substitution could be decided by the 1st Respondent, and for the 1st Respondent to make a determination on the person who should be substituted in place of the deceased tenant, in order to resist the application which was pending before the Board of Review.

This Court, by its judgment delivered on 20th June 2007 marked '**X12**' had therefore made the following direction:

> "*This Court directs the Commissioner of National Housing to determine a suitable person or persons who could be substituted in place of the deceased tenant for the purpose of appeal No. 2649 which is presently pending before the Ceiling on Housing Property Board of Review, and to communicate to the said Board of Review for the Board of Review to conclude the said appeal.*"

The effect of the above judgment is that the substitution of Nivithigala has been allowed in principle, with only the suitability of the person sought to be substituted left to be decided by the 1st Respondent.

The 1st Respondent had accordingly made the following decision dated 13th December 2012 marked '**X13**', allowing the substitution of the Petitioner in place of Nivithigala:

> **"මෙම පරීක්ෂණයේ දී පාර්ශවයන් මා වෙත ඉදිරිපත් කළ වාචික හා ලිඛිත සැළකිරීම් හා සාක්ෂි විෂය මූලිකව අදාළ නෛතික මූලධර්මවල අනුකූල විශ්ලේෂණය කිරීමෙන් පසුව මම මෙසේ නිගමනය කරමි.**
>
> 1. **ආර්.එම්. ලීලාවති ඒ. රත්නායක** 1998 SLR Vol. VII Part II **යන නඩුවේ දී ශ්‍රේෂ්ඨාධිකරණය දෙන ලද තීරණය ප්‍රකාරව පළමු පාර්ශවය වන හිල්ඩා නිවිතිගල යන අයට මියගිය කුලි නිවැසියා වෙනුවෙන් කිසිදු, ආදේශක අයිතියක් නොමැති බව තීරණය කරමි.**
>
> 2. **3 වන පාර්ශවය වන එම්.එස්.එම් සම්සුදීන් යන අය මෙකී දේපළය හෝ එහි කොටසක් මිළ දී ගෙන ඇත්තේ එකී දේපළය ජාතික නිවාස කොමසාරිස්වරයා පවරා ගැනීමෙන් පසුව වන බැවින් එකී මිල දී ගැනීම බලරහිත වන බැවින් දේපළය සම්බන්ධයෙන් කිසිදු, අයිතිවාසිකමක් ඔහුට නොමැති බව තීරණය කරමි.**

3. 2 වන පාර්ශවය වන විල්බට් ජයනෙත්ති යන අය මිය ගිය කුලී නිවැසියාගේ අන්තිම කැමති පත්‍රයේ පොල්මඃක්කරු ලෙස අදාළ දිසා අධිකරණයක් මගින් පිළිගෙන ඇති බැවින් ඔහුට මිය ගිය කුලී නිවැසියා වෙනුවෙන් ආදේශකත්වය ලබා ගැනීමට නෛතික අයිතිය තිබේ. එබැවින් මම ස්වාභාවික යුක්තියේ මූලධර්ම වලට සහ අදාළ අනෙකුත් නෛතික මූලධර්ම වලට අනුකූලව මා වෙත ඉදිරිපත් කරන ලද සියළු මූලික කරුණු විෂය මූලිකව විශ්ලේෂණය කිරීමෙන් පසුව මියගිය කුලී නිවැසියාගේ අයිතිවාසිකම් වෙනුවෙන් විල්බට් ජයනෙත්ති යන අය ආදේශ කිරීමට තීරණය කරමි."

The 10th Respondent had thereafter filed with the Board of Review, an appeal dated 3rd January 2013 marked '**X14**' against the above decision of the 1st Respondent.[16] The Board of Review having afforded the Petitioner and the 10th Respondent a hearing, had, by its order dated 29th August 2017 marked '**X15**', held as follows:

"*(a) The Board determines that the appeal of the petitioner is allowed without cost and the order dated 13th December 2012 made by the Commissioner of National Housing is hereby set aside;*

*(b) As the right of the tenant ceases with his death the Board determines that* ***there cannot be any substitution in place of the deceased tenant****;*

*(c) ....."*

Dissatisfied with the above decision of the Board of Review, the Petitioner has invoked the jurisdiction of this Court seeking the aforementioned Writ of Certiorari.

The above narration of the facts brings me back to the first issue for determination, namely whether a tenant who has made an application under Section 13 of the CHP Law could be substituted in the event of his death.

As discussed earlier, Section 13 (as well as Section 13A) of the CHP Law applies in respect of the permitted number of houses owned by an individual. Neither Section makes any reference to Section 36 of the Rent Act. I shall now consider whether the judgment of the Supreme Court in **Leelawathie vs Ratnayake**[17] would be relevant to a determination of the issue in this application.

[16] No. 2743 had been allocated to this appeal.
[17] Supra.

In **Leelawathie's** case, the tenant had made an application under Section 13 of the CHP Law to purchase the house let to her. The Commissioner decided to recommend to the Minister the vesting of the house in the Commissioner for the purpose of sale to the tenant. On an appeal by the owner of the house under Section 39 of the CHP Law, the Board of Review set aside the decision of the Commissioner. The tenant then moved the Court of Appeal by way of a Writ of Certiorari to quash the order of the Board of Review. The tenant died pending the hearing of the application before the Court of Appeal and her daughter was substituted. The Court of Appeal affirmed the order of the Board of Review but an appeal was preferred to the Supreme Court.

Chief Justice G.P.S.De Silva identified the issue to be decided, in the following manner:

> "*The short point that arises for consideration before us is whether the application made by the tenant in terms of section 13 of the CHP Law can be proceeded with by the substituted petitioner-respondent after the death of the tenant. In other words, has the substituted petitioner-respondent the locus standi to maintain the application made by her mother (now deceased) who was the tenant of the premises?*"

The Supreme Court, having considered the provisions of Sections 9 and 13 of the CHP Law held as follows:

> "*Moreover, there is a significant difference in the language of section 9 and section 13, insofar as the person entitled to make the application is concerned. While the entitlement to make an application for the purchase of the house is confined to any tenant in terms of section 13, the provisions of section 9 speak of the tenant .... or any person who may succeed under section 36 of the Rent Act to the tenancy. .... The words underlined above are not found in section 13. It seems to me that the difference in the language tends to show that the right conferred by section 13 is personal to the tenant who makes the application. In this connection, it is also relevant to note (as stated earlier) that Section 13 applies to houses which are within the permitted number allowed to be owned by the landlord.*"

The Supreme Court thereafter referred to the provisions of Section 17 which conferred upon the 2nd Respondent a discretion with regard to an application of the tenant made under Section 13 of the CHP Law as opposed to an application under Section 9 which gives the tenant a right to purchase the house such tenant is living, and held as follows:

> "*Once an application is made in terms of section 13 to purchase a house, the Commissioner of National Housing has to be satisfied in regard to the specific matters set out in sections 17 (1) (a), (b) and (c). Analysing the provisions of section 13 read with section 17, Thamotheram, J. in Caderamanpulle vs Keuneman*[18] *expressed himself in the following terms: 'Under section 13 an application has to be made under the law for the purchase of a house. This does not mean that every application purporting to be validly made under section 13 has to be acted on and a notification made to the Minister under section 17 even if (a), (b) and (c) of the latter section*[19] *are satisfied. It was rightly conceded by Mr. H. L. de Silva that there was an area of discretion left to the Commissioner for him to consider the equities in the case and decide whether the application should be entertained. Before going into the question raised at (a), (b) and (c) of section 17, he must decide whether he is going to accept an application under section 13 and notify the Minister that an application has been made under this law.'*
>
> *It would also be relevant to refer to the case of Perera v. Lokuge and others*[20]*, wherein Kulatunga, J* [21] *held that (1) the Minister's power to make the vesting order is discretionary, (2) the Commissioner is under a duty to consider equities in addition to the matters set out in Section 17 to enable the Minister to make a fair decision. It is thus abundantly clear that the CHP Law requires the Commissioner of National Housing to address his mind to the equities in the case and to act fairly. This again is a pointer to the true nature of the application made under Section 13, namely, that the right conferred is personal to the tenant making the application. The position of the present substituted-*

[18] SC Appeal No. 15/79; SC Minutes of 19th September, 1980.
[19] Section 17.
[20] 1996 (2) Sri LR 282.
[21] When dealing with an application under Section 13.

*petitioner-respondent may well be different from the position of the original applicant.*

*Admittedly, the present substituted petitioner-respondent is not the person who made the application under section 13 to purchase the premises in suit. For the reasons stated above, I hold that the substituted petitioner-respondent is not entitled to proceed with the application made under section 13 by the original applicant, namely, the deceased tenant (Aslin Ratnayake) and the Commissioner of National Housing himself has now no right to entertain the application. The right conferred by section 13 is personal to the tenant who makes the application and comes to an end upon her death - Actio personalis moritur cum persona*."

As held by the Supreme Court, an application under Section 9 is different to an application under Section 13 or 13A of the CHP Law. While Section 9 gives a tenant a right to purchase the house and hence the reference to an heir, no such right exists with a tenant making an application under Section 13 and 13A, with the discretion whether to allow the application being conferred with the Commissioner. This further explains the absence of a reference to an heir in Sections 13 and 13A. Furthermore, in exercising that discretion, the Commissioner is required to consider the equities of the case.

What is meant by 'equities' has been explained by in **Kathiresan v. Sirimevan Bibile, Chairman, Board of Review, Ceiling on Housing Property Law and Others**[22] in the following manner:

'*This requirement on the part of the Commissioner to consider whether the vesting of the house is fair and reasonable in relation to the respective interests of the parties, is nothing more than the normal requirement in Administrative Law that where a discretion is vested in an authority, it should be exercised reasonably*.'

[22] Supra.

The position that has arisen in this application however is different. Unlike in **Leelawathie**, the 1st Respondent, having considered the equities of the application of Nivithigala has recommended that the house be vested and the Minister has accordingly made a vesting order in terms of Section 17(1). That Order was challenged before this Court in CA (Writ) Application No. 355/85 and dismissed. In any event, the 10th Respondent has admitted that he is not challenging the Order made under Section 17. Thus, by the time of his death, Nivithigala had acquired proprietary rights in respect of the said property. The fact that the decision in **Leelawathie** would have been different had there been an Order under Section 17 is clearly evident by the following statement by Chief Justice G.P.S. De Silva:

> "*Furthermore,* ***there is the significant fact that in the present case the tenant who made the application in terms of section 13 died before an Order was made by the Minister under section 17 (1) vesting the house in the Commissioner of National Housing. There was not even a notification by the Commissioner to the Minister under section 17 (1)****. Thus the deceased tenant had no proprietary rights in respect of the house which could pass to her heirs on her death.*"[23]

I am therefore not inclined to follow the decision in **Leelawathie vs Manel Ratnayake.**

The learned Counsel for the Petitioner drew my attention to the judgment of the Supreme Court in **Cassim vs Weerawardene, Commissioner for National Housing and Another,**[24] and has urged that the facts of this application warrants this Court following the said judgment. The facts in **Cassim's** case are as follows. The property in question was purchased by Mohideen Cassim in 1968, during which time Shah Mihilar and his wife were in occupation as tenants. While in occupation, Mihilar made a request under Section 13 of the CHP Law on 20th October 1975, to purchase the property and after inquiry and recommendation to the Minister, the said property was vested in the Commissioner for sale to the tenant. This decision was affirmed by the Board of Review. Mihilar died on 27th April 2000 and his legal heir was his widow. On 8th May 2000, the Valuation Board notified the parties of the

[23] Supra, at page 354.
[24] [2002] 1 Sri LR 316.

value of the property. The widow of Mihilar received the said notification and informed the Commissioner that she was willing to make the payment on behalf of her husband. The Commissioner informed the widow that in view of the Supreme Court decision in **Leelawathie v. Ratnayake** she was not entitled to purchase the house and that steps will be taken to divest the house.

The widow moved the Court of Appeal by way of a Writ of Certiorari to quash the decision of the Commissioner to divest the house. The Court of Appeal allowed the application and directed the Commissioner to accept the money and transfer the house to the widow. On appeal, the Supreme Court observed that in **Leelawathie**, '*the tenant who made the application died before an order was made vesting the house in the Commissioner and that there was not even a notification by the Minister under Section 17(1)*' and that, that is the reason why the Supreme Court in **Leelawathie** held that '*the deceased tenant had no proprietary rights in respect of the house which could pass to the heir on her death*.' Having noted the facts in **Leelawathie**, the Supreme Court in **Cassim** observed that at the time of the death of the tenant, the house had been vested in the Commissioner and '*the only outstanding step required of him to effect a formal transfer of the premises was the payment of the purchase price*.' I must straightaway add that in the current application, Nivithigala had even paid ¼ of the purchase price, and that the position of Nivithigala is even better than the tenant in **Cassim**.

It is because of this factual position that the Supreme Court in **Cassim** held as follows:

> "*Even though the right of the tenant to make an application to purchase the house was a personal right, once that right was exercised and a vesting order made, the character of that right changed. It was a vested right which on the death of the applicant devolved on his heirs*."[25]

The above paragraph makes it clear as to why the Supreme Court refused to set aside the judgment of the Court of Appeal in **Cassim's** case and the basis on which it sought to distinguish that case from the judgment in **Leelawathie**. I agree with the

[25] Supra; at page 320.

learned Counsel for the Petitioner that the facts of this application fall entirely within the judgment of the Supreme Court in **Cassim**.

In **Council of Civil Service Unions vs Minister for the Civil Service**,[26] Lord Diplock identified 'illegality', 'irrationality' and 'procedural impropriety' as being the grounds upon which administrative action is subject to control by judicial review. He then went onto describe *illegality* in the following manner.

> "*By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable*."

The complaint of the Petitioner is that the Board of Review acted illegally when it arrived at its determination that the right of the tenant ceased with his death and that there cannot be any substitution in place of the deceased tenant. I have examined the Order of the Board of Review, '**X15**', and observe that the Board of Review has blindly followed the judgment in **Leelawathie v Ratnayake**. There has not been a consideration of:

a) the facts of this application *vis-à-vis* the facts in **Leelawathie;**

b) the reasons that led the Supreme Court to arrive at its decision in **Leelawathie;**

c) the legal principles laid down in **Leelawathie**.

The Board of Review has not even considered the judgment of the Supreme Court in **Cassim v Weerawardena**, which, for the reasons that I have already discussed, reflect the correct legal position that is applicable to this application.

In the aforementioned circumstances, I hold that where a vesting order has been made in terms of Section 17(1), a tenant who has made an application under Section 13 to purchase a house could be substituted in the event of his or her death.

[26] [1985] AC 374,

I must state that the substitution is not being made for the purpose of determining the person to whom the house should be transferred by the 1st Respondent. Nor is the Petitioner asking that the property be transferred to him. He is only seeking to be substituted in his capacity as Executor to fulfill the task entrusted to him by Nivithigala in his last will and thereby secure the rights of the beneficiaries nominated by Nivithigala in his last will. The Petitioner, and in his absence any other person who will carry out the wishes of Nivithigala is in my view a fit and proper person to be substituted in place of Nivithigala.

Furthermore, once the substitution is effected, the application of the 10th Respondent made by '**X8**' in response to the Order made in terms of Section 20 calling for claims for the price payable can be decided by the Board of Review. Once a determination is made on '**X8**', the 1st Respondent can transfer the house to the heirs of Nivithigala as per his last will. The issue relating to the proving of the last will would arise only at that stage and hence, the fact that the testamentary action has been withdrawn does not arise for consideration at this stage.

I must also state that the Board of Review, having correctly distinguished the facts of this application from that in **Leelawathie,** allowed the substitution of Nivithigala by its Order '**X10**'. This Order has not been challenged by the 10th Respondent. The current issue arose when the Petitioner was sought to be substituted, with an objection being taken that the Petitioner is not a fit and proper person to be substituted. Upon the said objection being upheld by the Board of Review, the Petitioner invoked the Writ jurisdiction of this Court. The Order made by this Court – vide '**X12**', was to direct the 1st Respondent *to determine a suitable person or persons who could be substituted in place of the deceased tenant,* and to communicate such decision to the Board of Review. It is therefore clear that the Order made by '**X10**' permitting substitution has not been interfered with by this Court. In those circumstances, it was not open to the Board of Review to have revisited the issue of substitution of Nivithigala. By doing so, the Board of Review has acted beyond its jurisdiction.

Taking into consideration all of the above circumstances, I am of the view that the Board of Review acted illegally when it arrived at its determination that the Petitioner cannot be substituted in place of Nivithigala. The Order of the Board of Review is therefore liable to be quashed by a Writ of Certiorari.

This brings me to the second issue to be decided in this application, i.e. the decision of the Board of Review that what has been vested in the 1st Respondent is only the house situated on the aforesaid premises and not the appurtenant land. I have already referred to the applicable legal provisions in this regard, which can be summarised as follows.

1) Where a tenant wishes to purchase the **house** he is living in, even though such house is not in excess of the permitted number of houses, the first step is for the tenant to make an application to the 1st Respondent, as provided by Section 13.

2) The second step is for the 1st Respondent to make his recommendation to the Minister, having taken into consideration the equities of the said application.

3) The third step is for the Minister to make a vesting order in respect of the **house** in terms of Section 17.

4) In this application, the Minister, acting on the recommendation of the 1st Respondent has proceeded to make the vesting order in terms of Section 17(1)- vide '**X2**'.

5) The fourth step is for the 1st Respondent to make a determination as to the **area of land** that is appurtenant to the said house.

6) As provided by Section 16, where any house is vested in the 1st Respondent under the CHP Law, there shall also be vested in the 1st Respondent, such extent of land as is in the opinion of the 1st Respondent, is reasonably appurtenant to the house.

7) The determination of the appurtenant land has been done by way of Plan '**X6**' and has been duly conveyed to the parties by letter dated 5th December 1997, '**X7**'.

8) The fifth and final step is for the 1st Respondent to invite claims for payment, as provided for in Section 20.

9) This too has been complied with by the 1st Respondent – vide '**X8**'.

Thus, to my mind, the vesting of the house is in terms of the vesting order, while the vesting of the appurtenant land is by operation of law pursuant to a determination by the 1st Respondent. I am therefore of the view that the cumulative effect of the provisions of Sections 16(1) and 17(1) is that the house and the extent of land appurtenant thereto are vested with the 1st Respondent.

I have examined the Order of the Board of Review '**X15**', where it has held as follows:

> "*Taking into consideration the arguments raised by both parties and the documents submitted to Court, we feel that by gazette notification bearing number 325 dated 23rd November 1984, only the house bearing premises no. 212/19 has been vested with the Commissioner of National Housing. Perusal of the said gazette marked 'A' carefully reveals that in the said gazette in two conspicuous places, it described as a 'house'. It does not mention about any land. It refers only to a house.*
>
> *Therefore, the Board is of the view that the appurtenant land, which is in extent 1 rood and 4 perches, was not included in the said gazette, and if the appurtenant land was not included in the said vesting, the purchase of the said property by the Petitioner-Appellant is a clear and valid transaction.*
>
> *If that position is legal, then the second gazette notification which declares that 1 rood and 4 perches has been vested with the Commissioner, is illegal, and has caused immense conflicts because that particular portion of land is already purchased by a bona fide purchaser*."

The above statement is incorrect, for two reasons.

The first is that the Board of Review has completely lost sight of:

(a) the provisions of Section 16(1) of the CHP Law, which provides for the vesting of the land that is appurtenant to the house by operation of law; and

(b) the fact that the cumulative effect of the provisions of Sections 16(1) and 17(1) is to vest in the 1st Respondent both the house and the extent of land appurtenant thereto.

The second is that by the time the transfer of the said premises was effected in favour of the 10th Respondent, the vesting order had already been made, with the result that absolute title to such house was with the 1st Respondent and not with its owner. The Board of Review therefore clearly erred when it held that the entire area of land has not vested with the 1st Respondent, and therefore, its decision is liable to be quashed by a Writ of Certiorari.

I accordingly issue a Writ of Certiorari to quash the decision of the Board of Review marked '**X15**'. The decision of the 1st Respondent marked '**X14**' shall therefore stand. The Board of Review is directed to commence the hearing of Appeal No. 2649 within 8 weeks hereof, and to deliver its decision within 20 weeks hereof.

I make no order with regard to costs.

**President of the Court of Appeal**