

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

In the matter of an application for Special Leave to  
Appeal.

R. A. Senanayake  
No. 43, Gregory's Road,  
Colombo 7.

**1<sup>st</sup> Respondent-Appellant**

S. C. Appeal No. 52/2003  
S. C. (Spl) L. A. No. 26/2003  
C. A. No. 418/2001  
C. H. P. B/R No. 2660  
C. N. H. CH/0/1033

**-Vs-**

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

**Petitioner-Respondent**

2. The Commissioner for National Housing  
CHP Branch, Sethsiripaya,  
Battaramulla.

3. G. H. A. Suraweera

4. C. R. S. Gunawardena

5. K. Bandara

6. A. Gooneratne

All members of C. H. P. Board of Review,  
Colombo 10.

**Respondent-Respondents**

BEFORE : Dr. Shirani A. Bandaranayake, J.,  
N. G. Amaratunga, J., and  
Saleem Marsoof, P.C., J.

COUNSEL : Romesh de Silva, P.C., Rohan Sahabandu, and Sugath  
Caldera for the 1<sup>st</sup> Respondent - Appellant.

L. C. Seneviratne, P.C., and Kirthi Sri Gunawardena for  
the Petitioner-Respondent.

Anil Gooneratne, Deputy Solicitor General for 2<sup>nd</sup> to 6<sup>th</sup>  
Respondent-Respondents.

ARGUED ON : 06<sup>th</sup> February 2007

WRITTEN SUBMISSIONS : 13<sup>th</sup> March 2007

DECIDED ON : 29<sup>th</sup> January 2009

**MARSOOF, J.**

Premises No. 43 2/2, Gregory's Road, Colombo 7, is a housing property of which the Petitioner-Respondent (hereinafter referred to as the 'Respondent') was the tenant on 13<sup>th</sup> January 1973, which was the date on which the Ceiling on Housing Property Law No. 1 of 1973 came into operation. It appears from the pleadings that the 1<sup>st</sup> Respondent-Appellant R. A. Senanayake, who is also known as Rohan Senanayake, (hereinafter referred to as the Appellant) was the owner of the said premises along with four other houses bearing Nos. 43, 43 1/1, 43 1/2, and 43 2/1 of Gregory's Road, Colombo 7. Since at the relevant time the Appellant was married but did not have any children, in terms of Section 2(1) of the Ceiling on Housing Property Law, he was entitled to own (as the "permitted number of houses") only two out of the aforesaid five houses. Accordingly, having made the declaration dated 9<sup>th</sup> June 1973 under Section 8 of the said Law, he opted to retain the ownership of the houses bearing assessment Nos. 43 and 43 1/1, and the remaining housing property bearing assessment Nos. 43 1/2, 43 2/1 and 43 2/2, Gregory's Road, Colombo 7 (hereinafter sometimes referred to as the 'surplus houses'), vested in the Commissioner for National Housing under Section 11 of the Ceiling on Housing Property Law. The present appeal relates to one of these surplus houses, namely premises No. 43 2/2, Gregory's Road, Colombo 7.

The bone of contention in this appeal is the legality and validity of the order to divest the said house bearing assessment No. 43 2/2, Gregory's Road, Colombo 7, (hereinafter sometimes referred to as the 'house in question'). The salient facts relating to this appeal are as follows: Pursuant to an application made on behalf of the Appellant, the Commissioner for National Housing made the recommendation dated 5<sup>th</sup> August 1985 (A11) to divest the house in question subject to the approval of the Minister. Thereafter, having presumably obtained the approval of the Minister, the Commissioner made the order dated 20<sup>th</sup> August 1985 under the provisions of Section 17A (1) of the Ceiling on Housing Property Law, which was published in the Government Gazette bearing No. 365 of 30<sup>th</sup> August 1985 (A12), purporting to divest the ownership of the said house. The said order was affirmed on appeal by the Ceiling on Housing Property Board of Review by its order dated 14<sup>th</sup> February 2001 (A18). The said recommendation and orders were challenged by the Respondent in writ proceedings commenced in the Court of Appeal which resulted in the order of that Court dated 11<sup>th</sup> February 2002 by which the aforesaid recommendation and order of the Commissioner for National Housing marked A11 and A12 and the order of the Ceiling on Housing Property Board of Review marked A18 were quashed by the grant of a mandates in the nature of *certiorari*. The main ground on which the Court of Appeal decided to quash the above mentioned recommendation and orders was that the Commissioner for National Housing acted without jurisdiction in divesting the house in question bearing No. 43 2/2, Gregory's Road, Colombo 7, on account of the birth of a child to the Appellant on 1<sup>st</sup> June 1977, when already by the order dated 1<sup>st</sup> March 1979 (A9) and the order published in the Government Gazette bearing No. 29 of 23<sup>rd</sup> March 1979 (A 10) another surplus house bearing assessment No. 43 2/1 had been divested in respect of the same child.

Special leave to appeal from the aforesaid decision of the Court of Appeal was granted by this Court on 14<sup>th</sup> July 2003 on the following questions:-

Question suggested by learned President Counsel for Appellant

- (1) Did the Court of Appeal fail to duly, properly and correctly consider the law in relation to the facts arising from the application of the Appellant for divesting of the premises?

Questions suggested by learned President Counsel for Respondent

- (2) Has the Commissioner for National Housing by Order A9 already made a decision to divest premises No. 43 2/1, Gregory's Road on account of the birth of a child to the Appellant?
- (3) Is the Order A11 also divesting of the premises No. 43 2/2, Gregory's Road, in respect of the birth of the same child?

In order to place these questions in context, it is necessary to refer to the rather complex circumstances relating to this appeal in chronological sequence. In doing so, it is also necessary to refer to the relevant provisions of the Ceiling on Housing Property Law.

As stated in its preamble, the objective of the Ceiling on Housing Property Law, was to regulate the ownership, size and cost of construction of houses and to provide for matters incidental thereto or connected therewith. Section 2 of the Law provided a mechanism for computing the permitted number of houses, which is the maximum number of houses an individual or a body of persons, corporate or unincorporate, may own. Sections 3 to 7 of the Law contained elaborate provisions for the determination of the permitted number of houses in certain special situations, and Section 8 made provision for the making of declarations by persons or bodies of persons who owned houses in excess of the permitted number of houses. Section 8(5) expressly provided that-

"Any house the ownership of which is not proposed to be retained in terms of any declaration made under this section, and in the case of a determination made by the Commissioner under subsection (3), any house the ownership of which is not retained as a result of such determination, is hereinafter referred to as a 'surplus house'."

It is common ground that at the time the Ceiling on Housing Property Law came into operation the Appellant was a married person who did not have any dependant children. Accordingly, in terms of Section 2(1) of the Law, the permitted number of houses the Appellant could lawfully own was two. It is also apparent from the declaration made by him under Section 8 of the said Law, that the Appellant had opted to retain the ownership of houses bearing Nos. 43 and 43 1/1, and that the remaining housing property bearing Nos. 43 1/2 and 43 2/1 and 43 2/2 of Gregory's Road, Colombo 7, became surplus houses. Under the Ceiling on Housing Property Law, an owner of one or more surplus house may dispose of such surplus house or houses within the grace period allowed for this purpose by the said Law. It has been submitted on behalf of the Appellant that the surplus houses of the Appellant were flats forming parts of an old building, and that they could not be disposed of within the time permitted by law due to the delay in registering the relevant condominium plan in terms of the Apartment Ownership Law No. 11 of 1973 and owing to

the existence of certain mortgages which had to be discharged. Learned President's Counsel for the Appellant has submitted that in view of this delay, the Appellant was compelled to seek further time from the Commissioner for National Housing to dispose of the surplus houses, and that the letters dated 29<sup>th</sup> June 1974, 16<sup>th</sup> December 1974, 7<sup>th</sup> February 1975 and 15<sup>th</sup> December 1975 were written by, or on behalf of, the Appellant appealing for further time. However, there was another, and in my view insurmountable, reason for the failure to dispose of the house in question, namely the fact that an application made by the Respondent to the Commissioner to purchase the house under Section 9 of the Ceiling on Housing Property Law was pending before the Commissioner.

A tenant of a surplus house was entitled to apply to the Commissioner to purchase the said house under Section 9 or Section 13 of the Ceiling on Housing Property Law. Section 9 of the Law expressly provided that-

"The tenant of a surplus house or any person who may succeed under section 36 of the Rent Act, No. 7 of 1972, 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 common ground that as determined by this Court in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263 at page 272 in proceedings to which the present Appellant and Respondent were parties, the Respondent as the lawful tenant of premises No 43 2/2, Gregory's Road, Colombo 7, had duly applied to purchase the house in question under and in conformity with Section 9 of the said Law.

Although by Section 10 of the Ceiling on Housing Property Law, an individual owner of houses in excess of the permitted number could have disposed of such houses within 12 months from 13<sup>th</sup> January 1973 being the date of commencement of the said Law, the Appellant was not entitled to do so as the Respondent, who was the Appellant's tenant of the said house, had already made an appeal to purchase the same. The relevant portion of Section 10, as it stood prior to the amendment of the said Law by Law No. 34 of 1974, is quoted below:-

"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 *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.*" (Emphasis added)

The grace period of twelve months granted by the Law to an individual owner for the disposal of surplus houses ended on 13<sup>th</sup> January 1974, and any surplus house not disposed of by that date would have vested on the Commissioner on that date in terms of Section 11(1) of the Ceiling on Housing Property Law. This Section, in its original version, provided as follows:-

"Any house owned by any person in excess of the permitted number of houses which has not been disposed of within a period of twelve months of the date of commencement of this Law shall *on the termination of such period vest in the Commissioner.*

Provided, however, that where the Commissioner, on application made to him by the owner of the house, is satisfied that the failure to dispose of the house was due to circumstances beyond the control of the owner, the Commissioner may, by Notification published in the Gazette, defer the vesting of the house for a further period not exceeding twelve months.”(Emphasis added)

There is no evidence of any application having being made by the Appellant prior to 13<sup>th</sup> January, 1974, seeking the deferment of the vesting of the surplus houses, nor is there any evidence of any Notification published in the Gazette relating to the said house in terms of the proviso to Section 11(1). The letters dated 29<sup>th</sup> June 1974, 16<sup>th</sup> December 1974, 7<sup>th</sup> February 1975 and 15<sup>th</sup> December 1975 by which extension of time was sought to dispose of the said houses, could not have prevented the ownership of the surplus houses vesting on the Commissioner on 13<sup>th</sup> January 1974 in terms of Section 11(1) of the Law.

Learned President’s Counsel for the Appellant, has however submitted that in view of the amendment to Section 10 of the aforesaid Law introduced in 1974 by the Ceiling on Housing Property (Amendment) Law No. 34 of 1974, the grace period for the disposal of a surplus house should be computed from the date the Commissioner communicated to the Appellant his determination regarding the maximum number of houses that may be owned by the latter. He submitted that according to folio 34 of the file maintained by the National Housing Department, the Commissioner’s determination was communicated to the Appellant on 17<sup>th</sup> February 1976, and accordingly, the Appellant could have disposed of the surplus house *within twelve months from the date of such communication*, namely on or before 17<sup>th</sup> February 1977, and that on 26<sup>th</sup> July 1976 the application marked 1R was made on his behalf seeking permission to do so.

An examination of Section 10 of the Ceiling on Housing Property Law as amended by Law No. 34 of 1974 exposes the fallacy of this submission insofar as it concerns the Appellant, who is an individual, and not a body of persons. As amended, the Section reads as follows:

“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*, and if such person is a body of persons, within a period of six months of the date on which the determination under this Law by the Commissioner or as the case may be, by the Board of Review, of the maximum number of houses that may be owned by such body was communicated to such body, or where such body applies for, and is granted an extension of time by the Commissioner, within six months from November 1, 1974, 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 house, has made application with simultaneous notice to the owner for the purchase of such house.”

It is relevant to note that the amendment was not intended to bring about any change in the grace period applicable to individual owners of surplus houses, who had only twelve months from the date the Ceiling on Housing Property Law came into force, to dispose of one or more of their surplus houses. The amendment only effected a change in the grace period applicable to a body corporate, by permitting a body of persons to dispose of any surplus house within a period of six months from the date of the communication of the determination of the Commissioner or the Board of Review in regard to the maximum

number of houses that may be owned by such body of persons. There is no way in which an individual owner such as the Appellant could claim a longer grace period than the one year period ending on 13<sup>th</sup> January 1974 for disposing a surplus house or suffering its vesting in the Commissioner.

It is also significant that by the affidavit dated 26<sup>th</sup> July 1976 filed with the application marked 1R, the father of the Appellant, Chandra Upali Senanayake, who held his power of attorney, requested the Commissioner to divest the surplus houses to enable him "to offer same to present Tenants of the said premises." This application was refused by the Commissioner, and his decision was affirmed on appeal by the Ceiling on Housing Board of Review. It is inconceivable that an application to have the said houses divested would have been made at that point of time had the ownership thereof not vested on the Commissioner on 13<sup>th</sup> January 1974. The Appellant's father has in fact in his affidavit dated 26<sup>th</sup> July 1976 specifically admitted that the ownership of the said houses, including the house in question, vested on the Commissioner on 13<sup>th</sup> January 1974. I therefore hold that the ownership of the said surplus houses did vest in the Commissioner on 13<sup>th</sup> January 1974.

This brings me to the first question on which special leave was granted, namely, whether the Court of Appeal had failed to duly, properly and correctly consider the law in relation to the facts arising from the application of the Appellant to have the house in question divested. According to the Appellant, an application dated 20<sup>th</sup> October 1978 (A8) was made on his behalf by his father Chandra Upali Senanayake, as his Attorney, seeking to have all three surplus houses, namely, premises Nos. 43 1/2, 43 2/1 and 43 2/2, Gregory's Road, Colombo 7, divested on the basis that the Appellant was entitled to own one more house in consequence of the birth of a child to him in 1977, and that in view of certain amendments made to the Ceiling on Housing Property Law by amending Law No. 34 of 1974, he was also entitled to further time to dispose of the other two surplus houses. The relevant portion of paragraph 6 of the said application addressed to the Commissioner marked A8 is quoted below:-

"I am now requesting you to divest by Gazette Notification, premises Nos. 43 1/2, 43 2/1 and 43 2/2, of which I am entitled to retain one flat under Section 11(3) of the Ceiling on Housing Property Law, as I have now a child of one year's age. I will dispose of the other two flats within one year of the date of publication of the divesting order in the Gazette. Therefore, I request time of one year from the date of publication of the divesting notice in the Gazette."

According to the Respondent, this was not the only application made to the Commissioner by or on behalf of the Appellant in this connection, and he has produced with his writ application filed in the Court of Appeal a copy of an order made by the Commissioner for National Housing on 5<sup>th</sup> August 1985 marked A11, allegedly on a subsequent application made by or on behalf of the Appellant, a copy of which application it is alleged by the Respondent, was never served on him. Neither the Appellant nor the Respondent-Respondents have made available a copy of the subsequent application to this court, but it appears from the inquiry notes contained in A11 that Mr. Nimal Senanayake, P.C who appeared for the Respondent at the inquiry held in that connection on 19<sup>th</sup> June 1985 had emphasized the importance of perusing the said application. It is important to note in this context, that the learned President's Counsel had at the very commencement of the said inquiry, pointed out that this was necessary "firstly because the application will give the precise grounds for requesting the divesting orders, and secondly because there had been

an order and an appeal on an application already with regard to divesting.” This appeal for greater transparency appears to have fallen on deaf years, and none of the parties have been able shed any light in regard to the question whether there had been any fresh application for divesting as alleged by the Respondent, or whether it was the continuation of the same proceedings commenced by A8.

Be that as it may, the aforesaid inquiry led to the impugned order of the Commissioner dated 20<sup>th</sup> August 1985 that was published in the Government Gazette bearing No. 365 of 30<sup>th</sup> August 1985 (A12). By the said order, the ownership of the house in question, namely, premises No. 43 2/2 Gregory’s Road, Colombo 7 was sought to be divested purportedly under the powers vested in the Commissioner under Section 17A(1) of the Ceiling on Housing Property Law. It is this order that was affirmed by the Board of Review by its order dated 14<sup>th</sup> February 2001 (A18), leading to the writ proceedings filed by the Respondent to have the said orders quashed.

The learned President’s Counsel for the Appellant has submitted that the Court of Appeal, in quashing the impugned orders made by the Commissioner and the Board of Review, has altogether overlooked the provisions of Section 17A of the Ceiling on Housing Property Law and has assumed erroneously that the only provision under which the Appellant can be afforded relief is Section 11(3) of the said Law. It is therefore necessary to examine the application or applications made by, or on behalf of, the Appellant in the light of Section 11(3) of the Law, which was expressly referred to in the application A8, and Section 17A which was introduced into the Law in 1974, of which no specific mention was made in the said application. Section 11(3) of the Ceiling on Housing Property Law provided that-

“Where on any day after the date of commencement of this Law any person becomes entitled to own any house in excess of the permitted number of houses as on such date, he shall so notify to the Commissioner who may, if any house owned by such person and vested in the Commissioner under the provisions of this Law continues to be so vested at the time of such notification, by Order published in the Gazette, divest himself of the ownership of such house, and on the publication in the Gazette of such Order, such house shall be deemed never to have vested in the Commissioner.”

There is no controversy regarding the fact that a male child named Pascal was born to the Appellant in London, United Kingdom on 1<sup>st</sup> June 1977 through his marriage to a non-national of Swiss origin as evidenced by the extract of Certification of Registration of Birth outside Sri Lanka marked 1R1, and that he thereby became entitled to own one more house. In computing the permitted number of houses which may be owned by an individual who is a member of a family under Section 2(1) of the Ceiling on Housing Property Law, the number of dependant children in a family had to be taken into consideration. As the Appellant was childless though married at the time the said Law came into effect, he became entitled to retain the ownership only two houses under the Law. However, in terms of Section 2(1) read with Section 11(3) of the Law, upon the birth of an additional child, the Appellant became entitled to one more house, and it is common ground that one out of the three surplus houses may be divested to the Appellant on account of this child.

In view of the peculiar, and I might add, intriguing, circumstances of this case, it is also necessary to consider the legal implications of Section 17A of the Ceiling on Housing

Property Law, which was introduced in 1974 through the Ceiling on Housing Property (Amendment) Law No. 34 of 1974. The said Section is quoted below in its entirety:-

- “(1)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.*
- (2) Where any house has vested in the Commissioner under section 11 and the person who was the owner thereof immediately prior to such vesting makes application to the Commissioner requesting that he be allowed a further period of time to dispose of such house, the Commissioner may, if satisfied that adequate grounds exist for granting such request and with the approval in writing of the Minister, by Order published in the Gazette, divest himself of the ownership of such house, and on publication of such Order in the Gazette, *such house shall be deemed never to have vested in the Commissioner.* Where such person fails to dispose of such house within a period of twelve months from the date on which the Order divesting the Commissioner of the ownership of such house was published in the Gazette, *the Commissioner may by Order published in the Gazette, vest such house in the Commissioner with effect from such date as may be specified therein.”*

At the outset, it may be observed that the two sub-sections of Section 17A are inherently different in character. While Section 17A(2) seeks to provide a further opportunity to an owner of a surplus house that had got vested under Section 11 to dispose of the same, Section 17(1) is an independent provision which can be invoked to grant redress to any person whose house has got vested under any provision of the Ceiling on Housing Property Law, not necessarily Section 11.

Furthermore, while a person in whose favor an order is made under Section 17A(2) is required to dispose of the house within twelve months from the order of divesting, no such requirement exists where a house is divested under Section 17A(1). Indeed, to my mind, Section 17A(1) which seeks to confer on the Commissioner for National Housing, the power to divest any house vested in him, albeit with the prior approval of the relevant Minister, without specifying any conditions precedent or subsequent or any guidelines for the exercise of such power, appears to suffer from over-breadth and renders some of the other more stringent provisions of the Law, including Section 17A(2) altogether superfluous. Nevertheless, I am of the opinion that such broad power should be exercised reasonably, and without violating the objectives of the Ceiling on Housing Property Law as may be gathered from the rest of its provisions.

There is considerable confusion, however, in regard to the relief purportedly granted by the Commissioner on the said application or applications of the Appellant, and in particular, in regard to the question whether the Commissioner sought to act under Section 11(3) or Section 17A(1) of the Ceiling on Housing Property Law. The main thrust of the submissions of the Counsel who appeared for the Respondent at the inquiry held by the Commissioner on 19<sup>th</sup> June 1985, and on appeal before the Board of Review, was that premises No. 43 2/1, Gregory’s Road, Colombo 7, was divested by the Commissioner on account of the Appellant’s son Pascal under Section 11(3) by the order dated 1<sup>st</sup> March 1979 marked A9, and that the Commissioner’s powers under this provision being thus

exhausted, the Commissioner did not have the jurisdiction to divest the house in question, namely, premises No. 43 2/2 of Gregory's Road, Colombo 7, under the same provision with respect to the same child. It is this position that is sought to be highlighted by the second and third questions on which Special Leave has been granted by this Court. Apart from this jurisdictional objection, it was also very strongly urged on behalf of the Respondent that the Appellant, who had been guilty of long delay in applying for relief, was not entitled to any, particularly by reason of the fact that it had given "hopes" to the Respondent who had on 11<sup>th</sup> March 1977 entered into an agreement to purchase the house from the Commissioner, and had been paying to the Commissioner Rs. 440 per month for nearly nine year towards the said purchase.

These submissions were not good enough to persuade the Commissioner and the Ceiling on Housing Property Board of Review to hold in favor of the Respondent, and it would appear from the order dated 14<sup>th</sup> February 2001(A18) that the Board of Review was clearly swayed by the equities in favor of the minor child Pascal, born to the Appellant for whose benefit the house in question was purportedly divested. The Court of Appeal has, however, by its order dated 11<sup>th</sup> December 2002 concluded that the entitlement of the Appellant for an additional house on account of the new born child has been met by the order of the Commissioner dated 1<sup>st</sup> March 1979 (A9 and A10) by which premises No. 43 2/1, Gregory's Road, Colombo 7 was divested, with the result that the Appellant retaining three out of the five houses owned by him at the time the said Law came into force, one each for his wife and himself and one on account of the child Pascal.

Learned President's Counsel appearing for the Appellant sought to assail the decision of the Court of Appeal on the basis that the Court has overlooked the provisions of Section 17A introduced by the 1974 amendment in arriving at the said conclusion, and he also emphasized that that the power conferred by Section 17A(1) on the Commissioner to be exercised with the approval of the Minister was a very broad one, and that it was under this provision that the house bearing No. 43 2/1 Gregory's Road, Colombo 7 was divested by A9 and A10. It was strenuously argued by the learned President's Counsel for the Appellant that the order marked A9, was made in terms of Section 17A(1) of the Ceiling on Housing Property Law, and this position is supported by the "Order under Sub-Section (1) of Section 17A" dated 1<sup>st</sup> March 1979 published in Gazette No. 29 dated 23<sup>rd</sup> March 1979 marked A10, which relates to the same premises. It is on this basis that it is contended on behalf of the Appellant that the divesting of the house in question by the impugned order of the Commissioner dated 20<sup>th</sup> August 1985 (A12) can be justified under Section 11(3) of the Law. Learned Counsel invited the attention of Court to A11 containing the notes of the inquiry held on 19<sup>th</sup> June 1985 and the recommendation of the Commissioner dated 5<sup>th</sup> August 1985 constituting, what learned Counsel described as "the reasoning for the divesting of 43 2/2" which disclosed that the house in question was indeed being divested on account of the birth of the child Pascal.

However, Senior Counsel appearing for the Respondent and the Respondent-Respondents strongly disputed this position and submitted that the order marked A9 was clearly made under Section 11 (3) and that the reference to Section 17A(1) on the face of the gazetted order marked A10 was an obvious error. They invited the attention of Court to the fact that the said order marked A9 is captioned as an "Order under Section 11(3)" and the body of the order also expressly refers to the powers vested in the Commissioner by Section 11(3). It was therefore, their position that the Commissioner had no jurisdiction to divest the house in question, namely premises bearing No 43 2/2 on account of the same child in whose favour the divesting order marked A9 has been made by the Commissioner.

In order to resolve this issue, it is first necessary to decide whether the Gazette Notification A10 was published to inform the public of the order marked A9 made under Section 11(3) of the Ceiling on Housing Property Law, the reference to Section 17A(1) in A10 being made in error, as contended by the Respondents, or whether A10 was a separate and distinct order clearly and lawfully intended to be made under Section 17A(1), as contended by the Appellant. It is clear from paragraph 6 of the application made in this regard on behalf of the Appellant marked A8 that he had sought that his three surplus houses bearing premises Nos. 43 1/2, 43 2/1 and 43 2/2 of Gregory's Road, Colombo 7 be divested, in such a way that one of them would be his entitlement on account of his new born son Pascal in terms of Section 11(3), and the other two are released to enable him to dispose of the same "within one year of the date of the publication of the divesting order in the Gazette."

Although it is not clearly stated in the said application as to whether the divesting of the latter two houses was sought under Section 17A(1) or Section 17A(2), the promise to dispose the same within one year from the date of the Gazette Notification indicates that the Appellant had Section 17A(2) in mind. If, as is now contended on behalf of the Appellant, it was decided by the Commissioner to divest premises No 43 2/1 in terms of Section 17A(1) as specifically stated in A10, some explanation should have been forthcoming as to why the Commissioner, with the approval of the Minister, decided to divest only one house, and more importantly, as to why the Commissioner chose to do so under Section 17A(1) sans the condition the house so divested be disposed of within one year, which the Appellant had promised to do in A8. No such explanation has been offered by the Appellant or the Respondent-Respondents.

Considering therefore, the proximity of the dates and the similarity of the schedules of A9 and A10, the absence of any explanation from the Appellant or the Respondent-Respondents as to why the order marked A9, which was made by the Commissioner ostensibly under Section 11(3), was not published in the Gazette in terms of, and as required by, that section, as well as the omission on their part to produce the original of the signed order made by the Commissioner and / or the approval given by the Minister relating to the Gazette Notification marked A10 purportedly published under Section 17A(1), I am inclined to the view that the order dated 1<sup>st</sup> March 1979 marked A9 seeking to divest premises bearing assessment No. 43 2/1, Gregory's Road, Colombo 7, was indeed made under Section 11(3) of the said Law, and that it was this very same order that was published in the Gazette marked A10 as required by that section. I am also of the opinion that the reference to Section 17A(1) in A10 was in fact made in error, whether by inadvertence or otherwise.

The other question that arose in the course of this appeal, is whether the order of the Commissioner dated 1<sup>st</sup> March 1979 (A9 and A10) finally determined all matters raised in the application dated 30<sup>th</sup> October 1978 marked A8. Clearly, the said order afforded the Appellant relief insofar as the application for an additional house on account of the birth of the minor son Pascal was concerned, but it is noteworthy that by A8 the Appellant had also sought further twelve months time to dispose of the other two surplus houses. It is only under the provisions of Section 17A(2) of the Ceiling on Housing Property Law that it was possible for the Commissioner to consider such an application and to make a divesting order with the approval of the Minister, but significantly, the orders marked A10 and A12 refer to Section 17A(1) and not Section 17A(2). Learned President's Counsel for the Appellant was therefore compelled to rely on Section 17A(1) and seek to justify the impugned order dated 20<sup>th</sup> August 1985, published in the Government Gazette bearing No.

365, of 30<sup>th</sup> August 1985 (A12) on the basis of that section. However, in this connection it is necessary to consider the observations made by this Court in the course of its judgment in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263. His Lordship Justice Wadugodapitya adverted to the several applications made by the present Appellant (who was the 3<sup>rd</sup> Respondent in that case in which the Commissioner was cited as the 2<sup>nd</sup> Respondent) to have the surplus houses divested under Section 17A(1), after the very first application made under that Section on 26<sup>th</sup> July 1976 (1R), and made the pertinent observation at page 266 that-

“.....it appears that in 1976 the 3<sup>rd</sup> respondent made an application to the 2<sup>nd</sup> respondent to divest ownership of the said premises under section 17A (1) of the Law, which application was refused by the 2<sup>nd</sup> respondent. The 3<sup>rd</sup> respondent thereupon appealed to the Board of Review which disallowed the appeal and upheld the order of the 2<sup>nd</sup> respondent. Undaunted, the 3<sup>rd</sup> respondent in 1979, made a further application to the 2<sup>nd</sup> respondent to divest ownership of the said premises under section 17A (1) of the Law. This too was refused by the 2<sup>nd</sup> respondent. The 3<sup>rd</sup> respondent did not appeal therefrom to the Board of Review. It, however, appears that by letter dated 8.7.81, the petitioners were informed that the 3<sup>rd</sup> respondent had made yet another application to the 2<sup>nd</sup> respondent to divest ownership of the premises and further that the 1<sup>st</sup> respondent would hold an inquiry on 25.8.81 to determine whether the ownership of the premises should be divested. In this connection, it appears that in terms of section 39 (3) of the Law, the determination of the Board of Review upon the appeal made by the 3<sup>rd</sup> respondent in respect of his first application to divest was final and that the 2<sup>nd</sup> respondent was wrong to have even entertained the 3<sup>rd</sup> respondent's second and third applications for divesting. The petitioners on their part objected to the holding of such an inquiry.”

I am therefore of the opinion, that in view of the finality attached by Section 39 (3) of the Ceiling on Housing Property Law to the said determination of the Board of Review on appeal from the decision made by the Commissioner not to divest any surplus house of the Appellant under Section 17A(1), it was not open to the Commissioner to make any further divesting orders under that provision.

I observe that in the above quoted passage His Lordship Justice Wadugodapitiya does not make any reference to the application made on behalf of the Appellant on 30<sup>th</sup> October 1978 (A8), probably because that application was not expressly made under Section 17A(1). As already noted, the said application expressly referred to Section 11(3) to have one house divested on account of the child Pascal and also the other two houses divested to enable them to be disposed of within 1 year from the “date of publication of the divesting order in the Gazette” as contemplated by Section 17A(2). It is significant that according to the notes of the inquiry held on 19<sup>th</sup> June 1985 and the recommendations of the Commissioner dated 5<sup>th</sup> August 1985 (A11), the said inquiry related to an application “for divesting of flats Nos. 41 2/2, 43 1/2 and 43 2/2”. This therefore may not have been the same proceedings that were commenced by A8 by which the father of the Appellant had sought that of the surplus houses bearing Nos. 43 1/2, 43 2/1 and 43 2/2, one house be divested for the child Pascal and the other two be divested to enable the Appellant to dispose of the same. It is significant that premises No. 41 2/2, which was one of the houses that was sought to be divested at the inquiry held on 19<sup>th</sup> June 1985, was not one of the surplus houses of the Appellant, its owner being F.R. Senanayake, also known as Ranil Senanayake, who is a brother of the Appellant. Although the two brothers are referred to as “applicants” in the

said notes, it is not clear whether they had made a joint application or whether separate applications made on their behalf had been taken up together for convenience.

It was these proceedings that ultimately resulted in the recommendation dated 5<sup>th</sup> August 1985 addressed to the relevant Minister by the Commissioner for National Housing which is contained in A11. The said recommendation is quoted below in its entirety:-

“APPLICATION FOR DIVESTING OF PREMISES NOS.  
41 2/2, 43 1/2 AND 43 2/2.

The main contention for divesting in the above application is the fact that Mr. F. R. Senanayake and Mr. R. A. Senanayake have 3 children born to them as follows:-

They are:-

Charith Upali Senanayake born on 28th March, 1972,  
Pradeep Arjun Senanayake born on 7th July, 1981  
to Mr. Ranil Senanayake.

Mr. Rohan Senanayake has one child, named, Pascal Ajith Senanayake born on 1st June, 1977.

The birth of the children mentioned above information about which has been made available to the Department subsequent to the law can be considered as the “occurrence of a subsequent event”.

I, therefore, recommend that the 3 premises mentioned above be divested with the approval of the Hon. Minister under Section 17A(1) of the C.H.P. Law.

Sgd/Y. B. Pussedniya,  
Commissioner for National Housing

5<sup>th</sup> August, 1985.”

It is clear from the above extract that the Commissioner has recommended that each of the 3 houses mentioned therein be divested in view of the “occurrence of a subsequent event” namely, the birth of two children, namely, respectively Charith in 1972, and Pradeep in 1981 to the Appellant’s brother, Ranil Senanayake, and the birth of a child by the name of Pascal to the Appellant, Rohan Senanayake in 1977. Although the recommendation has purported been made in terms of Section 17A (1) of the Ceiling on Housing Property Law, it would appear that the specific provision which provides for divesting on the occurrence of a subsequent event is Section 11 (3) which has been quoted earlier in this judgement.

In order to justify such divesting under this provision, the “subsequent event” that entitles any person to own any house in excess of the permitted number of houses as on 13<sup>th</sup> January 1973 on which date the Ceiling on Housing Property Law came into operation, should have occurred after the said date. It was absurd, to say the least, for the Commissioner for National Housing, who was statutorily vested with the administration of the said Law, to have recommended that a surplus house of the Appellant be divested under Section 11(3) or under any other provision of the Ceiling on Housing Property Law,

on account of the birth of the child Charith which occurred on 28<sup>th</sup> March 1972, as the existence of the said child would have been taken into consideration in computing the permitted number of houses under Section 2(1) of the Law. In any event, it was altogether irrational for surplus houses of the Appellant to be divested on account of the birth of one or more children to the Appellant's brother who did not own such houses prior to their ownership vesting on the Commissioner under Section 13 (1). As far as the Appellant's surplus houses are concerned, as already noted, premises bearing No. 43 2/1, Gregory's Road, Colombo 7, had been divested on account of the birth of child Pascal by the order of the Commissioner dated 1<sup>st</sup> March 1979 (A9) under Section 11(3) of the said Law, and the Commissioner was devoid of power to divest the house in question, namely premises bearing No. 43 2/2, Gregory's Road, Colombo 7, on account of the same child. It is therefore obvious that the Commissioner had acted in total excess of his lawful authority under the said Law in making and implementing his recommendation dated 5<sup>th</sup> August, 1985.

It is probably due to these infirmities that the Commissioner had purported to make the recommendation under Section 17A(1) which provides the Commissioner with a broader discretion. However, in my opinion, the legal maxim *generalia specialibus non derogant*, which means that general things do not derogate from special things, would not permit the ostensibly wide provisions of Section 17A(1), taken in its most comprehensive sense, to override the most stringent provisions of Section 11 (3) of the Ceiling on Housing Property Law to render the latter provision meaningless. In *Maithripala Senanayake, Governor of North Central Province and Another v. Gamage Don Mahindasoma and Others*, [1998] 2 Sri LR 333 at 370, Amarasinghe, J., quoted with approval the following passage from Halsbury, Laws of England, paragraph 875, which explains the said maxim:-

“Whenever there is a general enactment in a statute which, if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may apply. This is merely one application of the maxim that general things do not derogate from special things.”

I am therefore of the opinion that the Commissioner for National Housing had no authority to make the recommendation dated 5<sup>th</sup> August 1985 contained in A11 for the divesting of his ownership in the house in question under Section 17A(1) of the Law in all the circumstances of this case. As the impugned order dated 20<sup>th</sup> August 1985 published in the Government Gazette No. 365 dated 30<sup>th</sup> August 1985 (A12) was made by the Commissioner on the basis of the said recommendation, presumably after obtaining the approval of the relevant Minister, I am of the opinion that the Commissioner was devoid of power to make that order as well.

It is relevant to note that the Respondent, along with the tenant of premises No. 41 2/2, Gregory's Road, Colombo 7, had previously invoked the jurisdiction of the Court of Appeal by way of *certiorari* to have the latter order dated 20<sup>th</sup> August 1985 published in the Government Gazette No. 365 dated 30<sup>th</sup> August 1985 (A12) quashed, and was successful on appeal in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263. This Court, in granting the Respondent relief, had also directed that the Commissioner's decision to divest the relevant houses be communicated to the Respondent and the other tenant to enable them to appeal to the Board of Review in terms of Section 39 of the Law, if they so desire. The Respondent was accordingly notified of the decision of the Commissioner to divest the house in question,

namely premises bearing No. 43 2/2 Gregory's Road, Colombo 7 by the Commissioner's letter dated 20<sup>th</sup> April 1999 (A13). The Respondent thereafter lodged his Petition of Appeal dated 14<sup>th</sup> May 1999 (A14), which was taken up for hearing before the Ceiling on Housing Board of Review on 19<sup>th</sup> July 2000. It appears from the notes of proceedings before the Board of Review marked A 15 that Mr. P.A.D. Samarasekara, President's Counsel, who appeared for the Respondent had emphasized that the Commissioner had no power to divest the house in question on account of the child Pascal when another surplus house bearing assessment No. 43 2/1 has already been divested for the benefit of the same child. Learned President's Counsel also drew the attention of the Board to the observations made by the Supreme Court at page 266 of its judgement in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others*, (quoted earlier in this judgement) to the effect that the determination of the Board of Review upon the appeal made by the Appellant in respect of his application made to the Commissioner in 1976 under Section 17A(1) was final, and no further applications under that section should have been entertained. Despite these submissions, the Board of Review by its order dated 14<sup>th</sup> February 2001 (A18) considered the equities in favour of the minor child Pascal so overwhelming that they could overcome any deficiencies in substantive or procedural power and the legal rights of a tenant of a surplus house to purchase the same.

It is trite law that the State is the upper guardian of all minors, and our courts have recognized this principle which has its roots in our Roman-Dutch Common law. *See, Perera v. Perera* 3 Browne's Report 150; *Mustapha Lebbe v Martinus* 6 NLR 364; *A.D. Weragoda v R. Weragoda* 66 NLR 83 at 86; *Madulawathie v Wilpus* 70 NLR 90; *L.C.N. Fernando v L.A.G Fernando* 72 NLR 174 at 175; *G.Pemawathie v Kudalugoda Aratchi* 75 NLR 398 at 403; *Karunawathie v Wijesuria and Another* [1980] 2 Sri LR 14 at 19. It would appear from decisions such as *AD and Another v DW and Others* [2008] 3 SA 183 that this protection will extend to a minor child in appropriate cases even if it is resident abroad. It appears from the Certificate of Registration of Birth outside Sri Lanka dated 22<sup>nd</sup> December 1978 marked 1R1 that the minor child Pascal was born to the Appellant and a Swiss national to whom he was presumably married at the relevant time in London, England on 1<sup>st</sup> June 1977. There is paucity of evidence as regards Pascal's citizenship status or his place of residence, but it is clear that in April 1999 at the time when the Commissioner notified the Respondent of his decision to vest the house in question for the benefit of Pascal, he had ceased to be a minor.

It is also in evidence that while he was still a minor, by the order dated 1<sup>st</sup> March 1979 (A9) the Commissioner has divested premises No. 43 2/1, Gregory's Road, Colombo 7, on account of Pascal under Section 11(3) of the Ceiling on Housing Property Law, although curiously, the order made by the Commissioner for this purpose had transformed itself into an order purported to be made under Section 17A(1) by the time it was published in the Gazette A10. The house so divested was admittedly sold by the Appellant soon after the divesting, but it was submitted by learned President's Counsel for the Appellant that this was done in compliance with the requirement that the divested house should be disposed of within a period of twelve months from the date on which the divesting order was published in the Gazette. However, neither Section 11(3) nor Section 17A(1) of the said Law require that a divested house should be disposed of within a year, and Section 17A(2) which does contain such a requirement, was not the provision under which the divesting was done. Furthermore, no evidence was placed before the Board of Review, the Court of Appeal or this Court by any of the parties to this appeal as to whether or not the proceeds of the sale of premises No. 43 2/1, Gregory's Road, Colombo 7 accrued to Pascal, nor is there material to show that he ever invoked the jurisdiction of any court in this country to redress any grievance he might have in regard to the manner in which the proceeds of sale

have been dealt with. In the circumstances, there is no basis to hold that the interests of Pascal had been adversely affected by the sale of the aforesaid premises during his minority.

In my view, the Board of Review has also failed to consider the equities in favor of the Respondent, who was at all relevant times the tenant of the Appellant of the house in question. It is in evidence that the Respondent had duly made his application under Section 9 of the Ceiling on Housing Property Law to purchase the house in question, and that in pursuance of such application, the Commissioner offered to sell the house to the Respondent at a price to be determined after the house was valued. Accordingly, an Agreement in the prescribed form dated 11<sup>th</sup> March 1977 (A5) was signed by the Respondent in the presence of witnesses at the office of the Commissioner for National Housing, which document, curiously, was not signed by the Commissioner. On the same day, the Respondent also signed a document headed "Confirmation of agreement to purchase house under Section 9/13 of the Ceiling on Housing Property Law" marked A6. It is also in evidence that pending the valuation of the house in question and the fixing of the price, the Commissioner called upon the Respondent to pay a monthly sum of Rs. 440 which he agreed to be set off against the price of the house to be eventually determined.

Learned President's Counsel for the Appellant has argued that the failure of the Commissioner for National Housing to sign the said Agreement is fatal, and that there was in law no binding agreement to sell. However, it is pertinent to note that this Court has adverted to the question of the agreement to sell in its judgment in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263, and has observed at page 266 of the that the failure of the Commissioner to sign the Agreement is "his own fault" and not that of the present Respondent, and that latter "cannot be made to suffer for this omission". I am in respectful agreement with this observation.

It is noteworthy that as contemplated by the Agreement marked A5 and the Confirmation marked A6, certain payments have been made by the Respondent to the Commissioner for National Housing towards the purchase of the house in question. Learned President's Counsel for the Respondent invited the attention of Court to paragraph 8 of the affidavit dated 23<sup>rd</sup> March 2001 filed by the Respondent in the Court of Appeal, wherein he has averred that he has paid without default "the monthly amounts demanded by the Commissioner as payments towards the purchase price" from March 1977 "until the Commissioner purported to divest the said house and offered to refund all payments ...by his letter dated 18.02.1986 (A2)...." He has also produced with his affidavit marked A3 and A4 two receipts for Rs. 2640 each which add up to only Rs. 5280, but if the Respondent had regularly paid a monthly sum of Rs. 440 for the aforesaid period of approximately 9 years, the aggregate of such payments would be close to Rs. 47,520 - a tidy sum in the Nineteen Seventies and Eighties.

The Commissioner for National Housing in his affidavit dated 4<sup>th</sup> July 2001 has admitted the receipts marked A3 and A4 without expressly denying the claim that the said payments were regularly made during the period in question, and the Appellant in his affidavit dated 25<sup>th</sup> September 2001 has responded to the averments by admitting "the matter of record only", what ever he intended to mean by that phraseology. In the absence, therefore, of any express denial from the Appellant or the Commissioner of the matters set out in paragraph 8 of the Respondent's affidavit filed in the Court of Appeal, I am inclined to believe that the Respondent had in fact paid a substantial sum of money towards the purchase of the house

in question. In these circumstances, it is my opinion that the Respondent had a legitimate expectation, at the very least, that the house in question will be sold to him.

In my considered opinion, the equities favor the Respondent rather than the minor child Pascal, in whose favor house bearing premises No. 43 2/1, Gregory's Road, Colombo 7 had already been divested, although an attempt had been made to paint the picture that the said premises was divested in terms of Section 17(1) of the Ceiling on Housing Property Law to make out a case for another house to be divested on account of Pascal. It is unfortunate that the Commissioner for National Housing, and his Department, had wittingly or unwittingly helped the Appellant in this endeavor. To my mind, the "mistakes" made by the Commissioner for National Housing in this case are too many to be disregarded on the basis that they were made by sheer inadvertence.

I accordingly answer all the questions on which special leave has been granted by this Court in favor of the Respondent, and hold that-

- (1) The Court of Appeal has duly, properly and correctly considered the law in relation to the facts arising from the application or applications of the Appellant for divesting of the house in question;
- (2) The Commissioner for National Housing has by his order marked A9 decided to divest premises No. 43 2/1, Gregory's Road on account of the birth of the child Pascal born to the Appellant; and
- (3) The order marked A11 was *ultra vires* the powers of the Commissioner insofar as it sought to divest premises No. 43 2/2, Gregory's Road, in respect of the birth of the same child Pascal.

I see no basis to interfere with the decision of the Court of Appeal dated 14<sup>th</sup> July 2003, which is hereby affirmed. The appeal is accordingly refused. I award the Petitioner-Respondent a sum of Rs. 35,000/- as costs of this appeal payable by the 1<sup>st</sup> Respondent-Appellant.

**JUDGE OF THE SUPREME COURT**

**DR. SHIRANI A. BANDARANAYAKE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**NIMAL GAMINI AMARATUNGA, J.**

I agree.

**JUDGE OF THE SUPREME COURT**