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

In the matter of an Application for a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 50/2014

Rajapakse Arachchige Damitha Kumara Rajapakse,
Moragoda Road,
Mudungoda.

PETITIONER

1. Bolawalana Thanthrige Valentia Margaret Vijoy Fernando.

2. Rajapakse Arachchige Hashini Shihara Rajapakse.

3. Rajapakse Arachchige Shenal Lakitha Rajapakse.

All at Moragoda Road, Mudungoda.

SUBSTITUTED PETITIONERS

Vs.

1. The Commissioner for National Housing, National Housing Department, Sethsiripaya, Battaramulla.

2. O.R. Jansen,
Chairman,
The Board of Review of the Ceiling on Housing Property Law.

3. R. Yuganthi Amarasinghe.
4. J. M. S. Bandara.
5. W.N.R.P. Wijepala.

3rd to 5th Respondents are Members of the Board of Review

2nd – 5th Respondents are at
No. 10, Vipulasena Mawatha, Colombo 10.

6. Cyril Weeraratne,
No. 14/9, Wewalwala Road,
Bataganwila, Galle.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Manohara De Silva, P.C., with Hirosha Munasinghe for the Petitioner

Manohara Jayasinghe, Senior State Counsel for the 1st Respondent

Chandana Prematilleke for the 6th Respondent

Written Submissions: Tendered on behalf of the Petitioners on 12th June 2017 and 26th June 2020

Tendered on behalf of the 1st Respondent on 6th November 2017 and 19th February 2020

Tendered on behalf of the 6th Respondent on 2nd August 2017, 6th August 2018 and 16th January 2020

Decided on: 15th October 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 15th May 2019, all learned Counsel moved that judgment in this matter be delivered on the written submissions that have already been tendered by the parties. This Court thereafter directed the parties to submit their responses to certain matters on which clarifications were required, which was duly complied with by all parties.

The issues that arise in this application have a history of almost half a century, dating back to the enactment of the Ceiling on Housing Property Law No. 1 of 1973 (**the CHP Law**), which is the Act of Parliament that this Court is called upon to consider in determining the said issues.

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.[1] Section 2 specifies the maximum number of houses which may be owned by an individual with a distinction being drawn between an individual who is a member of a family and an individual who is not a member of a family. In terms of Section 2(5), "*An individual shall for the purposes of this Law be deemed to be a member of a family if such individual has a spouse or a dependent child or is a dependent child of any individual*".

Section 2(1) provides as follows:

> "*The maximum number of houses which may be owned by an individual who is a member of a family shall be such number of houses which together with the number of houses owned by the other members of that family is equivalent to the number of dependent children, if any, in that family, increased by two*."

Therefore, in terms of the CHP Law, an individual and his spouse, who have no children, can own a maximum of two houses. Section 2 further sets out the manner in determining the maximum number of houses that could be owned by a body of persons. The maximum number of houses as determined by Section 2 is referred to as the '*permitted number of houses*' that a person may own after the introduction of the CHP Law.

The house that is the subject matter of this application is situated at premises No. 11, 16th Lane, Kollupitiya. On the date that the CHP Law came into effect, the said house

[1] See the judgment of Sarath Silva, J (as he then was) in Kathiresan vs Sirimevan Bibile, Chairman, Board of Review and Others [(1992) 1 Sri LR 275 at 279] where he stated that: An examination of the provision of this Part (I) shows that there are two principal methods of such regulation. They are: (i) the imposition of a ceiling on the number of houses that may be owned by individuals or other bodies. This ceiling is provided for in Section 2; (ii) by giving a right to any tenant to make an application to the Commissioner for the purchase of a house rented to him.

was owned by Agnes Fonseka. It is not in dispute that Agnes Fonseka and her husband, R.C. Fonseka owned more houses than the permitted number of houses, and that as they did not have children, the permitted number of houses that they could own was two.

Section 8 of the CHP Law requires a person who owns houses in excess of the permitted number of houses to submit a declaration to the 1st Respondent, the Commissioner of National Housing. While Section 8(1) relates to a declaration that an individual who is not a member of a family and who owns houses in excess of the permitted number of houses on the date of commencement of the CHP Law shall make, Section 8(2), which is the Section that is applicable to this application, reads as follows:

> "*Where houses in excess of the permitted number of houses are owned on the date of commencement of this Law by the members of a family, the male spouse, or where such male spouse is not living or is not capable in law so to do, the female spouse, shall within twelve weeks of such date, send by registered post to the Commissioner*[2] *a declaration*:
>
> *(a)* ***specifying the number of houses*** *owned by each member of such family including houses owned in undivided shares;*
>
> *(b)* ***specifying the houses*** *the ownership of which the members of such family* ***proposes to retain****: and*
>
> *(c) giving such particulars relating to the houses referred to in paragraph (a) as are set out in the Schedule hereto.*
>
> *Such spouse shall* ***simultaneously intimate in writing to the tenant****, if any, of each house owned by each member of such family* ***the ownership of which is not proposed to be retained*** *that the ownership of such house is not proposed to be retained."*

[2] The reference to 'Commissioner' in the Act is to the Commissioner of National Housing.

Section 8(5) provides further that, "*Any house the ownership of which is not proposed to be retained in terms of any declaration made under this section, ..., is hereinafter referred to as a " surplus house "*

Section 8(4) of the CHP Law provides that:

> "*Any person who has, without reasonable cause, failed to send the declaration within the period referred to in subsection (1) or subsection (2), as the case may be, or has made any incorrect declaration in regard to the number of houses owned by him or by his family, as the case may be, shall be guilty of an offence under this Law, and any such house owned by such person or by any member of the family of such person as may be specified by the Commissioner by Notification published in the Gazette shall vest in the Commissioner with effect from such date as may be specified therein*."

As Agnes Fonseka together with her husband owned houses over and above the permitted number of houses, she was required to submit a declaration in terms of Section 8(2), on or before 7th April 1973. By letter dated 28th May **1974**, marked '**R3**', the 1st Respondent, Commissioner of National Housing had informed Agnes Fonseka that she had not submitted her declaration in terms of Section 8(2), and to submit same, within fourteen days[3] together with the list of houses that she has alienated during the period 13th January 1973 – 12th January 1974.

By letter dated 19th September 1976,[4] the husband of Agnes Fonseka had informed the 1st Respondent that '*by letter dated 9th July 1973 I had forwarded to you under registered cover by post, the fullest details about my properties, and my wife's properties.* ' He had thereafter proceeded to reiterate in the said letter that he owned the following houses, as is said to have been intimated by his letter of 9th July 1973:

[3] Agnes Fonseka has claimed that she submitted a declaration on 25th June 1973 and 9th July 1973 (page 533 of 'P2'). Even if she did, the said declarations are outside the time period set out in Section 8.
[4] Vide letter dated 19th September 1974 at page 477 of 'P2'.

	Assessment Number	**Status as at 19th September 1976**
1	173, W.A.Silva Mawatha	Firewood Shed
2	546, Galle Road, Kollupitiya	Used as an Office
3	374, Galle Road, Kollupitiya	Used as an Office
4	370, Galle Road, Kollupitiya	Gifted on 7th January 1974 to S. Salgado
5	364, Galle Road, Kollupitiya	**Will be retained by Agnes Fonseka**[5]
6	1, 10th Lane, Kollupitiya	Gifted on 12th January 1974
7	15, 10th Lane, Kollupitiya	Gifted on 7th January 1974
8	9/7, 16th Lane, Kollupitiya	Used as an Office
9	**11, 16th Lane, Kollupitiya**	Gifted on 11th January 1974
10	9/5, 16th Lane, Kollupitiya	Sold to a 3rd party as tenant had informed he does not wish to purchase
11	90, Lauries Road, Milagiriya[6]	**Will be retained by the declarent**[7]

Thus, in terms of Section 8(2), with Agnes Fonseka and her husband *declaring* that the houses situated at No. 364, Galle Road, Kollupitiya and No. 90, Lauries Road, Milagiriya are the two houses that they wish to keep, the rest of the houses referred to above were houses in excess of the permitted number of houses. Therefore, the house that is the subject matter of this application is a house which was in excess of the permitted number of houses that Agnes Fonseka could have owned with her husband, and was therefore a surplus house within the meaning of Section 8(5).

There are five important features in Section 8(2), namely:

1) Any individual who together with his spouse have houses in excess of the permitted number of houses must submit a declaration;

2) The said declaration must be submitted within 12 weeks of 13th January 1973;

3) The said declaration must set out the number of houses owned by such person;

4) The said declaration must set out the houses that such person proposes to retain;

[5] Vide letter dated 13th February 1974 at page 521 of 'P2'.
[6] This house was owned by R.C. Fonseka.
[7] Vide letter dated 13th February 1974 sent by R.C.Fonseka at page 525 of 'P2'.

5) Such individual shall '*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*.'

I must note at this stage that even though Section 8(2) required Agnes Fonseka or her husband to simultaneously intimate in writing to the tenant of each house the ownership of which they did not propose to retain, of such fact, there is nothing to indicate that such notice was in fact given to the tenant of No.11, 16th Lane, Kollupitiya.

The purpose of giving notice to the tenant that the owner does not wish to retain the house of which he/she is the tenant 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 for the purchase of such house*."

It is admitted that Agnes Fonseka had rented out one of the houses situated on the said premises to T. Wijeyesingham, while the other house comprising of three rooms had been rented to Somapala Samarakkara.[8] Although this Court has not been apprised of the reasons, it is admitted that the application of T. Wijeyesingham to purchase the house had been refused by the 1st Respondent, and that he had vacated the house after the appeal to the Board of Review was rejected in 1978. The other tenant, Somapala Samarakkara had also made an application to the 1st Respondent in terms of Section 9 of the Act seeking to purchase the said house. It is the application of Samarakkara that has given rise to this application.

Section 10 of the CHP Law sets out the steps that a person may take in respect of the houses which are in excess of the permitted number of houses, and is re-produced below:

[8] See proceedings of 12th February 2004 at page 365 of 'P2' and proceedings of 9th December 2003 at page 373 of 'P2', for a description of the house occupied by Samarakkara.

"Where, on the date of commencement of this Law, any person owns any house in excess of the permitted number of houses, such person may, if such person is an individual, within a period of twelve months from such date .... dispose of such house with notice to the Commissioner, ***unless*** *the tenant of such house or any person who may under section 36 of the Rent Act No. 7 of 1972, succeed to the tenancy of such house, has made application with simultaneous notice to the owner for the purchase of such house."*

Thus, Section 10 permits a person who owns more houses than the permitted number, to sell the excess house/s, subject to the following conditions:

1) The sale must be done within twelve months of 13th January 1973;

2) Notice of such sale must be given to the Commissioner;

3) An excess house can be sold only if the tenant has not applied to the Commissioner to purchase such house.

It must be noted that the tenant is required to provide the owner with a copy of the notice that he gives to the 1st Respondent under Section 9.

Section 8(6) of the Act provides as follows:

"*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*."

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(2), when the Commissioner of National Housing proposes to sell any 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 therefore contains 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 which was the regulation of the ownership of houses.

The house that relates to this application was a house that Agnes Fonseka did not wish to retain, and therefore was a house she was *entitled* to sell. Accordingly, Agnes Fonseka did exercise her right in terms of Section 10 by executing a Deed of Gift in favour of Aleric Wickremasinghe. However, her right to sell was subject to the three conditions I have already referred to.

Let me now consider if each of the said conditions have been satisfied.

The first condition is that the sale must be done within twelve months of 13th January 1973. On the face of it, this has been complied with as the Deed of Gift No. 237 in favour of Aleric Wickremasinghe has been executed on 11th January 1974.[9] The second condition is that notice of such sale must be given to the Commissioner. It appears that this too has been complied with.[10]

The third condition, namely that a house which is in excess of the permitted number of houses cannot be sold where the tenant has applied to the Commissioner to purchase such house, is the condition in Section 10 that has given rise to this application, with the tenant Samarakkara claiming that:

[9] I say *on the face of it* for the reason that Samarakkara has alleged that the said Deed was a forgery on the basis that Aleric Wickremasinghe was known by a different name in 1974, and changed his name to Aleric Wickremasinghe only thereafter.

[10] Vide letter dated 11th January 1974 marked 'R2'; also at page 531 of 'P2'.

(a) an application had in fact been made to the 1st Respondent to purchase the property; and

(b) the alienation of the said house by Agnes Fonseka in favour of Aleric Wickremasinghe is therefore, bad in law.

This is the basis for the competing claims of Samarakkara and the Petitioner.

The application of Samarakkara to purchase the said house had been refused by the 1st Respondent by his letter dated 28th January 1991.[11] The appeal by Samarakkara to the Board of Review against the decision of the 1st Respondent too had been rejected.[12] Samarakkara had thereafter filed CA (Writ) Application No. 370/2001 seeking to quash the above decisions. While the said application was pending, Aleric Wickremasinghe had passed away, and his nephew, the Petitioner in this application, and to whom the land had been gifted by Aleric Wickremasinghe, had been substituted in that application.[13]

By its judgment delivered on 18th November 2002,[14] this Court had made the following Order:

> "*Parties agree that therefore the decision of the Board of Review dated 2nd February 2001 is erroneous and has to be set aside. Accordingly, this Court issues a writ in the nature of Writ of Certiorari quashing the Order of the 3rd – 5th Respondent dated 2nd February 2001 marked as P7.* ***Upon agreement of parties****, this* ***Court directs the Commissioner to hold an inquiry under Section 9*** *of the Ceiling on Housing Property Law, specially as the position taken up in this case is that this is an excess house which had vested in the Commissioner by operation of the said Law.*"

The 1st Respondent was therefore required to consider the application of Samarakkara made under Section 9 to purchase the said house.

[11] Vide page 421 of 'P2'.
[12] Vide page 417 of 'P2'.
[13] The Petitioner has passed away in 2018, and his wife and two children have been substituted.
[14] The judgment is at page 102 of 'P1'.

Prior to proceeding with the inquiry, the 1st Respondent had permitted the substitution of the Petitioner in place of Aleric Wickremasinghe.

The scope of the inquiry before the 1st Respondent was to decide whether the application of Samarakkara under Section 9 of the Act to purchase the said house should be allowed. A decision in favour of Samarakkara required the 1st Respondent to determine whether the said house was a house which Agnes Fonseka had decided not to retain, and therefore was in excess of the permitted number of houses of Agnes Fonseka.

After affording both parties a hearing, the 1st Respondent by an Order delivered on 21st December 2006 had held as follows:[15]

> "අභියාචනා අධිකරණයේ අංක 370/2001 හා 2002.11.18 දරණ නියෝගය පරීදි, ඉහත කී අංක 11 දරණ නිවස 1973 අංක 01 දරණ නිවාස දේපල උපරිම පනතේ 9 වන වගන්තිය යටතේ වැඩි පුර නිවාසයක්ද යන්න සොයා බැලීම සඳහා මෙම පරීක්ෂණය පවත්වන ලදී.
>
> මෙම සියළුම කරුණු සලකා බලන විට ඇග්නස් පෝර්පියානා ෆොන්සේකා මහත්මියට 1973.01.13 වන දින වන විට නිවාස 07 ක අයිතියක් තිබූ අතර නිවාස දේපල උපරිම නීතිය යටතේ ඇයට තබා ගත හැකි නිවාස ගණන 02 කි. එබැවින් පරීක්ෂණයට භාජනය වී ඇති වරිපනම් අංක 11 දරණ නිවස වැඩිපුර නිවාසයක් වශයෙන් තීරණය කරමි. මෙම පරීක්ෂණයේදී ඉල්ලුම්කරුගේ බලාපොරොත්තුව වන්නේ ඉහත කී වගඋත්තරකරුගේ දේපල බැහැර කිරීම් නීත්‍යානුකූල නොවන හෙයින් ඔහුට එම නිවසත් සමගම සම්පූර්ණ ඉඩමට අදාල පර්චස් 19.5 ඉඩම් ප්‍රමාණයක් ඔහුට ලැබිය යුතු බවයි. නිවාස දේපල උපරිම නීතිය යටතේ නිවසක් පාතික නිවාස කොමසාරිස් වෙත පවරා ගත හැක්කේ එම නිවසට අනුබද්ධ සාධාරණ ඉඩම් ප්‍රමාණයකි. ඒ අනුව එකී නිවසට අදාල අනුබද්ධ ඉඩම් ප්‍රමාණය යටා කාලයේදී කේෂ්ත්‍ර පරීක්ෂණයක් මගින් තීරණය කරණු ලැබේ."

Thus the decision of the 1st Respondent was that the said house was as excess house of Agnes Fonseka and that Samarakkara is entitled to be sold the said house, together with the land appurtenant thereto. The only matter left to be decided was the extent of the land that was appurtenant to the said house.

Dissatisfied with the said decision of the 1st Respondent, the Petitioner had lodged an appeal with the Board of Review on 26th January 2007. While the matter was pending before the Board of Review, Samarakkara had passed away. The 6th

[15] Vide Order of the 1st Respondent at page 43 of 'P2'.

Respondent, who was the executor of the last will of Samarakkara, and who had been granted probate in District Court, Colombo Case No. DTS00014/09 had made an application to be substituted. Even though the Petitioner had objected to the said substitution, the Board of Review, by its Order made on 23rd June 2010,[16] had permitted the substitution of the 6th Respondent. It must be noted that the Petitioner has not challenged the said Order made by the Board of Review allowing the substitution of the 6th Respondent in place of Samarakkara, until it was challenged in this application.

The Board of Review, having considered the appeal of the Petitioner against the Order of the 1st Respondent, had, by its Order delivered on 21st January 2014, dismissed the said appeal.[17]

Dissatisfied with the said decision of the Board of Review, the Petitioner filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decision of the Board of Review dated 21st January 2014;

b) A Writ of Certiorari to quash the decision of the Commissioner of National Housing dated 21st December 2006;

c) A Writ of Certiorari to quash the decision of the Board of Review dated 23rd June 2010 permitting the substitution of the 6th Respondent in place of Somapala Samarakkara.

In **Council of Civil Service Unions vs Minister for the Civil Service**,[18] 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 and irrationality 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*

[16] Order is at page 81 of 'P1'.
[17] Order of the Board of Review is at page 1 of 'P1'.
[18] [1985] AC 374

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."

"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'[19]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The learned President's Counsel for the Petitioner submitted that the aforementioned decisions of the Board of Review and the decision of the 1st Respondent are illegal and irrational. Before I proceed to consider the several arguments raised by the learned President's Counsel, I would like to summarise the legal position applicable to this application.

a) The CHP Law was enacted in 1973, and was certified on 13th January 1973.

b) The CHP Law sought to impose a ceiling on the number of houses that could be owned by an individual, a family and a body of persons.

c) The aforementioned three categories of persons who owned houses in excess of the permitted number of houses were required to submit a declaration within 12 weeks of 13th January 1973.

d) In the said declaration, the owner was required to declare the details of the houses that the owner proposed to retain.

e) Thus, the failure to submit a declaration attracts penal consequences a well as the vesting of such premises in the Commissioner.

f) In addition, and very importantly, simultaneous with the said declaration, the owner was required to inform the tenant of each house that the owner did not propose to retain, of such fact.

[19] Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948(1)KB 223

g) The Commissioner could vest such house where the owner has failed to give such notice to the tenant.

h) Once informed by the owner, the tenant had the right to make an application in terms of Section 9 to purchase the house he or she was living in.

i) In terms of Section 10, the tenant is required to simultaneously give notice of his application to the owner.

j) The Law has provided the owner the right to sell any houses which are in excess, provided such sale is done within one year – i.e. on or before 13th January 1974 – and very importantly, provided there is no application by the tenant to purchase the house.

k) Thus, the right to sell is contingent upon an application by the tenant to purchase the house. If the tenant has made an application, then, the owner cannot sell that house.

l) Any house which has not been disposed of within the one year period shall vest in the Commissioner by operation of law.

m) The Commissioner is required to offer for sale to the tenant, any house vested in him, prior to offering such house to third parties.

I shall now consider the several arguments presented to this Court on behalf of the Petitioner.

The first argument of the learned President's Counsel for the Petitioner is that an application in terms of Section 9 must be made within four months of the coming into operation of the CHP Law. He states that the application by Samarakkara has been made on 23rd May 1973, which is outside the four month period, and is therefore not a valid application.

It is not disputed that even though there have been two inquiries before the 1st Respondent, two inquiries before the Board of Review and one Writ application before this Court relating to the application of Samarakkara, this position is being

taken up for the first time, only in this application.[20] The learned Counsel for the 6th Respondent has correctly taken up the position that this objection should have been taken up at the first available opportunity, and that by his failure to do so, the Petitioner has acquiesced with the application of Samarakkara.

I am of the view that whether the application is out of time is a mixed question of fact and law which should have been raised before the 1st Respondent and the Board of Review, thus affording the parties an opportunity of clarifying matters. No explanation has been offered by the Petitioner as to his failure to do so.

I must state that the application of Samarakkara has not been made available to this Court, nor was it available at the time Samarakkara gave evidence before the 1st Respondent. Samarakkara had been cross examined in detail by the Counsel who appeared for the Petitioner at the inquiry before the 1st Respondent relating to the application made by him.[21] However, not a single question has been asked from Samarakkara relating to the date of his application, nor has any suggestion been made to him that his application is outside the time period in Section 9.

How did this issue with regard to the date of the application then arise? In its Order dated 21st December 2006, the 1st Respondent has stated that File No. CH/O/978 had been opened on *27th June 1973*.[22] That does not mean that the application of Samarakkara has been made on that date. The Board of Review, in its Order dated 21st January 2014 has stated that Samarakkara made his application on *23rd May 1973*.[23] This appears to be the only reference to the date of the application of Samarakkara.

As I have observed, the application of Samarakkara was not available even at the inquiry, it was not put in issue by the Petitioner, and therefore, I am not in a position to ascertain the basis for this statement by the Board of Review, nor am I in a position to conclude that the application of Samarakkara is outside the four month period set out in Section 9.

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[20] This issue has not been raised, either in the petition of appeal to the Board of Review [vide page 275 of 'P1'] nor in the written submissions tendered to the Board of Review [vide page 236 of 'P1'].
[21] Vide proceedings of 22nd April 2004 at page 353 of 'P2';
[22] Vide page 134 of 'P1' – "CHO/978 **ලිපි ගොනුව ආරම්භ වී ඇත්තේ** 1973.06.27 **දින සිට බව පෙනේ**"
[23] Vide page 4 of 'P1'.

Furthermore, in terms of Section 8(2), simultaneous to the filing of the declaration with the Commissioner, Agnes Fonseka was required to inform the tenant of each house that she did not propose to retain, of that fact, thus enabling the tenant to make a decision whether to make an application to the 1st Respondent to purchase the house occupied by such tenant. This view is supported by the fact that while the declaration by Agnes Fonseka must be made within twelve weeks, Samarakkara had a period of four months, or in other words, twenty-six days from the last date available to the owner, to submit his application to purchase the said house. In other words, the entitlement of Samarakkara to make an application was contingent upon Agnes Fonseka making a declaration. I have already stated that Agnes Fonseka did not submit her declaration as required by Section 8. Her reply that she did submit a declaration, even if accepted, is that she did so on 9th July 1973. This is clearly outside the 12 week period provided by Section 8.

Thus, even if Samarakkara made his application outside the four month period, it would not be fair to penalise Samarakkara as he had no notice of the intention of Agnes Fonseka. This gives context to the submission of the learned Senior State Counsel for the 1st Respondent and the learned Counsel for the 6th Respondent that the time period specified in Section 9 is not mandatory, as the CHP Law does not specify the consequences for not adhering with the time period, unlike with the failure on the part of the owner to give notice to the tenant. Therefore, even if there is a failure by Samarakkara to make his application within time, that is not fatal to the maintainability of his application. In any event, by the time the declaration of Agnes Fonseka is said to have been made, Samarakkara had already made an application to purchase the house.

For all of the above reasons, I do not see any merit in the first argument advanced on behalf of the Petitioner.

Having concluded that the application by Samarakkara is within the provisions of the CHP Law, I shall now consider whether the sale of the said premises by Agnes Fonseka to Aleric Wickremasinghe is valid in terms of the CHP Law.

The Board of Review, having considered the material, had decided that (a) Agnes Fonseka was not entitled to sell the said house as Samarakkara had already made an application, and therefore the disposition in favour of Aleric Wickremasinghe is a nullity *ab initio;* (b) the house shall therefore vest in the Commissioner.

I have already noted, and it is in fact admitted by all parties, that Agnes Fonseka had houses in excess of the number of houses permitted by the Law. The CHP Law required her to do two things – first, submit a declaration within 12 weeks to the 1st Respondent. Second, simultaneous to the submission of the declaration, submit a notice to the tenant of each house that she does not propose to keep, informing the tenant of that fact. As already observed, the purpose of doing so is to enable the tenant to make a decision whether he wishes to purchase the house, and if so, to enable the tenant to make an application in terms of Section 9.

The entitlement of Agnes Fonseka to sell an excess house is contingent upon an application by the tenant, and is triggered only if an application has not been made by the tenant. It was submitted on behalf of the Petitioner that Samarakkara did not give notice of his application to Agnes Fonseka, and that Agnes Fonseka was therefore entitled to sell the said house. However, there is no evidence to substantiate the position that Samarakkara did not notify Agnes Fonseka of his application nor has Samarakkara been cross examined on this matter at the inquiry before the 1st Respondent. As Samarakkara had made an application to purchase the said house, Agnes Fonseka had no entitlement to sell the said house to any person.

There is one other matter that I must advert to. That is to the fact that Wijayasingham who was occupying another house on the same premises as a tenant of Agnes Fonseka had made an application to purchase the house on 26th March 1973, which is within the stipulated time period.[24] It is in fact Wijayasingham who had alerted the 1st Respondent to the fact that Agnes Fonseka owned many houses in Colombo and that she had not submitted a declaration in terms of the Law. Although his application was rejected many years later, Agnes Fonseka could not have executed a deed in favour of Aleric Wickremasinghe as, in any event, the

[24] Vide page 503 of 'P2'. The application of Wijayasingham had been refused by the 1st Respondent and by the Board of Review on 11th July 1978 – vide written submissions of the Petitioner at page 235 of 'P1'.

application of Wijayasingham made within the four month window, was pending by then.

For all of the above reasons, the findings of the Board of Review that Deed No. 237 in favour of Aleric Wickremasinghe executed on 12th January 1974, is contrary to the provisions of the CHP Law, and is invalid, is not an illegal decision.

The second argument of the learned President's Counsel for the Petitioner was that the *space* occupied by Samarakkara is not a house, and therefore the provisions of the CHP Law would not apply.

In terms of Section 47 of the CHP Law, a house means:

> *"an independent living unit, whether assessed or not for the purpose of levying rates, constructed mainly or solely for residential purposes, and having a separate access, and through which unit access cannot be had to any other living accommodation, and includes a flat or tenement, but shall not include*
>
> *(1) sub-divisions of, or extensions to, a house which was first occupied as a single unit of residence; and*
>
> *(2) a house used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of ten years prior to March 1, 1972.*"

Although the Petitioner sought to argue that the *space* occupied by Samarakkara was only the garage of the house, that position has not been suggested to Samarakkara during his cross examination. In fact, he was cross examined on the nature of the house at the inquiry before the 1st Respondent, and his evidence was very clear that what was being occupied was an independent living unit comprising of three rooms and a toilet with separate access.[25]

I have referred to the fact that Samarakkara challenged the decision of the Board of Review rejecting his application in CA (Writ) Application No. 370/2001. In its judgment dated 18th November 2002, this Court has held as follows:

[25] Vide proceedings held on 12th February 2004 at page 365 of 'P2', and 8th December 203 at page 373 of 'P2'.

"*Upon agreement of parties, this Court directs the Commissioner to hold an inquiry under Section 9 of the Ceiling on Housing Property Law, specially as the position taken up in this case is that this is an excess house which had vested in the Commission by operation of the said Law.*

It is also to be noted that in terms of a minute made in the record that had been called for and perused by this Court, this house had been registered since 1962 as "a house". (vide minute dated 10th September 1975.)...."

The above judgment has not been appealed against, and therefore there is a clear finding by this Court that the *space* occupied by Samarakkara is a house. While the Petitioner cannot canvass that issue any further, this was the basis on which the Board of Review dismissed the said argument. I am of the view that the said decision of the Board or Review is neither illegal nor irrational.

For the above reasons, I do not see any merit in the second argument of the Petitioner.

The third argument of the learned President's Counsel for the Petitioner was that the 6th Respondent cannot be substituted in place of Samarakkara, who passed away while the appeal of the Petitioner was pending before the Board of Review, as he does not fall within the category of persons referred to in Section 36 of the Rent Act.

It was submitted that:

(a) In terms of Section 9 of the CHP Law, it is only "*a person who may succeed under section 36 of the Rent Act to the tenancy of such house"* who can be substituted; and

(b) As the 6th Respondent does not fall within the category of the persons referred to in Section 36, the 6th Respondent cannot be substituted.

Let me consider this argument by re-producing Section 9:

"*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*[26] *for the purchase of such house*."

Section 36 of the Rent Act contains 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.

In my view, Section 9 of the CHP Law permits two categorises of persons to make an application to purchase a house. The first is the tenant himself. The second is, where the tenant dies during the period provided for in Section 9 to make an application, any person who may succeed under section 36 of the Rent Act to the tenancy of such house. Thus, the legislature, by specifically referring to Section 36 of the Rent Act in Section 9 has extended the right of a tenant to purchase a house in terms of the CHP Law to the heirs of such tenant, in the event the death of the tenant occurs during the period specified in Section 9.

The learned Senior State Counsel has correctly pointed out that Section 9 only deals with the question '*who can make an application to the Commissioner?*' and not with the question, '*who can succeed to a deceased tenant's proprietary rights*'.

The 6th Respondent has been substituted in place of Samarakkara not on the basis that he is a tenant. Samarakkara had nominated the 6th Respondent as the executor of his last will, and the 6th Respondent has been granted probate by the District Court. Thus, the 6th Respondent has been substituted in place of Samarakkara for the purpose of pursuing Samarakkara's application to the 1st Respondent. The learned Counsel for the 6th Respondent has correctly submitted in his written submissions that the beneficiaries of the Order made by the 1st Respondent would not be the 6th

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

Respondent, but the three persons named in the last will of Samarakkara as beneficiaries. Thus, the decision to permit the substitution of the 6th Respondent is within the law.

I must also state that the Board of Review allowed the substitution of the 6th Respondent by its Order dated 23rd June 2010, only after considering the objections of the Petitioner to the said substitution. That Order has not been challenged, until this application was filed in 2014. The learned Senior State Counsel and the learned Counsel for the 6th Respondent have taken up the position that the said Order cannot be challenged at this stage due to the delay in doing so. I am in agreement with the said submission and take the view that if the Petitioner was dissatisfied with the Order of the Board of Review regarding substitution, he ought to have challenged that decision soon thereafter. I am therefore in agreement with the learned Counsel for the Respondents that the Petitioner is guilty of *laches* in so far as the Order of substitution is concerned.

Taking into consideration all of the above factors, I do not see any merit in the third argument of the Petitioner.

This brings me to the final argument on behalf of the Petitioner. It was sought to be argued that even though he made the application in 1973, Samarakkara had paid the rent to Aleric Wickremasinghe in 1988 and 1989, thereby recognising Wickremasinghe as the owner.[27] Samarakkara has admitted in his evidence that he did pay the rent, but only because Wickremasinghe had demanded that the rent be paid to him, at the funeral of Agnes Fonseka.[28] Samarakkara had stated that in any event, Wickremasinghe did not encash the money orders sent to him.

The learned Senior State Counsel has submitted that even if Samarakkara had acquiesced with the title of Wickremasinghe, that has no bearing on the 1st Respondent. While agreeing with the said submission, I am of the view that the fact that Samarakkara paid the rent to Wickremasinghe has no bearing on his application for the reason that the transfer of the house to Wickremasinghe was contrary to the provisions of the CHP Law, and therefore Wickremasinghe had no rights as an owner.

[27] Vide proceedings of 22nd April 2004 at page 359 of 'P2'.
[28] Vide proceedings of 24th June 2004 at page 339 of 'P2'.

Taking into consideration all of the above circumstances, I do not see any legal basis to grant the reliefs prayed for by the Petitioner. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal