

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

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

**CA (Writ) Application No: 536/2010**

Sithy Masoona Mohideen,  
31, Moor Street,  
Kalutara.

**Petitioner**

1. J. Ratnayake,  
No. 17, Fareed Place,  
Colombo 4.

1(a) Samagita Ratnayake,  
Imperial Gardens Apartment,  
Apartment No. 304,  
70, Sukhumvit Soi 21,  
Bangkok 10110, Thailand.

1(b) Nandamal Ratnayake,  
18730, Nau Avenue, Porter Ranch,  
CA 91326, USA.

2. The Commissioner of National Housing,  
National Housing Department,  
Sethsiripaya, Battaramulla.

3. Dr. M.S. Jaldeen,
4. R.W.M.S.B. Rajapakse,
5. M. Sritharan,

Members of the Ceiling on Housing  
Property Board of Review,  
Norris Canal Road, Colombo 10.

**Respondents**

**Before:** Arjuna Obeyesekere, J

**Counsel:** A.L.M.Hidayathulla, P.C. with Ranga Marasinghe, Chintha Colonne and I. Wickremayake for the Petitioner

Kalinga Indatissa, P.C with Ranil Samarasuriya, Ms. Danushika Sigera and Ms. Arjanee Samaranayake for the Substituted 1A and 1B Respondents

Ms. Maithri Amerasinghe Jayatilake, State Counsel for the 2<sup>nd</sup> Respondent

**Written Submissions:** Tendered on behalf of the Petitioner on 11<sup>th</sup> January 2017 and 31<sup>st</sup> October 2018

Tendered on behalf of the Substituted Respondents on 11<sup>th</sup> January 2017 and 9<sup>th</sup> October 2018

Tendered on behalf of the 2<sup>nd</sup> Respondent on 30<sup>th</sup> November 2018

**Decided on:** 28<sup>th</sup> March 2019

**Arjuna Obeyesekere, J.**

When this application was taken up for argument on 19<sup>th</sup> July 2018, the learned Counsel appearing for both parties moved that this Court pronounce judgment on the written submissions that had already been filed and the additional written submissions that would be tendered on behalf of the parties.

The Petitioner, having obtained permission of this Court, has filed an amended petition seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the Order made by the 3<sup>rd</sup> – 5<sup>th</sup> Respondents on 7<sup>th</sup> July 2010;<sup>1</sup>
- b) A Writ of Mandamus directing the 2<sup>nd</sup> Respondent to terminate proceedings in Inquiry No. CH/1A/42/51459/219.

The Act of Parliament that this Court is called upon to consider in determining the issue that arises in this application is the Ceiling on Housing Property Law No. 1 of 1973, as amended (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. Section 2 specifies the maximum number of houses which may be owned by an individual who is a member of a family as well as an individual who is not a member of a family. Section 2 further sets

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<sup>1</sup> By the said Order, the 3<sup>rd</sup> – 5<sup>th</sup> Respondents who are the members of the Board of Review appointed under the Ceiling on Housing Property Law, have held that the 2<sup>nd</sup> Respondent should in the first instance allow the substitution of the 1<sup>st</sup> Respondent, in place of his mother and the Petitioner in place of her husband and thereafter inquire into the merits of the application pending before the 2<sup>nd</sup> Respondent.

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<sup>2</sup> 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 Commissioner, unless the tenant of such house or any person who may under section 36 of the Rent Act succeed to the tenancy of such

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<sup>2</sup> The reference to Commissioner is to the Commissioner of National Housing, the 2<sup>nd</sup> Respondent in this application.

house, 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 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 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.

Section 9 as well as Section 10 of the CHP Law refers to Section 36 of the Rent Act, which 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. 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 purchase a house in terms of the CHP law to the heirs of such tenant, in the event of the death of the tenant.

It is clear that the above provisions contained in Sections 8, 9, 10, 11 and 12 of the CHP Law deals with houses which are in excess of the permitted number of houses.

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".<sup>3</sup>

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 makes it clear that Section 13 does not relate to the houses which are in excess of the permitted number of houses. The effect of Section 13 has been considered by this Court in Kathiressan v. Sirimevan Bibile, Chairman, Board of Review, Ceiling on Housing Property Law and others<sup>4</sup>, where this Court, having considered the provisions of the Act, 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

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<sup>3</sup> 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.

<sup>4</sup> 1992 (1) Sri LR 275.

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 policy also involves the vesting of such house without the consent of the landlord.”<sup>5</sup>

It is further observed that Section 13 does not contain a reference to Section 36 of the Rent Act. Thus, a person cannot be considered as a tenant, for the purposes of making an application under Section 13 by virtue of being the surviving spouse or child of a tenant.

This aspect was explained by the Supreme Court in Biso Menika vs Cyril De Alwis and others<sup>6</sup> as follows:

“The relationship of landlord and tenant is constituted by the tenant recognising the new owner as his landlord by attorning to him. If he refuses to attorn he forfeits the tenancy and becomes a trespasser and is not entitled to make or maintain any application under section 13 of the Law.

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<sup>5</sup> 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.

<sup>6</sup> 1982 (1) Sri LR 368.

It is fundamental that the relationship of tenant and landlord should subsist between the applicant under section 13 of the Law and the respondent from whom the house is sought to be purchased.”<sup>7</sup>

Through the Ceiling on Housing Property (Amendment) Act No. 18 of 1976, the legislature introduced many amendments to the CHP Law including Section 13A. Similar to Section 13, the new Section 13A too does not relate to the surplus houses in excess of the permitted number of houses nor does it contain a reference to Section 36 of the Rent Act.

Section 13A(1) reads as follows:

“Where the owner of a house-

- (a) has left Sri Lanka, and has either renounced citizenship of Sri Lanka or has ceased to be a citizen of Sri Lanka under the Citizenship Act; or
- (b) has been residing abroad for a continuous period of ten years otherwise than as an employee of the Government of Sri Lanka or of any foreign government or of any international institution; or
- (c) **has left Sri Lanka for the purpose of settling abroad;** or
- (d) is not in existence or is not known or cannot be traced,

the tenant of such house may apply to the Commissioner for the purchase

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<sup>7</sup> Supra page 375.

of such house."

Very significantly, Section 13A(2) of the CHP Law imposes the following additional requirements that a tenant making the application under Section 13A(1) to purchase a house must prove to the satisfaction of the 2<sup>nd</sup> Respondent:

- (a) That he has been the tenant of such house for not less than five years prior to the date of such application; and
- (b) That he was not during the period commencing on January 13, 1973, and ending on the date of such application, the owner of a house, for the ejectment of the tenant of which, no action or proceeding may be instituted under the Rent Act on the ground that such house is required for occupation as a residence for the landlord of such house or for any member of the landlord's family.

In terms of Section 13A(2), the Commissioner is required to publish a notice in the Gazette and in one Sinhala, Tamil and English newspapers circulating in Sri Lanka, stating that an application has been made under subsection (1) for the purchase of such house, only upon being satisfied of the matters set out in Section 13A(2) of the CHP Law.

Having set out the relevant legal provisions, this Court will now proceed to briefly examine the facts that are relevant to the determination of this matter.

This application relates to the house constructed on premises No. 17, Fareed Place, Colombo 4 (the said house). The said house had initially been owned by P. W. Gunewardena who had gifted the said house to his son, J. W. Gunewardena in 1970. Mrs. P.K.Ratnayake, the mother of the 1<sup>st</sup> Respondent had obtained the said house on rent from P. W. Gunewardena in 1945 and had continued to be the tenant under J. W. Gunewardena.

On 18<sup>th</sup> November 1985, Mrs. Ratnayake had made an application to the 2<sup>nd</sup> Respondent, Commissioner of National Housing, in terms of Section 13A(1) of the CHP Law seeking to purchase the said house on the basis that the owner of the house, J.W.Gunewardena was residing abroad. While this application was pending before the 2<sup>nd</sup> Respondent, J.W.Gunewardena had sold the said premises to Aboobacker Abu Haja Mohideen in August 1990. The Petitioner is the wife of Mohideen, who passed away in December 2000. Although not in issue, this Court is of the view that the sale of the said house would not have affected the application of Mrs. Ratnayake and that in any event, the said application could have been considered under Section 13 of the CHP law.

It is admitted between the parties that the 2<sup>nd</sup> Respondent published the notice referred to in Section 13A(2) of the CHP Law in the Ceylon Daily News of 5<sup>th</sup> October 1990 and that in response to the said notice, and as required by Section 13(4) of the CHP Law, Aboobacker objected to the application made by Mrs. Ratnayake. It must be observed that no objection was taken by Mrs. Ratnayake to the sale of the said house by J.W.Gunewardena to Aboobacker.

It is not in dispute that the 2<sup>nd</sup> Respondent, having held an inquiry into the said objection raised by Aboobacker, had made an order on 12<sup>th</sup> August 1993

recommending that the said house be vested in the 2<sup>nd</sup> Respondent, in terms of Section 13A(5) of the CHP Law.<sup>8</sup> Aboobacker, who by then was the owner of the said house, had lodged an appeal with the Board of Review against the said order, in terms of Section 39 of the CHP Law. The Board of Review, having heard the appeal of Aboobacker, by its order delivered on 27<sup>th</sup> August 1994, had set aside the said decision of the 2<sup>nd</sup> Respondent and directed the 2<sup>nd</sup> Respondent to conduct a fresh inquiry.

The 2<sup>nd</sup> Respondent had thereafter commenced the inquiry *de-novo* on 28<sup>th</sup> September 1994. Although Aboobacker had been represented at this inquiry at the early stages thereof, he had been absent and unrepresented on 15<sup>th</sup> February 1995, when the 2<sup>nd</sup> Respondent had decided to act in terms of Section 13A(2) of the CHP Law and called for written objections to the application of Mrs. Ratnayake. As there were no objections, the 2<sup>nd</sup> Respondent had proceeded to recommend to the Minister to vest the said house in the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent had thereafter conveyed the said house and premises to Mrs. Ratnayake by a Deed of Transfer on 3<sup>rd</sup> September 1996, upon the payment of a sum of Rs. 844,015. Mrs. Ratnayake had transferred the said house and premises to her son, the 1<sup>st</sup> Respondent, by a Deed of Transfer on 23<sup>rd</sup> January 1997. Mrs. Ratnayake had passed away on 9<sup>th</sup> July 1999.

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<sup>8</sup> Section 13A(5) of the Act requires the Commissioner to submit a report to the Minister on the application under Section 13A(1) after considering the written objections, if any, made under Section 13A(3). Section 13A(6) of the Act specifies that the Minister may after considering the report made to him under Section 13A(5), and if he is satisfied having regard to all the circumstances of the case that the application should be allowed, by Order published in the Gazette vest such house in the Commissioner with effect from such date as may be specified therein.

Ideally, all issues relating to the application by Mrs. Ratnayake under Section 13A(1) of the CHP Law should have ended upon the execution of the deed of transfer in her favour. However, this was not to be.

In July 2003, the Petitioner had filed Writ Application No. 920/03 in this Court, seeking a Writ of Certiorari to quash the decision of the Commissioner to vest the said premises and to cancel the Deed of Transfer executed in favour of Mrs. Ratnayake. Although this Court had dismissed this application, the Supreme Court by its judgment delivered on 13<sup>th</sup> September 2005<sup>9</sup>, had held as follows:

"We grant leave and take the matter up for hearing. We find that according to P14(b), order has been made by the Board of Review to hold a fresh inquiry as no notices of the inquiry have been tendered to the Petitioner. An inquiry had thereafter been instituted and postponed for 15.02.98. No inquiry however has been held on 15.02.98. We are of the view that this matter ought to be referred back to the Commissioner of National Housing for inquiry in terms of P14(b) dated 27.08.94. Subject to above, appeal is allowed."<sup>10</sup>

This Court reiterates that by the time Writ Application No. 920/03 was filed in this Court, a deed of transfer had been executed in favour of the 1<sup>st</sup> Respondent. The effect of the judgment of the Supreme Court would be that all steps taken after the filing of the application by Mrs. Ratnayake, including the execution of the aforementioned deed of transfer are deemed to have

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<sup>9</sup> SC Special Leave to Appeal Application No. 75/2005; SC Minutes of 13<sup>th</sup> September 2005.

<sup>10</sup> This Court observes that the reference to P14(b) is a reference to the decision of the Board of Review dated 27<sup>th</sup> August 1994 (vide paragraph 21 of the petition in CA (Writ) Application No. 920/2003).

been declared invalid, for the reason that having a fresh inquiry to determine the application of Mrs. Ratnayake under Section 13A of the CHP Law would otherwise not serve any purpose.

By the time the inquiry re-commenced before the 2<sup>nd</sup> Respondent in January 2006, Mrs. Ratnayake as well as Aboobacker had passed away. As a result, the successors of both parties had raised objections with regard to the *locus standi* of the other party but the inquiry had proceeded on the basis of an order made by the 2<sup>nd</sup> Respondent on 17<sup>th</sup> December 2007 that the objections with regard to *locus standi* would be dealt with at the end of the inquiry.

However, a further application had been made on 20<sup>th</sup> February 2009 by the Counsel for the Petitioner that Mrs. Ratnayake should be substituted since she has passed away. When the application for substitution was made, the Petitioner had objected to the said substitution, which resulted in the order delivered by the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> June 2009 that substitution was not required. On an appeal lodged by the Petitioner in terms of Section 39 of the CHP Law, the Board of Review, by its Order delivered on 7<sup>th</sup> July 2010 had allowed the substitution of the 1<sup>st</sup> Respondent in place of Mrs. Ratnayake and the substitution of the Petitioner in place of her late husband, Aboobacker and directed the 2<sup>nd</sup> Respondent to hear the application on its merits. Dissatisfied with the said Order, the Petitioner filed this application, invoking the Writ jurisdiction of this Court, seeking a Writ of Certiorari to quash the said Order.

The question that this Court is therefore called upon to answer in this application is whether a tenant who makes an application in terms of Section

13A of the CHP Law can be substituted by the heir of such tenant, upon the passing away of the tenant.

As observed earlier, Section 9 of the CHP Law provides for the tenant to purchase the house that the tenant is living in, provided the said house is in excess of the permitted number of houses that an individual may own in terms of the CHP Law. The intention of the legislature to extend the right of the tenant making an application under Section 9 of the CHP Law to his heirs, in the event of the death of the tenant has been clearly laid down by having a clear reference to the provisions of Section 36 of the Rent Act that upon the death of the tenant, the surviving spouse or child shall be deemed to be a tenant.

Section 13 and 13A of the CHP Law, which applies in respect of the permitted number of houses that may be owned by an individual, does not have a reference to Section 36 of the Rent Act. Section 13A, which is the section under which Mrs. Ratnayake made the application, was introduced by the Amendment Act in 1976. This Court is of the view that the omission of Section 36 of the Rent Act from Section 13A of the CHP Law is not accidental but deliberate. This is clearly borne out when one considers that in terms of Section 13A(2) of the CHP Law, the person making the application as a tenant must prove that he has been the tenant of such house for not less than 5 years prior to the date of such application. Such a restriction, which is clearly inconsistent with Section 36 of the Rent Act, is not found even in Section 13, thereby demonstrating the clear intention of the legislature to exclude the heirs of such tenant from an appointment under Section 13A. Thus, this Court

is of the view that the right conferred under Section 13A is personal to the tenant.

This Court has examined the Order of the 3<sup>rd</sup> – 5<sup>th</sup> Respondents and find that the Board, having held that, ‘although the said Law does not spell out any provision as to substitution in place of a deceased party,’ had proceeded to hold that, ‘the tribunal should resort to the general principles of civil procedure as embodied in the Civil Procedure Code’. This Court is of the view that the Board of Review failed to appreciate that the right to make an application under Section 13A of the CHP Law is personal to the applicant tenant and that the rights of the applicant crystallise only upon a vesting order being made by the Commissioner. Thus, where the applicant passes away prior to such a vesting order being made, no rights pass to the heirs for the reason that no rights had accrued to the applicant at that point of time. Furthermore, this Court is of the view that the Board of Review erred by resorting to a procedural provision without considering the substantive provision of law. In these circumstances, this Court holds that the Board of Review acted outside its jurisdiction when it permitted the 1<sup>st</sup> Respondent to be substituted in place of his mother, Mrs. Ratnayake.

The right of an heir of a tenant to be substituted in place of a deceased tenant who had made an application under Section 13 of the CHP Law was considered by the Supreme Court in Leelawathie vs Manel Ratnayake.<sup>11</sup> As observed earlier, Section 13 as well as Section 13A applies in respect of the permitted number of houses owned by an individual and neither Section has made any reference to Section 36 of the Rent Act. Hence, this Court would now consider

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<sup>11</sup> 1998 (3) Sri LR 349.

whether this judgment of the Supreme Court would be relevant to a determination of the issue in this application.

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 him for the purpose of sale to the tenant. On an appeal by the owner of the house under Section 39 of the 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 restored the order of the Board of Review but the judgment was appealed against 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 Section 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 2<sup>nd</sup> 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<sup>12</sup> expressed himself in the following terms: 'Under section 13 an application has to be made under the law for

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<sup>12</sup> SC Appeal No. 15/79; SC Minutes of 19<sup>th</sup> September, 1980.

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<sup>13</sup> 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<sup>14</sup>, wherein Kulatunga, J<sup>15</sup> held (1) that 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-petitioner-respondent may well be different from the position of the original applicant.

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

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<sup>13</sup> Section 17.

<sup>14</sup> 1996 (2) Sri LR 282.

<sup>15</sup> When dealing with an application under Section 13.

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.

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 completely 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 in Section 13 and 13A to a reference to an heir. Furthermore, in exercising that discretion, the Commissioner is required to consider the equities of the case.<sup>16</sup>

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<sup>16</sup> What is meant by 'equities' has been explained by Sarath N. Silva J (as he then was) in *Kathiressan v. Sirimevan Bibile, Chairman, Board of Review, Ceiling on Housing Property Law and others (supra)* 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

The equities when considering an application of a tenant will be quite different to the equities that would apply when considering whether the heir to a tenant should be permitted to purchase the house. In the above circumstances, this Court is clearly inclined to follow the decision of the Supreme Court in Leelawathie's case.

The learned State Counsel appearing for the 2<sup>nd</sup> Respondent drew the attention of this Court to the judgment of the Supreme Court in Cassim vs Weerawardene<sup>17</sup> and sought to distinguish the present application from the facts in Leelawathie's case. 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 20<sup>th</sup> 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 tenants. This decision was affirmed by the Board of Review. Mihilar died on 27<sup>th</sup> April 2000 and his legal heir was his widow. On 8<sup>th</sup> May 2000, the Valuation Board notified the parties of the 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.

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more than the normal requirement in Administrative Law that where a discretion is vested in an authority, it should be exercised reasonably.'

<sup>17</sup> 2002 (1) Sri LR 316.

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.’

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.”

The above paragraph makes it very 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. However, the facts in the instant application are very much similar to

Leelawathie and different to Cassim. Even though by the time that Mrs. Ratnayake passed away in 1999, the house had already been sold to her by the 2<sup>nd</sup> Respondent and she in turn had gifted the said house to her son the 1<sup>st</sup> Respondent, the effect of the judgment of the Supreme Court in SC Special LA No. 75/2005 was to nullify or set aside everything that had taken place after the application was lodged by Mrs. Ratnayake under Section 13A on 18<sup>th</sup> November 1985. On this basis, at the time of the death of Mrs. Ratnayake, her application was still pending and neither Mrs. Ratnayake nor the 1<sup>st</sup> Respondent had any proprietary rights in respect of the said house, thereby bringing this case within the facts and the reasoning in Leelawathie and outside Cassim. For these reasons, this Court is not in agreement with the submission of the learned State Counsel.

The learned State Counsel also drew the attention of this Court to the decision of the Supreme Court in People's Bank vs Atapattu<sup>18</sup>. This Court has examined the said judgment and find that the Supreme Court was clearly influenced by the reference in Section 71 of the Finance Act No. 11 of 1963 to the definition of 'specified heir' when it held that the right to make an application for redemption is not personal to the original transferor. As discussed earlier, Section 13 and 13A of the CHP Law clearly does not recognize an heir and hence, the judgment in People's Bank vs Atapattu has no relevance to this application.

The learned President's Counsel for the 1A and 1B Substituted Respondents has taken up the objection that the Petitioner has no *locus standi* to participate at the inquiry before the 2<sup>nd</sup> Respondent or to make this application to this

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<sup>18</sup> 1997 (1) Sri LR 208.

Court. The Petitioner is the wife of Aboobacker who, by virtue of having purchased the said house in 1990, had objected to the application of Mrs. Ratnayake and participated at the inquiry held before the 2<sup>nd</sup> Respondent, without any objection being taken by Mrs. Ratnayake. On his death, the said house and property would devolve on his heirs and spouse and therefore, this Court is of the view that the Petitioner has the *locus standi* to institute this action.

Taking into consideration all the circumstances of this case, this Court is of the view that the Board of Review acted outside its jurisdiction when it permitted the substitution of the 1<sup>st</sup> Respondent in place of his mother, Mrs. Ratnayake. The 3<sup>rd</sup> – 5<sup>th</sup> Respondents must understand correctly the law that regulates its decision making power and must give effect to it. A failure to do so renders the said decision illegal. This Court accordingly issues the Writ of Certiorari prayed for in paragraph (b) of the prayer to the petition, quashing the Order made by the Board of Review on 7<sup>th</sup> July 2010. This Court holds that the effect of the Writ of Certiorari being issued is that there is no valid application under Section 13A of the CHP Law pending before the 2<sup>nd</sup> Respondent and that the 2<sup>nd</sup> Respondent is *functus*.

This Court further holds that the heirs of Mrs. Ratnayake are entitled to a refund of the monies paid by her to the 2<sup>nd</sup> Respondent. Therefore, this Court directs the 2<sup>nd</sup> Respondent to refund all monies paid by Mrs. Ratnayake to her heirs within three months from today. If however, the monies have been paid by the 2<sup>nd</sup> Respondent to the Petitioner or her late husband Aboobacker, the Petitioner shall, within three months from today, refund to the 2<sup>nd</sup> Respondent all sums of money so paid with legal interest calculated from the date of such

payment until the date of this judgment to enable the 2<sup>nd</sup> Respondent to pay such monies to the heirs of Mrs. Ratnayake.

This Court makes no order with regard to costs.

**Judge of the Court of Appeal**