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

S.C. (Appeal) No. 10/2007
S.C. (Spl.) L.A. No. 233/2006
C.A. (Writ) Application No. 679/2003

1. Andiapillai Karuppannapillai,

2. Kaliappapillai Soundararajan,

3. Arunasalampillai Manickawasagar,

   Trustees of Sammangodu Sri Kathirvelayutha Swami Temple,

   all of No. 91/1, Main Street,
   Colombo 11.

2nd Respondent-Appellants

Vs.

1. Raja Rajeswari Visvanathan,

2. Romesh Sadesh Kumar Visvanathan,

3. Romesh Kandiah Visvanathan,

4. Rashidharan Visvanathan,

   All of No. 27, Lorensz Road,
   Colombo 04.

Substituted Respondents-Petitioners-Respondents

1. Sammangodu Sri Kathiravelayutha Swamy Kovil Paripalana Society Ltd.,
   No. 105, Bankshall Street,
   Colombo 11.
   Presently of No. 91/1, Main Street,
   Colombo 11.

Applicant-Respondent-Respondent

3. Hema Wijesekara,
   The Commissioner of National Housing,
   Department of National Housing,
   Ministry of Housing,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

4. Hon. Arumugam Thondaman,
   Then Minister of Housing,
   Ministry of Housing and Plantation Infrastructure,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

5. Hon. Ferial Ashroff,
   Minister of Housing,
   Ministry of Housing,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
K. Sripavan, J.

COUNSEL : Wijayadasa Rajapakse, PC, with Nilantha Kumarage
for 2nd Respondent-Appellants

A. Gnanathasan, ASG, PC, with N. Wigneswaran, SC, for 3rd,4th and 5th Respondents-Respondents

Dr. Sunil Coorey for Substituted Respondents-Petitioners-Respondents

ARGUED ON: 08.07.2009

WRITTEN SUBMISSIONS

TENDERED ON:	2nd Respondent-Appellants	:	31.08.2009
	3rd, 4th & 5th Respondents	:	29.07.2010
	Substituted Respondents-Petitioners-Respondents	:	29.07.2010

DECIDED ON: 26.10.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 21.08.2006. By that judgment, the Court of Appeal had decided to set aside the approval granted by the Minister dated 19.02.2003 (3R15a) and the divesting order published in the Gazette on 25.02.2003 (3R16). Accordingly the application for a writ of certiorari made by the substituted respondents-petitioners-respondents (hereinafter referred to as the substituted respondents) was allowed. The 2nd respondent-appellants (hereinafter referred to as the appellants) came before this Court against the judgment of the Court of Appeal for which Special Leave to Appeal was granted.

At the hearing of this appeal it was agreed by all learned Counsel that the only issue that has to be considered was whether the original respondent, namely, Kandiah Visvanathan, (hereinafter referred to as the respondent), who was the father of the substituted respondents, was entitled to a communication of the decision of the Commissioner of National Housing prior to its publication.

The facts of this appeal as submitted by the appellants, *albeit* brief, are as follows:

The appellants are the Trustees of Sammangodu Sri Kathiravelayutha Swamy Temple and were the owners of the house bearing No. 27, Lorensz Road, Colombo 04 (hereinafter referred to as 'the said premises'). When the Ceiling on Housing Property Law (hereinafter referred to as the CHP Law), came into operation, the appellants had made a declaration as

required by the said law to the Commissioner of National Housing (X_1). On the basis of the said declaration made by the appellants, the said premises, was vested as a surplus house by the Commissioner of National Housing (X_2 and X_3). The appellants had thereafter appealed against the said vesting order to the Board of Review of Ceiling on Housing Property (hereinafter referred to as the Board of Review). The respondent's father, Kanagasabai Kandiah was the tenant of the said premises and after his death, his widow Sellamma Kandiah became the tenant of the said premises. At the time that appeal was taken for hearing before the Board of Review, the said Sellamma Kandiah had died and her son Kandiah Visvanathan, viz., the respondent, appeared before the Board of Review.

The Board of Review, by its order dated 26.06.1978, had dismissed the appeal and had decided that the respondent, Kandiah Visvanathan, is the tenant of the said House (X_4).

Thereafter, one Wigneswarie Kandiah, a sister of Kandiah Visvanathan, had challenged the said order of the Board of Review by instituting action in the District Court of Mt. Lavinia and the said Court had dismissed that action, by its judgment dated 27.03.1995 (X_{13}). Being aggrieved by that judgment the said sister of Kandiah Visvanathan had made a final appeal to the Court of Appeal and by judgment dated 14.10.1999, the Court of Appeal had affirmed the judgment of the District Court (X_{14}). Against the said judgment of the Court of Appeal the said Wigneswarie Kandiah had come before this Court and by its judgment dated 22.10.2002 this Court had dismissed the said appeal (X_{15}).

In the mean time the Commissioner of National Housing, by his letter dated 04.06.1997 (X_{16}), had informed the respondent to pay a sum of Rs. 96,335/- as the assessed value of the said premises and the said respondent had accordingly paid the said sum to the National Housing Authority. Thereafter an inquiry had been held on 20.04.1999 and it was decided that no action would be taken in respect of the transfer of the said premises without the conclusion of all cases relating to said premises.

Since the appellants were agitating for several years for the divesting of the said premises as neither compensation was paid nor the Commissioner had transferred title of the said property to a third party, they had made an application under section 17A of the CHP Law to the Commissioner, for divesting the ownership of the said premises to the appellants. On

the basis of the inquiry that was held, the Commissioner had decided to divest the said premises and had sought approval of the Minister for the said divestiture in terms of section 17(A)(1) of the CHP Law (3R15). The Minister had granted approval on 19.02.2003 (3R15a) and the divesting order was published in the Gazette of 25.02.2003 (3R16). Thereafter the Commissioner by his letter dated 12.03.2003 had informed the Attorney-at-Law for the respondent that action had been taken under section 17(A)(1) of the CHP Law on the application made by the appellant. The respondent had appealed to the Board of Review on the basis of the said decision and had also filed an application seeking for a writ of certiorari before the Court of Appeal to quash the decisions of the Minister of Housing and the Commissioner of National Housing, approving the divesting of the ownership of the said premises and seeking a writ of mandamus compelling the 3rd respondent to issue an instrument of disposition transferring the said premises to the respondent.

During the pendency of the said writ application, the said respondent had died and the 1st to 4th respondents were substituted in place of the deceased.

The Court of Appeal by its judgment dated 21.08.2006 set aside the approval granted by the Minister on 19.02.2003 and the divesting order published in the Gazette on 25.02.2003.

Learned Counsel for the substituted respondents contended that the facts of this appeal are similar to the facts in **Goonewardene and Wijesooriya v Minister of Local Government, Housing and Construction** ([1999] 2 Sri L.R. 263). It was accordingly submitted that the respondent, who had participated at the inquiry, had a legitimate expectation of becoming the purchaser of the said premises. Therefore learned Counsel for the substituted respondents contended that the Court of Appeal had correctly decided that the respondent was a party aggrieved by the decision to divest and therefore had a statutory right of appeal to the Board of Review in terms of section 39(1) of the CHP Law. It was further contended on behalf of the substituted respondents that the Commissioner had failed to notify the respondent of the decision to divest and the reasons for such decision. The contention was that the Commissioner, by failing to notify the respondent of his decision had violated the rules of natural justice.

The Court of Appeal, having considered the application filed by the respondent had held that he had a legitimate expectation of purchasing the premises in question and that a decision to divest would have affected him adversely. The Court of Appeal had arrived at the aforesaid decision on the basis of the letter dated 04.06.1997 (X_{16}) referred to earlier, by which the Commissioner of National Housing had requested the respondent to deposit a sum of Rs. 96,335/-.

It was not disputed that the respondent's father K. Kandiah was the tenant of the premises in question until his death in July 1952. Thereafter the widow of the said Kandiah became the tenant of the said premises. She passed away in July 1973.

The said premises in question was regarded as an excess house by the Board of Review, by its order dated 26.06.1978 (X_4). The said Board of Review, by that order had decided that the respondent was deemed to be the chief occupant of the premises.

The CHP Law, which came into operation on 13.01.1973, specifically deals with the procedure that should be followed by a tenant, who may apply to purchase a surplus house. Section 9 of the said Law, which deals with such situations, has clearly stated that,

> "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."

Reference was made to the applicability of Section 9 of the CHP Law in **Desmond Perera and Others v Karunaratne, Commissioner of National Housing and Others** ([1994] 3 Sri L.R. 316), where it was held that,

> "Section 9 of the CHP Law is precise, clear and unambiguous. **A tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months**

from the date of commencement of the CHP Law which was 13.01.1973" (emphasis added).

It was not disputed that the respondent had made an application to the Commissioner of National Housing in terms of section 9 of the CHP Law only on 06.03.1979. The date of commencement of the CHP Law as defined in section 47 of the said Law, was 13.01.1973 and the respondent had made his application, six (6) years after the relevant date of commencement. Considering the provisions contained in section 9 of the CHP Law, the application of the respondent to purchase the premises in question therefore is clearly out of time.

In **Desmond Perera and Others v Karunaratne, Commissioner of National Housing and Others** (supra), the Court had taken pains to consider whether there was any obscurity and/or ambiguity in the wording of section 9 of the CHP Law. In that case, the 1st petitioner had made his application for the purchase of the premises on 27.03.1981, which was 8 years after the CHP Law coming into effect. Considering the application made by the 1st petitioner in 1981 and the applicability of the provisions contained in section 9 of the CHP Law, Grero, J. had stated that,

> "The Court is of the view, that there is no obscurity and ambiguity in the wording of section 9 of the CHP Law . . . . Therefore this Court has to give effect to the plain meaning of this section. In doing so this Court is of the view, that a tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months (four) from the date of commencement of the CHP Law. Much prominence was given to this Law, when it came into force. Petitioners who are the tenants of the 3rd respondent should be or ought to be vigilant about the laws enacted and published regarding their rights and duties. They may make full use of them if they so desire. Failure in their part to comply with section 9 of the CHP Law is not a ground to make a complaint against draftsmen of the said Law. When the

> wording of the section is so clear and precise, they should have made applications to the Commissioner within four months after the commencement of the Law to purchase the houses as stated in that section. This Law came into operation on 13.01.1973. The 1st petitioner (but not the other petitioners) made his application to the Commissioner on 27.03.81, i.e., 8 years after the commencement of this Law."

The applicability of the provisions contained in Section 9 of the CHP Law was again considered in **Desmond De Perera and Others v Karunaratne, Commissioner for National Housing** ([1997 1 Sri L.R. 148), where G.R.T.D. Bandaranayake, J., had stated that,

> "Section 9 . . . creates the opportunity for the tenant to opt to purchase the house he lives in. So the section categorically requires him to do only one single thing – namely, to apply to the Commissioner for the purchase of a house. This he must do within the stipulated period of four months from the date of commencement of the law – which was 13.01.73."

In **Desmond Perera and Others** (supra) Court had held that the 1st petitioner had failed to comply with the provisions of section 9 of the CHP Law.

As could be clearly seen, the facts of the present appeal as regards the application made to the Commissioner of National Housing in terms of section 9 of the CHP Law, is similar to the facts in **Desmond Perera and Others** (supra). As stated earlier it is not disputed that the original respondent had made his application 6 years after the commencement of the said Law and therefore the respondent has not acted in terms of the time frame laid down in section 9 of the CHP Law.

The next issue that should be considered is as to whether the respondent had a legitimate expectation as was held by the Court of Appeal on the basis of the request made by the Commissioner of National Housing on 04.06.1997 to deposit a sum of Rs. 96,335/- (X_{16}).

Referring to the said letter dated 04.06.1997 (X_{16}), the Court of Appeal had held that although the application to purchase the house was made out of time and the respondent has no right to purchase the house under section 9 of the CHP Law, the Commissioner had used his discretion and had elected to sell the house to the tenant by requesting the respondent to pay the assessed value of the property, survey fees and the fees for the deed. Accordingly the Court of Appeal had proceeded on the premise that although the respondent had no legal right to purchase the property in terms of section 9 of the CHP Law, since the Commissioner had used his discretion to sell the house to the respondent, that exercise of discretion could confer legitimate expectation to the respondent. In deciding that the respondent had a legitimate expectation in purchasing the premises in question, the Court of Appeal had referred to the decision in **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra). Referring to the questions that had to be considered by the Court in that case, the Court of Appeal had held that on the application made to divest the premises in question, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the said premises. Thereafter the Commissioner had sought approval from the 4th respondent-respondent (hereinafter referred to as the 4th respondent) to divest the premises in question in terms of section 17A(1) on the basis of his recommendation dated 06.01.2003 (3R15). The Court of Appeal had further held that although the divesting order was published in the Gazette of 25.02.2003 (3R16), the Commissioner had failed to communicate his decision of divesting, to the respondent, before obtaining the approval of the Minister.

Section 17A(1) of the CHP Law refers to divesting the ownership of houses vested in the Commissioner and the section reads as follows:

> "Notwithstanding that any house is vested in the Commissioner under this Law, the Commissioner may, with the prior approval in writing of the Minister, by Order published in the Gazette, divest himself of the ownership of such house, and on publication in the Gazette of such Order, such house shall be deemed never to have vested in the Commissioner."

Learned President's Counsel for the appellant contended that the appellant's position was that the Trustees of the Temple had written several letters requesting the release of the premises in question to the Temple, as the premises in question is situated within the Courtyard of the Temple. Accordingly, the appellant had made an application in terms of section 17A(1) of the CHP Law to the Commissioner for divesting the ownership of the premises in question to the appellant.

On the basis of the said application, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the premises in question. The Commissioner thereafter had taken necessary steps to obtain the approval of the Minister in terms of section 17A(1) of the CHP Law and the divesting order was published in the Gazette on 25.02.2003 (3R16).

Learned President's Counsel for the appellant, referring to the aforementioned decision taken by the Commissioner, contended that as the respondent had not made any application to the Commissioner for the purchase of the premises in question within the time period prescribed in section 9 of the CHP Law, the Commissioner was not bound to communicate the decision of such divesting to the respondent.

It is to be noted that section 17A(1) of the CHP Law, does not stipulate a time limit within which an application must be made in terms of that section. However, the provision contained in section 9 of the CHP Law is different in that context, since a mandatory time frame is clearly prescribed in that section. Considering the provisions contained in sections 9 and 17A(1) of the CHP Law it is clear that, if a tenant is to make complaints against the Commissioner regarding these decisions, it would be necessary for him to follow the procedure laid down in the respective provisions of CHP Law, prior to making such complaints.

In **Desmond De Perera and Others v Karunaratne, Commissioner for National Housing** (supra), the tenants had failed to make applications to purchase the relevant houses within the time prescribed by section 9 of the CHP Law as in this appeal. Considering the question as to the need for the Commissioner to have notified the tenants, this Court had stated that,

> "**In the absence of applications to purchase houses tenanted by them in terms of the law, these appellants cannot be heard to complain of dereliction of duty by the 1st respondent**. **In the aforesaid situation, there is no administrative duty to notice the tenants of houses vested that those houses are to be divested**" (emphasis added).

Legitimate expectation cannot simply be taken in isolation. It has to be considered in the light of administrative procedures where the legal right or intent is affected. This position was carefully considered in **Attorney-General of Hong Kong v Ng Yuen Shiu** ([1983] 2 AC 629), where it was stated that,

> ". . . . When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

As stated earlier the Court of Appeal in this matter had referred to the decision in **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra) in support of the position that the respondent had a legitimate expectation of purchasing the premises and that a decision to divest would have affected him adversely.

In **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra) the tenants had submitted their applications in terms of the relevant applicable procedure, and considering the said position, the Court had correctly come to the finding that the said tenants had a legitimate expectation. When a party had tendered applications as per the provisions of the applicable statute, they do have a legitimate expectation to receive instructions thereafter as to the relevant procedure that they should follow on the basis of the relevant provisions and the applications they had made.

In **Goonawardene and Wijesooriya** (supra) the Court had carefully considered this position and had stated that,

> "What appears to have happened seems to be that the learned Judge of the Court of Appeal, having erroneously found as a fact that "Admittedly they (the appellants) have not made applications to purchase the premises under section 9 of the Law", proceeded to base himself on the decision in **Perera v Karunaratne** (supra) and held against the appellants. It appears that the facts in the above case (otherwise known as the Baur's case) were quite different to those in the instant case. In the Baur's case, the tenants of the Flats in question had not made applications to the Commissioner of National Housing to purchase any of the Flats (except for one who applied, not to the Commissioner, but to the Board of Review nearly 8 years after the stipulated four months) . . . . In the circumstances the Court rightly held that the tenants had no *locus standi* to question the validity of the Commissioner's decision
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> . . . . They had no legitimate expectation of becoming owners of the Flats. It is thus clear that Baur's case is quite different, and has no application to the two appeals before us."

In the present appeal as has been stated earlier, there was no valid application filed by the respondent in terms of section 9 of the CHP Law. The concept of legitimate expectation could apply only if there was a valid application filed by the respondent. Accordingly, the Court of Appeal was in error in holding that the respondent had a legitimate expectation.

Learned Counsel for the substituted respondents submitted that the respondent had made an application to divest the said premises and the Commissioner after holding an inquiry on 09.04.2002 had directed to divest the premises in question. The Commissioner had sought the approval of the 4th respondent to divest the premises in question in terms of section 17A(1) of the CHP Law. The Minister had granted his approval on 19.02.2003 (3R15a) and

the divesting order was published in the Gazette dated 25.02.2003 (3R16). The contention of the learned Counsel for the respondent was that the Commissioner had not communicated the said decision to the respondent and that had been a failure in observing the rules of natural justice.

As has been stated earlier, section 9 of the CHP Law clearly states that the application for the purchase of a surplus house must be made within four months from the date of commencement of the CHP Law. As has been stated earlier, it is not disputed that the respondent had not made an application within the stipulated time frame described in section 9 of the CHP Law. When the respondent had not complied with the relevant provisions, there had been no valid application before the Commissioner for the purchase of the house in question and in such circumstances, there is no requirement or a necessity for the Commissioner to consider such application or inform the respondent of such decision.

For the reasons aforesaid it is evident that the respondent was not entitled to a communication of the decision of the Commissioner of National Housing prior to its publication.

This appeal is accordingly allowed and the judgment of the Court of Appeal dated 21.08.2006 is therefore set aside.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.
I agree.

Judge of the Supreme Court

K. Sripavan, J.
I agree.

Judge of the Supreme Court