SRI LANKA SUPREME COURT **Judgements Delivered (2006)**

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Ariyawansa And Others v. The People's Bank And Others - SLR - 145, Vol 2 of 2006 [2006] LKSC 3; (2006) 2 Sri LR 145 (13 March 2006)

ARIYAWANSA AND OTHERS
VS
THE PEOPLE'S BANK AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA, J. AND
DISSANAYAKE, J.
SC (FR) APPLICATION NO. 338/2003.
20TH OCTOBER 2005 AND 10TH AND 17TH JANUARY, 2006.

Fundamental Rights- Appointment of officer to Grade 3 - 1 of the People's Bank - Promotion of Management Trainees - Change of scheme of recruitment in an arbitrary manner giving higher appointments to respondent officers - Article 12(1) of the Constitution.

The petitioners were recruited as management trainees of the People's Bank in 1990 and 1994 in terms of circular 300/99 under which persons were first appointed management trainees. After probation they were in due course promoted to Grade 3-111,3-11 and 3-1.As against this procedure ,in 2003 the Bank appointed 5th to 51 st respondents to Grade 3-1having altered the scheme in circular 300/99 which enabled direct recruitments on a claim that such appointments were made after probation and an examination. The 5th to 51st respondents were recruited as management trainees only in the year 2000 and were given direct appointments to Grade 3 - 1 in 2003 despite protests by petitioners who were in 2003 in Grade 3-11having complied with circular 300/ 99. The petitioners who protested were not given any information or replies to their communications and the recruitments of 5th to 51st petitioners to Grade 3-1 were done in secrecy. The respondent counsel said that such appointments were made as circular 300/99 was a failure and there resulted a management crisis in the Bank which was averted by the new procedure and appointments directly to Grade 3-1 of the 5th to 51 st respondents.

HELD:

1. There was no evidence of a management crisis in the Bank. In any event the change of procedure of appointment and the scheme in circular 300/99 to the prejudice of the petitioners was arbitrary and unjustified though in principle, the Bank may alter the scheme of recruitment. But this must be done without violating the rights of petitioners under Article 12(1) of the Constitution.

2. The appointments of 5th to 51st respondents to Grade 3-1of the Bank's Service were invalid.

Cases referred to :

1. State of U. P. v. Deoman (1960) Air SC 1125
2. International Airport Authority case (1979) AIR SC 1628
3. Air India v Nargesh Meerza (1981) Air SC 1829
4. Basantiabai v State of Maharastra (1984) AIR 366
5. Maneka Gandhi v Union of India (1978) AIR SC 597
6. Ajay Hasia v Khalid Mujib (1981) AIR SC487

APPLICATION for relief for infringement of fundamental rights.

J. C. Weliamuna with Shantha Jayawardana and Maduranga Ratnayake for petitioners.

Wijayadasa Rajapakse, PC with Rasika Dissanayake for 1st to 51st respondents.

cur.adv. vult.

13, March 2006.

SHIRANI BANDARANAYAKE, J.

The petitioners, who were employed in the 1st respondent Bank as Deputy Managers in Grade 3 - II of the Staff Grade alleged that their fundamental rights guaranteed in terms of Articles 12(1)and 14(1)(g) were violated by the respondents for which this Court granted leave to proceed in terms of Article 12(1) of the Constitution.

The petitioners' version, in terms of their submissions, is as follows:

According to the petitioners all of them were eligible for promotion to the post of Manager Grade 3 - I of the 1st respondent Bank in terms of Clauses 3.1.2 and 3.1.3 of Staff Circular No. 300/99 of the 1st respondent Bank (P1).

The 2nd and 4th to 8th petitioners (hereinafter referred to as the batch of 1990) were employed by the 1st respondent Bank as 'Management Trainees' in October 1990 and the 1st, 3rd and 9th to 12th petitioners (hereinafter referred to as the batch of 1994) were recruited by the respondent Bank in a similar capacity as 'Management Trainees' in March 1994.

These two batches, according to the petitioners, were selected consequent to a rigorous selection process, including a competitive test from among 1000 applicants in 1990 and out of 800 applicants in 1994. Out of the 1000 applicants, only 30 were selected for the batch of 1990 and 36 for the batch of 1994.

Thereafter, upon attaining the requistite qualifications stipulated in StaffCircularNo.300/99(P1) including the period of probation, the 3rd, 4th and 5th petitioners were appointed to Grade3 - II as Deputy Managers of the 1st respondent Bank with effectfrom07.12.1995 and the 12th petitioner on 01.03.1999(P4). The 1st, 2nd and 6th to 11th petitioners ,who had failed to fulfill the eligibility criteria for such appointment along with the other petitioners, however had obtained the requisite qualifications thereafter and were appointed to Grade 3 - II as Deputy Managers with effect from 03.12.1999 based up on a scheme proposed by the Board of Directors of the 1st respondent Bank for that purpose (P5A, P5B, and P6).

According to the petitioners, in terms of Clause 3 of Staff Circular No. 300/99, their next promotion was to Grade 3 - I in the rank of Manager. Sub Clauses 3.2.1, 3.2.2 and 3.2.3. of the Staff Circular No. 300/99 (P1), refer to the method in which such promotions are to be effected. In terms of those provisions, whilst 30% is allocated for appointments based on seniority, 70% is allocated to be filled on the results of a competitive test in addition to the requirement of attaining the necessary experience. The 1st to 3rd petitioners became qualified at the competitive examination held in February 2000. The 4th to 12th petitioners did not qualify at the examination and were awaiting the conducting of the next competitive examination for such purpose.

As submitted by the petitoners, in December 2001, the 1st respondent Bank recruited a further batch of Management Trainees including the 5th to 51st respondents (hereinafter referred to as the batch of 2002). This batch commenced training in February, 2002. The petitioners submitted that there were not able differences in the recruitment of batch of 2002from the previous batch, which comprise the following:

(a) the training period was extended to 3 years;
(b) the allowance paid had increased substantially;
(c) no provisions guaranteeing the confirmation of service, upon the successful completion of training/probation period; and
(d) no provisions therefore relating to promotions thereafter, even in the event of being absorbed into the cadre of the 1st respondent.

According to the petitioners, at the time this application was filed, the Management Trainees of batches of 1990 and 1994 were placed as Deputy Managers at their respective branches of the 1st respondent Bank. Most of them were functioning in the capacity of heads of Departments, whilst some were appointed as Managers. Although there was no specific guarantee that the batch of 2002 would be employed by the 1st respondent upon the completion of their 3 year's training, which was due in year 2005, it was common understanding that those who are successful in the batch would be placed in Grade 3 -III as Assistant Managers in terms of Staff Circular No. 300/99 (P1). Moreover, the petitioners contended that many of the said batch of 2002 were placed directly under the supervision of most of the petitioners.

However, contrary to the accepted procedure laid down in Staff Circular No. 300/99(P1), the petitioners were reliably made to understand on 23.06.2003 that,

(a) there were moves afoot on the part of the 3rd and 4th respondents to abruptly suspend the training period of the said batch of 2002, based upon a proposal submitted to the Board;
(b) the said batch of 2002 were to be placed in positions as Managers of the 1st respondent in Grade 3 - I in preference to the petitioners; and
(c) although this was contrary to the scheme of promotion (P1) the Board had in fact approved this scheme.

Soon after, petitioners had collectively made representations to the 3rd respondent on 23.06.2003 seeking to ascertain the veracity of the above information, the 3rd respondent had informed the petitioners that there had been such a proposal submitted to the Board of Directors. When objection was taken at the said meeting for any move to alter the status of appointments to Grade 3-I, the 3rd respondent had categorically informed them that any such appointment would be made only upon the successful completion of a competitive examination. However ,no details were given regarding the said examination. Thereafter the petitioners addressed a letter dated 30.06.2003 to the 2nd respondent informing him of the aforementioned meeting and seeking his immediate intervention in this matter (P9). According to the petitioners they never received a reply to this letter. Notwithstanding the steps taken by the petitioners, they had learnt that the 1st to 4th respondents had taken steps to appoint the said batch of 2002 to Grade 3 - 1of the 1st respondent Bank with effect from 16.06.2003(P11).

The petitioners therefore alleged that the said appointments of the 5th to 51st respondents to Grade 3 - I of the,1st respondent Bank are unfair, arbitrary and capricious and in violation of the fundamental right guaranteed to them in terms of Article 12(1) of the Constitution.

The learned President's Counsel for the respondents submitted that the senior management ranks within the 1st respondent Bank consisted 1 of the following positions; viz. General Manager, Deputy General Manager, Assistant General Manager, Grade I - Chief Manager, Gracie II - Senior Manager, Grade 3 - I - Manager, Grade 3 - II - Deputy Manager and Grade 3 - III - Assistant Manager.

According to the learned President's Counsel for the respondents, the 1st respondent Bank was compelled to change its recruitment procedure in 1987 due to extreme pressure the 1st respondent Bank had to face from the trade unions. Therefore in 1987, 1990 and 1994, the 1st respondent Bank had recruited over 100 Management Trainees on the basis that after the period of probation they would be given permanent employment as Grade 3 -III-Assistant Managers. From this group of Trainees, the more competent Assistant Managers, it was expected, would eventually through a process of promotions rise up to the ranks of Grade 3 - II - Deputy Managers, Grade 3 -1- Managers and to higher positions. However, due to the existing scheme of promotion within the Bank, it was found that the said Management Trainees would be able to reach only the next promotional Grade of 3

- I Manager and therefore it was felt that the Bank's line of succession would be greatly endangered if the said scheme of recruitment of Management Trainees was to continue and it was felt that the change of the scheme of recruitment of Management Trainees adopted in 1987 was a mistake and a failure. Learned President's Counsel for the 1st respondent Bank contended that since the recruitment procedure and the relevant criteria for promoting the said recruits were so ineffective, that the Bank would face a vacuum in its senior management positions within the next few years, the 1st respondent Bank had decided to adopt an entirely new recruitment procedure to recruit its Management Trainees.

In these circumstances, since the 1st respondent Bank had decided to adopt an entirely new recruitment procedure to recruit its Management Trainees, it was contended that the recruitment procedure adopted for the batch of 2002 has no relationship to Circular No. 300/99 (P1), which deals with promotions and recruitments/appointments.

It is not disputed that the petitioners as well as the 5th to 51st respondents were recruited to the 1st respondent Bank as 'Management Trainees'. It is also not disputed that, at the time the 5thto 51st respondents joined the Bank, the petitioners were functioning in the grade of Class 3- III of the 1st respondent Bank. The 5th to 51st respondents were recruited in 2002 in terms of the applications called by advertisement marked 17A. By that advertisement, applications were called for Management Trainees. It is thus clear that the petitioners as well as the 5th to 51st respondents had joined the 1st respondent Bank as Management Trainees at different times. At the time the 5th to 51 st respondents were recruited as Management Trainees, they had entered into an agreement with the 1st respondent Bank for them to be trained in banking practices for a period of three years. The 5th to 51st respondents were recruited in 2002 and therefore their training was to be completed only in 2005. At the time the impugned promotions were given to the 5th to 51 st respondents, admittedly they were probationary Management Trainees and had not been appointed to Grade 3 - III.

As referred to earlier, the petitioners as well as the 5th to 51st respondents were all recruited to the 1st respondent Bank on the same basis as Management Trainees. After the initial recruitment, there cannot be further recruitments to the service as thereafter it would only be promotions and therefore, I am not inclined to accept the version given by the learned President's Counsel that the promotions in question are only recruitments. Moreover, the 1st respondent Bank having stated that the 5th to 51st respondents were not promoted, but recruited for a second time on a different basis has further contended that 'although the 5th to 51st respondents were contracted as Management Trainees for a training period of three years due to the above reasons, the Bank decided to change the recruitment conditions and decided to offer the 5th to 51st respondents a new contract of service by which they were to be placed in Grade 3 - I after one year of probation and after successfully passing the relevant examinations.'

This clearly indicates that although the petitioners as well as the 5th to 51st respondents were recruited by the 1st respondent Bank on the same basis as

Management Trainees, the 1st respondent Bank had thereafter taken steps to alter the position of the newly recruited batch of Management Trainees (5th to 51st respondents) from that of Management Trainees to Manager Grade 3 - I. It is to be borne in mind that, at the time such appointments were made, the batch of 2002, had not completed their initial probationary period, and therefore ths;1tbatch was never promoted either to Grade 3 - III or Grade 3 - II. Thus the steps taken by the 1st respondent Bank clearly indicates that the petitioners were treated unfairly and unreasonably without giving due consideration to the provisions of Circular No. 300/99 (P1), which made the petitioners to allege that their fundamental rights were violated by the 1st respondent Bank.

Article 12(1) of the Constitution deals with the right to equality and reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law.&quot ;

The right to equality means equal protection from both legislative and executive actions, which would be treated as arbitrary and discriminatory. The guarantee of equality stipulated in terms of Article 12(1) of the Constitution therefore is directed against actions which are arbitrary and/ or discriminatory. Further the concept of 'equal protection of the law' denotes equal treatment under similar circumstances. This concept clearly postulates that equals should be treated equally and that among such equals the law should be equal and equally administered. Referring to the right to equality, Subba Rao, J. in State of U. P. v Deoman'1)stated that,

"All persons are equal before the law is fundamental of every civilized Constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed."

The concepts of negation of arbitrariness and unreasonableness are embodied in the right to equality as it has been decided that any action or law which is arbtirary or unreasonable violates equality (International Airport Authority's case (2),Air India v Nargesh Meerza (3)and Basantibai v State of Maharashtra(4). In Maneka Gandhi v Union of India (S)referring to the principle of reasonableness it was stated that, "The principle of reasonableness, . . . legally as well as philosophically, is an essential element of equality or non arbitrariness. . . ."

Further in Ajay Hasia v Khalid Mujib(6)after considering the concept of reasonableness and its applicability, it was held that,

"the concept of reasonableness and non-arbitrariness pervade the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

The petitioners' allegation is that, the 1st respondent Bank, made appointments to Grade 3 - I from amongst the 5th to 51st respondents, who had joined the 1st respondentBankin2002as Management Trainees, with effect from 16.06.2003 (P11), whilst the petitioners employed in the capacity of Deputy Managers in Grade 3 - II of the Staff Grade of the 1st respondent Bank and who had initially joined as Management Trainees in 1990 and 1994, were not so promoted and the said decision of the 1st respondent Bank not to promote the petitioners prior to granting promotions to 5th to 51st respondents is unreasonable.

It is not disputed that there cannot be direct appointments made to the rank of Manager Grade 3 - I of the 1st respondent Bank and there could be only promotions to that position. It is also not disputed that the said promotions are governed by the Staff Circular No. 300/99(P1). If the 1st respondent Bank thought it fit to have direct appointments to be made to Grade 3-1, then the 1st respondent Bank should have first amended the scheme of promotions contained in Circular No. 300/99 (P1) taking into consideration the requirements of the Bank.

Although the 1st to 4th respondents refer to a 'management crisis' and due to such situation that they had decided to promote 5th to 51st respondents to the rank of ManagerGrade3 - I overlooking the petitioners, the respondent shave not established there was in fact such a management crisis in the Bank, which necessited them to promote 5th to 51st respondents overlooking the petitioners. It is also to be borne in mind that, the 1st to 4th respondents had referred to a situation, where there 'would be a management crisis' only in their objections, however, without any supporting material. The petitioners on the other hand by their document marked P16 had clearly demonstrated the fact that there is no such 'management crisis' as presented by the 1st to 4th respondents and even in the event that there is the strongest likelihood of such kind of a crisis, then the simplest solution for such crisis would be to facilitate the promotional prospects of the petitioners and other Management Trainees recruited in 1990 and 1994, in terms of Staff Circular No. 300/99 (P1), but not the decision to promote the 5th to 51st respondents overlooking the petitioners. There was no evidence forthcoming from the 1st respondent Bank as to the action they had taken to get over any such 'management crisis' they were concerned of and even the document titled 'Need to change the policy on recruiting Management Trainees to People's Bank' (R1) is undated and no material was placed before this Court to show that action had been taken to consider the said document, as there appears to be no decision taken on this document.

It is to be borne in mind that at the time a decision was taken to deviate from the scheme of promotions, the 1st to 4th respondents had not given any notice of such change and therefore the petitioners were not aware of the basis of the promotions granted to the 5th to 51st respondents.

Considering the aforementioned circumstances it is evident that there was no scheme of recruitment to the post of Manager Grade 3 -I directly other than through the scheme and process provided for in Staff Circular No. 300/99(P1). It is not disputed that the petitioners belong to the group of batches of 1990and

1994whereas the 5th to 51st respondents belong to the batch of 2002. The petitioners therefore were clearly senior to the 5th to 51st respondents. Furthermore, it is common ground that the petitioners as well as the 5th to 51st respondents had joined the 1st respondent Bank as Management Trainees. More importantly at the time the promotions to the rank of ManagerGrade3-I were made, the petitioners were functioning as Deputy Manager Grade 3 - \I and the 5th to 51st respondents were still functioning as Management Trainees. Accordingly, it is obvious that, by the decision of the 1st respondent Bank to promote the 5th to 51st respondents to Grade 3 -lover looking the petitioners, they had acted unfairly, unreasonably and without giving any consideration to the right to equality enshrined in our Constitution.

Learned President Counsel for the 1st respondent Bank contended that all employees in Grade 3 - II including the petitioners were to sit for the examination in terms of Staff Circular No. 300/99(P1) and the new Management Trainees (5th to 51st respondents) were also allowed to sit for the said examination. In terms of Staff Circular No. 300/99 (P1) the applicants for the position of Manager Grade 3 - I had to sit for an examination and the eligibility criteria for this purpose made it a compulsory requirement that the officers should have completed a minimum of 3 years of service in the Grade of Deputy Manager (Grade 3 - II). As has been stated earlier the 5th to 51st respondents joined the Bank only in February 2002 as Management Trainees and they were not qualified to sit for the aforementioned examination at that time in terms of the provisions of Staff Circular No. 300/99(P1).

Learned President's Counsel for the 1st respondent Bank correctly submitted that the 1st respondent Bank as an employer has a right to change its recruitment procedure and policies from time to time and correct and/or remedy mistakes of the existing schemes in the best interests of the Bank. Whilst endorsing the views expressed by the learned President's Counsel, it has to be stated that although the Bank has the right to take necessary and appropriate action for the development of the Bank, such action must be taken having in mind the provisions of the Constitution, especially giving due consideration to the equality provision contained in Article 12(1) of the Constitution.

When this matter was supported for leave to proceed, learned President's Cousel for the respondents had given an undertaking that the decision of the 1st respondent Bank to appoint the 5th to 51st respondents to Grade 3 - I would be suspended until the final hearing and determination of this application. Therefore the 5th to 51 respondents were not appointed to Grade 3 - I.

Considering the totality of the circumstances of this application it is evident that by promoting the 5th to 51st respondents from the position of Management Trainee to Manager Grade 3 - I, the 1st respondent Bank had acted arbitrarily and unreasonably and therefore, I hold that the 1st respondent Bank had violated the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution. For the reasons aforementioned, therefore the appointments made to Grade 3 -I from and among the 5th to 51st respondents must be set aside. The 1st

and 2nd respondents are directed to take steps afresh for granting promotions to the rank of Manager Grade 3 - I, according to law.

I make no order as to costs.

WEERASURIYA,J.-I agree.

DISSANAYAKE,J.-I agree.

Relief granted.

2- CM 8095

Attorney-General And Others v. Sumathipala - SLR - 126, Vol 2 of 2006 [2006] LKSC 2; (2006) 2 Sri LR 126 (29 March 2006)

ATTORNEY-GENERAL AND OTHERS

VS

SUMATHIPALA

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA, J.
UDALAGAMA, J.
DISSANAYAKE, J AND.
RAJA FERNANDO, J.
SC APPEAL 82/2004.
S.C. SPLA 190/2004.
CA (BA) 171/2004.
MC COLOMBO NO. 55 305/01.
13TH SEPTEMBER, 29TH SEPTEMBER, 27TH OCTOBER, 7THDECEMBER AND 20TH DECEMBER 2005.

Bail- Code of Criminal Procedure Act, section 404 - Nature of power of Court of Appeal under section 404 of the Code- Whether it is an appellate and revisionary or original power - Whether section 47(1) of the Immigrants and Emigrants Act prohibits the Court of Appeal granting bail to an accused charged under section 45 of the Immigrants and Emigrants Act - Court cannot grant bail on the ground that section 47(1) of the Immigrants and Emigrants Act contravenes the fundamental rights of the accused.

On 04.12.2003 the Criminal Investigation Department reported to the Magistrate's Court of Colombo that the respondent abetted one Dhammika Amarasinghe to use an irregular passport, an offence punishable under section 45 of the Immigrants and Emigrants Act, an offence which is not bailable. Amarasinghe was on remand in another case. The respondent who could not be found appeared before the Magistrate, on a Poya holiday and was ordered a conditional release, terminating proceedings against the respondent.

On 10.12.2003 the 4th respondent (OIC/CID) instituted proceedings against the respondent and Amarasinghe in the Chief Magistrate's Court for an offence under section 45 of the Immigrants and Emigrants Act.

Amarasinghe was murdered in the Magistrate's Court when he was produced in another case. The respondent appeared before the Magistrate and the Magistrate

ordered his remand. No bail application was made or refused in respect of him under section 402 or 403 of the Code of Criminal Procedure Act.

However, on an application made to the Court of Appeal which was decided by a Divisional Bench of 3 judges the respondent was enlarged on bail. Sri Pavan, J. held that under section 404 of the Code, the power of the Court of

Appeal was appellate whilst Abeyratne, J. held separately that its power was original. Bail was granted in view of the fact that the prohibition against bail in section 47(1) of the Immigrants and Emigrants Act was too harsh and interfered with the fundamental rights of the respondent.

HELD:

1. The power of the Court of Appeal under section 404 of the Code is appellate or revisionary (and not original) and applied only to cases under sections 402 and 403 of the Code.

2. Section 471(1) of the Immigrants and Emigrants Act prohibited bail pending trial to a person charged with an offence under section 45 of that Act, and particularly in view of Article 80(3) of the Constitution, even the Supreme Court had no power to grant bail prohibited by the plain words of section 47(1) of the Immigrants and Emigrants Act. It is for the Parliament to amend the Law, if it is too harsh.

1. Benwell v. The Attorney General 1988 1 Sri LR 1
2. Rev. Singarayar Sri Kantha Law Reports II 154
3. In Re Ganapathpillai 1920 21 MR 481
4. Flora v United States 362 US 145
5. Mannalige Gowda v Star of Mystore PIR 1964 Mysore 84
6. Benoy Krishna v State of West t;3enga/lR 1966 Cal 429
7. The King v Lokunona 1908 11 NLR 120
8. Kamusumay v Minister of Defence and External Affairs 1961 63 NLR 214
9. Kanapathy v Jayasinghe 1964 GG NR 549
10. Nithynandan and Others v Attorney General and Another 1983 2 Sri LR 251
11. Jyotiben Ramlal v State of Gujarat 1996 1 Gu J. L. K. 395
12. Aswini Kumar v Aravinda Bose Air 1952 SC 369
13. Union of India Shrianbai AIR 1954 SC 596
14. Kushi Ram v The State 1954 AIR 779
15. Babu Singh v State of Uttar Pradesh AIR 1978 SC 527
16. Magor and Mellons ROC v Newport Corporation 1952 AC 189
17. Government Agent, Superintendent of Police v Suddhana et al. 1905, Tambiahs' Report 39.

APPEAL from the judgment of the Court of Appeal.

Yasantha Kodagoda, Deputy Solicitor General with Harshika de Silva, State Counsel for appellant.

D. S. Wijesinghe, PC with Navin Marapana and Kaushalya Molligoda for respondent.

29th March, 2006.
SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgments of the Court of Appeal dated 18.06.2004. By those judgments, the Court of Appeal enlarged the petitioner-respondent (hereinafter referred to as the respondent) on bail. The respondents-appellants (hereinafter referred to as the appellants) appealed therefrom primarily on the basis that there are serious errors of law in the judgments of the Court of Appeal, which have now given rise to far reaching implications in the administration of criminal justice. Learned Deputy Solicit or General submitted that the appellants do not want a reversal of the status quo in relation to the respondent and the respondent who was enlarged on bail could remain so, as there are no violations of the conditions of bail, whatever be the outcome of this appeal. In view of this submission, learned President's Counsel for the respondent submitted that he had no objection to leave being granted on questions of law raised by the appellants. Accordingly special leave to appeal was granted on 11 questions based on the judgment of Sripavan, J. with whom the President of the Court of Appeal Somawansa, J. agreed (hereinafter referred to as the judgment of Sripavan,J.) and on7 questions based on the judgment of Abeyratne, J. in which Abeyratne, J. had agreed with the decision of Sripavan, J., but gave separate reasons (hereinafter referred to as the judgment of Abeyratne, J.)

At the hearing, both learned Counsel agreed that although there are eighteen questions on which special leave to appeal was granted, the issues that have arisen for determination by this Court would be as follows:

(a) whether section 404 of the Code of Criminal Procedure Act, vests only appellate and revisionary jurisdiction in the Court of Appeal or whether the Court of Appeal is also vested with original jurisdiction ?;

(b) Whether section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of Appeal to consider granting bail to a person accused of an offence under Section 45 of the Immigrants and Emigrants Act ?;

(c) the applicability of section 3(1) of the Bail Act.

Learned President's Counsel for the respondent, however submitted that neither the appellants nor the respondent had raised the question on the applicability of section 3(1) of the Bail Act before the Divisional Bench of the Court of Appeal and therefore although the appellants had made submissions briefly on the subject, the respondent would not deal with the aspect of the applicability of section 3(1) of the Bail Act.

Considering this submission of the learned President's Counsel for the respondent, it was agreed upon at the hearing that the law relating to section 3(1)

of the Bail Act would be considered in detail in S. C. (Appeal) No. 28/2005, which case was heard by the same Bench and will not be considered in this appeal.

The facts of this appeal, as submitted by the learned Deputy Solicitor General for the appellants, albeit brief, are as follows:

Pursuant to criminal investigations conducted by the Criminal Investigation Department (hereinafter referred to as the CID)on04.12.2003, criminal proceedings were initiated against the respondent and another, in the Magistrate's Court of Colombo. These proceedings were initiated following the filing of a Report under the Code of Criminal Procedure Act, No. 15of 1979(hereinafter referred to as the Code of Criminal Procedure Act), wherein it was alleged that the respondent had abetted one Dammika Amarasing he to use an irregular passport issued under the name of Buddhika Priyashantha Godage. At that time, whilst the respondent was not under arrest by the police, the said Dammika Amarasinghe was in remand custody consequent to a remand order made in another case.

According to the appellants, since 04.12.2003, officers of the CID unsuccessfully attempted to arrest the respondent for having committed the aforementioned offence. However, it had not been possible to arrest him as he was not found in any of the locations where it was reasonable to assume that he would be found. However, as stated by the appellants, on 08.12.2003 (which was a public holiday, due to that day beingthe Poya Day), the respondent had surrendered to Magistrate A. S. Gamlath Arachchi, who was on roster duty to function as the Magistrateon behalf of all the other Magistrates of Hulftsdorp, Colombo. At the conclusion of that day's proceedings, the said Magistrate made order of 'conditional release', thereby according to the appellants, terminating the proceeding against the respondent.

Thereafter on 10.12.2003,the4th appellant instituted criminal proceedings against the respondent and Dammika Amarasinghe in the Chief Magistrate's Court, Colombo by filing a complaint under section 136(1)b of the Code of Criminal Procedure Act. Since the respondent and Dammika Amarasinghe became accused for having committed offences under section 45 of the Immigrants and Emigrants Act, the appellants moved the Magistrate's Court for the issue of a warrant of arrest of the respondent. The learned Magistrate made order refusing to issue a warrant of arrest, but issued summons on the respondent.

Consequent to the institution of criminal proceedings, the aforementioned Dammika Amarasinghe was murdered when he was arraigned in the Magistrate's Court regarding another case.

On 19.01.2004, the prosecution in case No. 55305/3/1 submitted to the learned Magistrate a charge sheet for consideration of Court and on that day the respondent, who had avoided appearing before the Magistrate's Court until then, appeared before the Magistrates and was placed in remand custody. On 30.01.2004, the appellants had moved to amend the charge framed against the respondent, which was allowed and the respondent had pleaded not guilty and he was charged for having committed an offence under section 45(1) (a) of the

Immigrants and Emigrants Act, which is punishable in terms of section45(2) of the said Immigrants and Emigrants Act.

According to the appellants, the trial against the respondent commenced in the Chief Magistrate's Court and was proceeding and no application was made seeking his enlargement on bail. Therefore the appellants contended that there does not exist an order by the learned Magistrate made upon a consideration of such application refusing to enlarge the petitioner on bail.

On 27.01.2004, the respondent filed an application in the Court of Appeal seeking an order from the Court of Appeal granting bail to the respondent (P5). On a consideration of circumstances pertaining to the hearing of this matter and of certain questions of fundamental importance arising for

determination in the case, the President of the Court of Appeal made order constituting a Divisional Bench (P9), which heard the respondent's application.

On 18.06.2004, the Court of Appeal made order enlarging the respondent on bail in a sum of Rs. 250,000 in cash with three sureties acceptable to the Magistrate, who should be government servants drawing a monthly salary not less than Rs. 20,000. The Court also ordered that the passport of the respondent be impounded and to be kept in the custody of the Registrar of the Court. The Court also directed that the respondent should report to the 3rd appellant, namely the Director of the Criminal Investigation Department, once a fortnight (P1 0).

Having set down the facts of this appeal, as set out by the appellants, let me now turn to consider the main question of law taken up at the hearing of this appeal.

At the commencement of the hearing, learned President's Counsel for the respondent took up a preliminary objection that the appellants had not tendered their written submissions in terms of the Supreme Court Rules of 1990. The appellants by way of a motion dated 18.03.2005, prior to the commencement of the hearing as well as at the stage of argument, explained the reasons for the delay in filing their written submissions. However, at the stage of hearing as well as in their written submissions filed subsequent to the conclusion of the hearing, learned President's Counsel for the respondent had submitted that having regard to the importance of the issue relating to the question of the nature of the jurisdiction of the Court of Appeal and also having regard to the conditional nature of the special leave to appeal granted to the State where the respondent to be on bail irrespective of the outcome of the appeal, the respondent does not wish to pursue the preliminary objection. Since the respondent is not pursuing the preliminary objection regarding the filing of the written submissions in terms of Supreme Court Rules, this Court will not go into the matter and would consider only the main appeal to which I would now turn to on the basis of the two questions referred to earlier.

(A) Whether section 404 of the Code of Criminal Procedure Act, vests only appellate and revisionary jurisdiction in the Court of Appeal or whether the Court of Appeal is also vested with original jurisdiction?

Learned Deputy Solicitor General for the appellants strenuously contended that section404 of the Code of Criminal Procedure Act, confers only an appellate/ revisionary jurisdiction in the Court of Appeal and the said jurisdiction is restricted to situations which fall under sections 402 and 403 of the Code of Criminal Procedure Act. The respondent on the other hand submitted that the position with regard to the afore-mentioned question is extremely clear and that section 404 of the Code of Criminal Procedure Act, confers original jurisdiction on the Court of Appeal to entertain applications for bail from any person in custody. The Court of Appeal in Sripavan, J., 's judgment referring to the decision in Benwell v The Attorney Genera/(I) where it was stated that,

"the Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in Sections 402 and 403,"

had considered the matter in question on the basis that the Magistrate' had refused to grant bail to the appellant and therefore the existence of an order of an original Court was in force at the time the appellant made his application to the Court of Appeal to exercise its jurisdiction.

Abeyratne, J. on the other hand, in his judgment, after considering the decisions in Rev. Singarayar(2)and in re GanapathipillaPJ has clearly stated that, the Court of Appeal has original jurisdiction.

Accordingly it is necessary to examine section 404 of the Code of Criminal Procedure Act. It is now well-settled law that the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation (Flora v United StateS(4) Mannalige Gowda v State of Mysore (5)Benoy Krishana v State of WestBengaf.6).Discussingthe importance in considering the legislative history of statute in interpretation, Bindra is of the view that (Interpretation of Statutes, 9th Edition, pg. 863)

"It is also well-settled that in interpreting an enactment, the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, the purpose and the mischief it seeks to suppress."

Notwithstanding the aforementioned, Bindra had further stated (supra pg. 876) that,

"When the statute has undergone changes by way of amendments or otherwise, it is not only permissible, but of great assistance on the matter of interpretation to examine the legislative history of the provisions."

Therefore as referred to by Maxwell (Interpretation of Statutes, 7th Edition, pg. 65) as to how the Act at present in force should be interpreted, it would be of use to examine the corresponding section of the previous enactments.

Section 396 of the Criminal Procedure Code, No. 15 of 1898 was the corresponding section to section 404 of the present Code of Criminal Procedure Act. Section 396 was as follows:

"The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive, and, the Supreme Court may in any case direct that any person be admitted to bail, or that the bail required by a Police Magistrate be reduced or increased."

Section 396 of the Criminal Procedure Code, No. 15 of 1898 was considered in the case of in re Ganapathipillai (supra), where the then Supreme Court interpreted the words 'in any case' to mean that the jurisdiction of the Supreme Court under section 396 to be revisionary and/ or appellate as there is a condition pre-requisite for the exercise of such jurisdiction. The application in Ganapathipillai (supra) was for an order on the grant of bail. De Sampayo, J. in Ganapathipillai(supra) stated that the Court was bound by the views expressed in the case of The King v Lokunona{7}which had examined section 396 of the Criminal Procedure Code of 1898. Learned Presidents's Counsel for the respondent agreed that the interpretation given in Ganapathipillai (supra) had restricted the jurisdiction of the Supreme Court under section 396 of the Criminal Procedure Code of 1898 to be revisionary and/or appellate and further submitted that the law as it then stood as interpreted in the case of Ganapathipillai (supra) was therefore followed in the subsequent cases of Kamusamyv Minister of Defence and External Affairs (8)and Kanapathyv Jayasinghe(9),where section 396 of the Criminal Procedure Code of 1898 was given careful consideration.

Learned President's Counsel for the respondent also contended that, the Criminal Procedure Code of 1898was repealed by section 3(1)a of the

Administration of Justice Law, No. 44 of 1973 (hereinafter referred to as the AJL and although the new enactment basically adopted the provisions of the old Code, it had introduced new words with an attempt to expand the meaning of the relevant section, with a view to overcome the restrictive interpretation given to the words 'in any case' in Ganapathipillai's (supra) case. Section 103(4) of the AJL reads as follows:

"Notwithstanding anything contained in this section, the Supreme Court may in any case direct that any person be admitted to bailor that the amount of the bond fixed by any original Court be reduced or increased."

Learned Presidents Counsel for the respondent, referring to the newly introduced words in section 103(4) of the AJL, which reads as 'notwithstanding anything contained in this Section', submitted that it was intended to give a wider

interpretation to the section in order to provide an opportunity for persons in custody to seek relief by way of an application for bail.

It is however to be borne in mind that section 103(4) of the AJL had not been interpreted by this Court as it was replaced within 6 years of its introduction by the present Code of Criminal Procedure Act. Accordingly it would not be of any assistance to this Court to examine the aforesaid provision of the AJL, having in mind the questions that are before this Court. However, it is of interest to.f1oteobservations made by Prof. G. L. Peiris (Criminal Procedure in Sri Lanka,2nd Edition 1998, PP.152-152)in regard to the powers of the Supreme Court in respect of bail under the provisions of AJL, where he had stated that,

"Unlike the English Courts which have jurisdiction under the common law to made orders for bail in all cases, the Supreme Court of Sri Lanka has no comparable power. Its power and jurisdiction in this regard are conferred and regulated by statute - previously by the Courts Ordinance and the Criminal Procedure Code and today by the Administration of Justice Law."

Consequently what is relevant and more important would be to consider the provisions stipulated in Section 404 of the Code of Criminal Procedure Act, which repealed and replaced the AJL in 1979. Section 404 of the present Code of Criminal Procedure Act reads as follows:

"The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive; and notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail or that the bail fixed by the High Court or Magistrate be reduced or increased or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody."

Learned Deputy Solicitor General for the appellants contended that section 404 of the Code of Criminal Procedure Act and section 396 of the Criminal Procedure Code of 1898 were similar. His contention was that the Court of Appeal in Rev. Singarayar v Attorney General (supra), Nithyanandanand Others v Attorney General (ID) and the Supreme Court in Benwell v TheAttorney General and Another (supra) had correctly stated the Judicial interpretation and view of the nature of the jurisdiction that has been vested in the Court of Appeal by section 404, that it does not vest 'original' jurisdiction in the Court of Appeal.

However, learned President's Counsel for the respondent took a contrary view on the submissions made by the learned Deputy Solicitor General for the appellants and submitted that the words 'notwithstanding anything to the contrary in this Code or any other Law', which were absent in section 396, but are found in section 404 and their significance was overlooked by Court incoming to their conclusion in all the aforementioned decisions. Learned President's Counsel for the respondent further contended that the cases of Rev. Singarayer (supra) and Benwell (supra) are clear examples of judgments given by the failure to point out a significant

change brought about in the law by the amendment of a section, perhaps due to an oversight or inadvertence and therefore the judge not having addressed his mind to the meaning that should be attributed to the said amendment. Therefore the learned President's Counsel for the respondent submitted that Rev. Singarayer (supra) and Benwell (supra) clearly are decisions 'per incuriam'.

Although the contention of the learned President's Counsel for the respondent is that in the decisions of Rev. Singarayer's (supra) and Benwell (supra), the Court had not given its mind to the words 'notwithstanding anything to the contrary in this Code or any other law', which were absent in section 396, but are found in section 404, a careful examination of these decisions clearly indicate that this is not so, as there is reference to the added words in section404 of the Code of Criminal Procedure Act. For instance in Benwell v The Attorney General (supra) Sharvananda, C. J., was conscious about the addition of the words in section 404 of the Code of Criminal Procedure Act, when he stated that the Court of Appeal is empowered to exercise only appellate jurisdiction, as his Lordship had stated that,

"Counsel made reference to section 404 of the Code of Criminal Procedure Act, No. 15 of 1979 which inter alia, provides that 'notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail'. It was urged that in any event, the Court of Appeal, had power sunder this section to admit the appellant to bail. In my view, this section does not support Counsel's submissions. The expression 'in any case' can only refer to the cases referred to in the two previous sections, viz., 402 and 403 of the Code, and is not of general application. The Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in section 402 and 403."

Thus although section 404 of the Code of Criminal Procedure Act, was not considered in detail, it would not be correct to say that they have not considered the contents of the new section as the decisions in Rev. Singarayer (supra), Nithyanandan (supra) and Benwell (supra) correctly reflects the nature of the jurisdiction vested in the Court of Appeal by section 404, which is limited to appellate and revisionary jurisdiction.

Considering the submission made by the learned President's Counsel for the respondent, it is not possible to accept that by the introduction of the term 'notwithstanding anything to the contrary in this Code or any other law', legislature had vested 'original' jurisdiction in the Court of Appeal in considering the grant of bail.

The decisions which had considered the vesting of jurisdiction pertaining to bail since Ganapathipillai (supra) had been unanimous in its outcome and the only difference in section 404 is the inclusion of the non-obstante clause which was not in the previous sections it is settled law that the non-obstante clause will have to beread in the context of what the legislature conveys in the enacting part of the provision. (Jyothiben Ramlal v Stateof Gujaraf.11) Aswini Kumar v Arvinda

Bose(12),Union of India v Shrinbai (13). Considering the effects of non-obstante clauses, Bindra states that,

"The proper way to construe a non-obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to betaken as overriding anything in consistent to that meaning in the provisions mentioned in the non-obstante clause. . . . . It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principal underlying non-obstante clause may be invoked only in the case of 'irreconcilable conflict' (Emphasis added).

As stated by Sharvananda, C. J. in Benwell (supra) the expression in section 404 could only be referred to in sections402 and 403 of the Code of Criminal Procedure Act. Section404 of the Code is contained in Chapter XXXIV, which deals with bail and consists of 7 sections from sections402 - 408. It is to be noted that section 403 was amended by the Code of Criminal Procedure (Amendment)Act, NO.4of 1993.Section402 and the amended section 403(1)read as follows:

"402 -when any person other than a person accused of a non bailable offence appears or is brought before a Court and is prepared at any time at any stage of the proceedings before such Court to give bail such person shall be released on bail:

Provided that the Court if it thinks fit may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as herein after provided." 403(1)- A Magistrate or a Judge of the High Court, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence:

Provided that a person alleged to have committed or been concerned in committing or suspected to have committed or to have been concerned in committing, an offence punishable under section 114, 191 and 296 of the Penal Code shall not be released, at any stage of any inquiry or trial, except by a Judge of the High Court."

Considering the aforementioned sections, along with section 404 of the Code of Criminal Procedure Act, it is apparent that for the Court of Appeal to consider making a direction under section 404 there should be an order from the Judge of the High Court or a Magistrate.

Accordingly, when one considers all these provisions together having in mind the non-obstante clause in section 404, there is nothing to imply that the Court of Appeal has original jurisdiction with regard to granting of bail. In fact although not specifically stated, it appears that, Sripavan, J., in his judgment where the President of the Court of Appeal had agreed, had proceeded on the premise that section 404 vests only appellate and revisionary jurisdiction in the Court of Appeal. Moreover, although not specifically stated, it also appears that Sripavan, J. in his judgment had referred to the decisionsin Rev.Singarayer (supra) and Benwell (supra),in the light that the Court of Appeal could exercise appellate and revisionary jurisdiction in

terms of section 404 of the Code of Criminal Procedure Act. Thus in his judgment, Sripavan, J., after making reference to Rev. Singarayer'scase (supra) and Benwell'scase (supra) had quoted from the judgment of Sharvananda, C. J. in Benwell's (supra) case. Thereafter he had stated that,

"As averred in paragraph27 of the petition, the Magistrate has refused to grant bail to the petitioner. Hence, the existence of an order of an original court was in force at the time the petitioner made this application, for this court to exercise its jurisdiction (emphasis added)."

Paragraph 27 of the petition dated 26.01.2004 to the Court of Appeal stated thus:

"However, the learned Magistrate disallowed the objections raised on behalf of the petitioner stating that there was no need to file a fresh or amended report by the Police despite the death of the 1st accused and fixed the matter for the 30th January, 2004 to determine whether charges would be framed against the petitioner as required by section 182 of the Code of Criminal Procedure Act. Further the learned Magistrate whilst stating that he appreciated the presence of the petitioner in Court despite his present condition, but that he was unable to grant bail in view of Section 47 of the Immigration and Emigration Act, remanded the petitioner to fiscal custody until 30th January 2004. A true copy of the said order is annexed hereto marked 'P15' (emphasis added).&quot ;

Accordingly, it is apparent that Sripavan, J. had considered the respondent's application having identified a 'bail refusal order' by the learned Magistrate on 19.01.2004 and thereafter had considered the matter on the premise that section 404 vests only appellate and revisionary jurisdiction in the Court of Appeal. Learned Deputy Solicitor General submitted that there were two discrepancies between the Sinhala and the English versions of section 404 and that the Sinhala version gives section 404 a restrictive interpretation. These discrepancies were that, in the Sinhala text the words' wzq@ CfDd6:>D2:5)' is given whereas in the English text this is stated as 'in any case' and the word, 'c.:J@)zq~clZ5)<::i?' which is given in the Sinhala text, appears as 'any person' in the English text. Whilst agreeing with the submission of the learned Deputy Solicitor General that there exist these two discrepancies, it is to be borne in mind that there are also other such discrepancies when the Sinhala and English texts of section 404 are compared.

However, the applicable text in terms of Article 23(3) is quite clear in this regard, as it provides that the law published in Sinhala shall as from the date of such publication be deemed to be the law and super cede the corresponding law in English. Further, in terms of Article 23(1) of the Constitution in the event of any inconsistency between any two texts, the text in the Official Language should prevail. In such circumstances although there are differences between the English and Sinhala texts, it would not be necessary for the purpose of this appeal to venture into a detailed examination of the differences between the aforementioned two versions.

Accordingly it is apparent that in terms of the section 404 of the Code of Criminal Procedure Act, the Court of Appeal has only the appellate and revisionary jurisdiction.

Having considered the effect of section 404 of the Code of Criminal Procedure Act, let me now turn to examine the applicability of section 47(1) of the Immigrants and Emigrants Act.

(B) Whether section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of Appeal to consider granting bail to a person accused of an offence under section 45 of the Immigrants and Emigrants Act?

Learned Deputy Solicitor General took up the position that in terms of section 47(1) of the Immigrants and Emigrants Act, bail was denied to persons accused of offences contained in that section. The contention of the learned Deputy Solicitor General is that the term 'shall' carries with it a mandatory obligation on all courts and the parliamentary proceedings also reveal that the intention of the legislature was clearly to ensure that by the use of the terms 'non-bailable', persons accused of offences contained in that section be denied bail in the literal sense of the English word 'non-bailable.' He also took up the position that section 47(1) of the Act as amended, overrides the provisions of section 404 of the Code of Criminal Procedure Act, since the former belongs to specific law and the latter falls within the category of general law.

Section 47(1) of the Immigrants and Emigrants Act, No. 20 of 1948, as amended states as follows:

"Notwithstanding anything in any other law-

(a) every offence under paragraph (a) of sub-section(1) of section 45;
(b) every offence under sub-section (2) of section 45 in so far as it relates to paragraph (a) of sub-section (1) of that section;
(c) .....
(d) .....
(e) .....

shall be non-bailable and no person accused of such an offence shall in any circumstances be admitted to bail."

Section 45 of the Act was amended by Act, No. 42 of 1998 to include the offence in respect of which the respondent was charged and section 47 was also amended to include the aforementioned new offences ,which were brought in under section 45 and these were listed under the category of 'non-bailable' offences in terms of section 47 of the Act.

Learned President's Counsel for the respondent contended that there cannot be any conflict between section 47(1) of the Immigrants and Emigrants Act (as amended) and section 404 of the Code of Criminal Procedure Act, for the reason

that the Immigrants and Emigrants Act comes within the purview of the Magistrate's Court, whereas section 404 refers to the jurisdiction of the Court of Appeal, as section'404 of the Code has conferred original jurisdiction in the Court of Appeal. However, as examined earlier ,the Court of Appeal has no original jurisdiction regarding section 404 of the Code of Criminal Procedure Act as it has only appellate and revisionary jurisdiction.

Be that as it may, it would be necessary and relevant to consider the manner in which this appeal had come before the Court of Appeal. As stated earlier, the Magistrate made order on 19.01.2004 remanding the respondent, acting in terms of section 403(1) of the Code of Criminal Procedure Act and section 47(1) of the Immigrants and Emigrants Act. Thereafter an application was made to the Court of Appeal in terms of section 404 of the Code of Criminal Procedure Act. It is to be borne in mind that at the time the application for bail was made to the Court of Appeal, as stated by Sripavan,J., there was an order made by the learned Magistrate acting in terms of section 403(1) of the Code of Criminal Procedure Act. However, there was no application made by the respondent to the learned Magistrate seeking bail and there is no such refusal order made by the learned Magistrate. The Magistrate acting in terms of section 47(1) of the Immigrants and Emigrants Act, made order remanding the
respondent. Accordingly, there was no such order before the Court of Appeal, for them to consider in order to exercise appellate or revisionary jurisdiction for the purpose of affirming or setting aside the order refusing bail by the learned Magistrate.

Moreover there is a further matter that has to be referred to in this regard. The Court of Appeal, even whilst exercising appellate or revisionary jurisdiction could not have overlooked the provisions stipulated in section 47(1) of the Immigrants and Emigrants Act. Section 47(1), as referred to earlier takes away the jurisdiction on all Courts to grant bail to accused persons. Accordingly although the Court of Appeal could have exercised appellate or revisionary jurisdiction in terms of section 404 of the Code of Criminal Procedure Act, it could not have been lawful for the Court of Appeal to grant bail in terms of section 47(1) of the Immigrants and

Emigrants Act. Sripavan, J., in his judgment has correctly referred to Bindra (Interpretation of Statutes, 8th Edition pg. 151) as well as to the ratio of Kushi Ram v The State (14) that when special provision is made in a special statute,that special provision excludesthe general provision in the general law and therefore by section 47, the legislature intended that a person accused of an offence under section 45 of the Immigrants and Emigrants Act shall not in any circumstances be admitted to bail.

Having said that the Court of Appeal had considered the granting of bail to the respondent, and Sripavan,J. had referred to the provisions in Articles 13(2) and 13(5) of the Constitution and had come to the conclusion that any strict interpretation of section 47(1) of the Immigrants and Emigrants Act would be unconstitutional and unreasonable and therefore an interpretation must be made in a manner respecting petitioner's liberty taking into account the provisions relating to

the fundamental rights enshrined in the Constitution. The Court of Appeal had on that premise enlarged the respondent on bail.

When bail has to be refused in terms of section 47(1) of the Immigrants and Emigrants Act, it would necessarily infringe on the right to personal liberty. Therefore as stated in Babu Singh v State of Uttar Pradesh(15) reasonableness postulates an intelligent care that deprivation of freedom by refusal of bail is not for punitive purpose, but for bi-focal justice to the individual involved and the society affected. Moreover, it is an accepted rule that the mere fact that the literal meaning of the words used leads to an injustice is no ground for disregarding the meaning. Referring to injustice which would occur by the process of interpretation, Bindra (Supra at pg.261) states that,

"It is to be taken as a fundamental principle standing as it were on the threshold of the whole subject of interpretation, that the plain intention of the legislature, as expressed by the language employed is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning, it is to be obeyed (emphasis added)."

Referring to Martin B. in Ornamental Pyrographic Woodwork Co. v Brown, Bindra further states that (supra),

"The question depends entirely on the Act of Parliament that the true mode of dealing with Acts of Parliament is to give them their ordinary meaning, and to carry out what the legislature in words enact.

Even if the result of such a construction is attended with injustice, still the true mode is to carry it out, instead of endeavouring to tamper with it, and to give it what it supposed to be a construction more consonant with justice (emphasis added)."

In such circumstances even in a situation where there could be a violation of the basic fundamental rights enshrined in the Constitution, it would be an obligation for this Court to give effect to the intention of the legislature. Moreover, in terms of Article 80(3) of the Constitution,

"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever."

Therefore, it is apparent that the Court of Appeal could not have inquired into the validity or the constitutionality of section 47(1) of the Immigrants and Emigrants Act at that stage. As stated by Viscount Simonds in Magor and Sf. Mellons ROC v Newport Corporation (16)a Judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore the role of the Judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the

function of every Judge to do justice within the stipulated parameters. Referring to the function of a Judge, Justice Dr. Amerasinghe, was of the view that (Judicial Conduct, Ethics and Responsibilities, pg. 284),

"The function of a judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years. In Government Agent, Superintendent of Police v Suddhana et a/., (17) Chief Justice Layard said, at the time when the Privy Council was the country's apex tribunal:

"If we wrongly construe the law the remedy is by appeal to His Majesty in Council. If on the other hand we rightly construe the law and the law is unpalatable to any section of the community, the remedy of that section of the community is to endeavour, if possible to have the law amended. Such endeavours, however, should be constitutional."

Considering the provisions in terms of section 47(1) of the Immigrants and Emigrants Act, it is clearly evident that although section 404 vests appellate and revisionary jurisdiction in the Court of Appeal to grant bail, section 47(1) has taken away that jurisdiction from all Courts as offences under section 45 of the Immigrants and Emigrants Act shall be non-bailable and no person accused of such an offence shall be admitted to bail.

It is thus clearly evident that the effect of section 47(1) of the Immigrants and Emigrants Act is that no person accused of such an offence shall be admitted to bail. The restriction thus devolves on an accused, who would have to be incarcerated without a remedy until the conclusion of the trial. Compared with the provisions of the fundamental rights enshrined in our Constitution, it is an arguable point that this position leads to an injustice as even a suspect would be deprived of his liberty irrespective of the fact that in terms of the provisions contained in the Chapter on fundamental rights of the Constitution, the basic rights of the individual must be safeguarded.

However, it is to be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of section 47(1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is for the legislature, viz., the Parliament to make necessary amendments if there is a conflict between the specific provisions and individual liberty. Considering unjust and unfair action in terms of legislative provisions, Henry Cecil (The English Judge, Hamlyn Lectures, 1970, pg. 125),was of the view that,

"The object of every court must be to do justice within the law. Admittedly the law sometimes forces an unjust decision. If there is no way about it, it is for Parliament to alter the law if the injustice merits an alteration (emphasis added)."

Therefore, although it may force an unjust decision, it is quite clear that section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of

Appeal to consider granting bail to a person accused of an offence 'under section 45 of the Immigrants and Emigrants Act.

For the aforementioned reasons, I answer questions A and B as follows:

(a) Section 404 of the Code of Criminal Procedure Act of 1979vests only appellate and revisionary jurisdiction in the the Court of Appeal; and

(b) Section 47(1) of the Immigrants and Emigrants Act serves as a prohibition on the Court of Appeal to consider granting bail to a person accused of an offence under section 45 of the Immigrants and Emigrants Act.

This appeal is accordingly allowed and both judgments of the Court of Appeal dated 18.06.2004 are set aside. Although grant of bail for the respondent was unlawful for the foregoing reasons, as agreed by the learned Deputy Solicitor General there would not beany reversal of the status quo of the respondent. In all the circumstances of this case there will be no costs.

WEERASURIYA,J. -I agree.
UDALAGAMA, J. -I agree.
DISSANAYAKE,J. -I agree.
FERNANDO,J. -I agree.

Appeal allowed subject to the Respondent's right to remain on bail as per undertaking given by the Applicant.

Shiyam v. Officer-in-Charge, Narcotics Bureau And Another - SLR - 156, Vol 2 of 2006 [2006] LKSC 4; (2006) 2 Sri LR 156 (29 March 2006)

SHIYAM
VS
OFFICER-IN-CHARGE, NARCOTICS BUREAU AND ANOTHER

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA, J.
UDALAGAMA, J.
DISSANAYAKE, J.
FERNANDO, J.
SC APPEAL NO.28/2002.
CA (PHC) REVISION APPLICATION NO. 170/204.
HC COLOMBO BAIL NO. 2230/04.
MC MALIGAKANDA B 937/03.
29TH SEPTEMBER, 27TH OCTOBER AND
1ST DECEMBER 2005 AND 9TH JANUARY.
AND 15TH FEBRUARY 2006.

Bail-Bail Act, No. 30 of 1997, section 3(1) - Poisons, Opium and Dangerous Drugs Act, No. 12 of 1952, section 83(1) - Does section 3(1) of the Bail Act exclude the application of section 83(1) of Act, No.12 of 1952 as amended by Act, No. 13 of 1984? -Is section 83(1) a provision referred to in the expression "any other written law in respect of the release on bail of persons accused under such other written law" contained in section 3(1) of the Bail Act or cover offences eusdem generis contained in the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 and regulations made under the Public Security Ordinance? - Jurisdiction of High Court to consider bail under section 83(1) of Act, No. 12 of 1952 as amended - Use of proceedings of Parliament in construing legislative intention.

The appellant, his wife and driver were charged with possession of 9.086kg of heroin. The Magistrate made order for the remand of the three suspects in view of the fact that under section 83 of the Poisons, Opium and Dangerous Drugs Act, No.12 of 1952 as amended by Act, No.13 of 1984, no person suspected of an offence under Section 54 of that Act shall be released on bail except by the High Court in exceptional circumstances. The High Court in applications by the appellant and his wife released the wife but not the appellant. The appellant's revision application was dismissed by the Court of Appeal for want of exceptional circumstances.

It was argued for the appellant that section 3(1) of the Bail Act nullified the remand in that while section 2 provided that giving bail was the rule and refusal

was the exception, under section 3(1) of that Act it is provided that nothing in this Act shall apply to a person who is accused or suspected or convicted under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or under regulations made under the Public Security Ordinance or any other written Law which makes express provision in respect of bail of persons accused or suspected or convicted of offences under such other written law. It was argued that the Poisons, Opium and Dangerous Drugs Act was not a written Law eusdem generis the laws mentioned in section 3(1) of the Bail Act which excluded laws relating to public order. Hence section 3(1) had no effect on persons accused of offences under the Poisons, Opium and Dangerous Drugs Act which deals with a different subject.

HELD:

1. The eusdem generis rule had no application and section 3(1) permitted the prohibition under section 83 of the Poisons, Opium and Dangerous Drugs Act against bail. As such, the section 83 restriction against bail was operating despite section 3(1) of the Bail Act.

2. In case of doubt, it is competent to look at Parliamentary debates on Acts to ascertain the intention of the law. According to recent judgments the debate in Parliament on the Bail Act shows that bail under that Act was not available to a person accused of an offence under written law in the nature of section 83 of the Poisons, Opium and Dangerous Drugs Act restricting bail and not necessarily limited to written laws dealing with public order.

Cases referred to :

1. Bangalore Electricity Supply Co. Ltd v. CIT, West Bengal 1978 SC 1272
2. Kochumi v. State of Madras and Karima AIR 1960 SC 1080
3. Melicio Fernandes v Mohan Nair AAIR 1966 60A 23
4. SS. Magnhilol (Owners) v. McIntyre Brothers and Co. 1920 3 KB 321
5. Pepper v. Hart 1993 1AURR 42
6. J. B. TextileIndustries Ltd. v. Minister of Finance and Planning 1981 1 Sri LR 156
7. Manawadu v Attorney- General 1987 2 Sri LR 30
8. De Silva and Others v. Jeyaraj Fernandopulle and Others 1996 1 Sri LR 22

APPEAL against the judgment of the Court of Appeal.

Faiz Musthaha, P C. with Amarasiri Panditharatne, Gaston Jayakody and Thushani Machado for appellant.
Dappula de Livera, Deputy Solicitor General for respondents.

Cur.adv. vult.

March 29 2006.

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 15.02.2005. By that judgment the Court of Appeal refused the application made in Revision by the 1st suspect - petitioner- appellant hereinafter referred to as the appellant) for bail pending trial in the High Court of Colombo. The appellant made an application to this Court on which special leave to appeal was granted on the following question:

"Did the Court of Appeal err in law by the failure to take into account the provisions of the Bail Act, No. 30 of 1997".

The facts of this appeal, as submitted by the appellant, albeit/brief, are as follows:

The appellant, a 46 years old businessman, was arrested along with his wife and his driver on 28.11.2003 at his residence. It was alleged that the appellant was in possession of 23kg of brown powder (pure quantity of heroin was 9.086kg as confirmed by the Government Analyst).) On 29.11.2003 the three suspects were produced before the learned magistrate, Maligakanda where order was made detaining them until 05.12.2003. On 05.12.2003 the learned Magistrate made order remanding the three suspects and the appellant submitted that he had been in remand since then (P1). On 10.02.2004 the appellant, his wife and the driver had made applications for bail to the High Court of Colombo (P1, P3 and P4). The bail applications in respect of the appellant and his wife were taken together for inquiry before the High Court of Colombo and by his order delivered on 12.03.2004, the learned High Court Judge allowed the application made by the appellant wife and granted her bail, but had refused his application (P7). The appellant, being aggrieved by that order filed an application in Revision in the Court of Appeal which was dismissed on 15.02.2005 for the reason that the documentation produced on his behalf in support of his application for bail do not reveal any exceptional circumstances and that for the ailments the appellant has complained of, treatment could be obtained from the Prison Hospital.

Learned President's Counsel for the appellant submitted that the appellant had been indicted before the High Court of Colombo in terms of the provisions of the Poisons, Opium and Dangerous Drugs Act, No. 12of 1952as amended by Act, No. 13 of 1984for possession and trafficking of heroin. The contention of the learned President's Counsel for the appellant is that the grant of bail in respect of suspects who are charged under the Poisons, Opium and Dangerous Drugs Act, as amended, is subject to the provisions of the Bail Act, No. 30 of 1997(hereinafterreferredto as the Bail Act) and that the provisions of the Bail Act would apply to any person accused or suspected of having committed or convicted of offences under any law other than those who are accused or suspected of having committed or convicted under the Public Security Ordinance, Prevention of Terrorism Act and any other written law which makes express provision in regard to the release of such suspect on bail. It was also contended that the Poisons Opium and Dangerous Drugs Act as amended cannot come within the ambit of any other written law as contemplated by section 3(1) of the Bail Act as there is no provision

in the Poisons, Opium and Dangerous Drugs Act with regard to the release of suspects accused of or having. committed offences under the said Act. Learned President's Counsel for the appellant also drew our attention to section 2 of the Bail Act. According to the learned President's Counsel for the appellant, section 2 of the Bail Act contemplates that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.

It is common ground that since the enactment of the Bail Act, it is the general law which is applicable for the granting of bail as it replaced the relevant provisions contained in the Code of Criminal Procedure Act, No. 15 of 1979. However, the Bail Act had excluded special statutes which had made express provisions pertaining to the grant of bail and such provisions are contained in section 3(1) of the Bail Act, which reads as follows:

"Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law (emphasis added.)"

Admittedly the appellant has been indicted under the provisions of the Poisons, Opium and Dangerous Drugs Act, No. 12 of 1952 (as amended by Act No. 13of 1984)and was charged for possession and trafficking in a total of 9.086Kg. of heroin. The contention of the learned President's Counsel for the appellant was that section 83(1) of the Poisons, Opium arid Dangerous Drugs Act introduced by the amending Act, No. 13 of 1984, provides that no person suspected of an offence under section54A shall be released on bail except by the High Court in exceptional circumstances. Learned President's Counsel thus submitted that the appellant was indicted with the commission of offences under section54A of the Act and if not for the Bail Act, would come within the provisions of section 83 of the Poisons, Opium and Dangerous Drugs Act. Therefore it was contended on behalf of the appellant that both the High Court and the Court of Appeal erred in not taking cognizance of the fact that provisions of the Bail Act prevailed over the Poisons, Opium and Dangerous Drugs Act, considering the operation of the ejusdem generis rule in the construction of section 3(1) of the Bail Act. Learned Deputy Solicitor General for the respondent strenuously argued that the ejusdem generis rule has no application to section 3(1) and therefore the appellant cannot come within the provisions of section 3(1) of th Bail Act. Since the contention of the learned President's Counsel for the appellant is chiefly based on the applicability of the rule of ejusdem generis in interpreting section 3(1) of the Bail Act, it would be necessary to examine the said rule vis a vis its application to section 3(1) of the Bail Act.

Ejusdem generis, as stated in Bangolore Electric Supply Co. Ltd, v. CIT, West Bengal (1)is not a rule of law, but a rule of construction, which would enable a Court to ascertain the intention of the legislature. The rule is applicable only when particular words, which belong to a class, category or genus, are followed by

general words. Referring to this doctrine, Bindra (Interpretation of Statutes, 9th Edition, pgs. 684-685) clearly states that, the rule "requires to be applied with great caution and not pushed too far so as to unduly or unnecessarily limit general and comprehensive words
to dwarf size. He further stated that,

"The rule of ejusdem generis is not one of universal application. It is merely a rule of construction and as such it may be of no assistance when the intention of the legislature is so plain as to require no resort to cannons of construction.,

The rule is to be made use of only where the language of the statute under consideration is somewhat vague or uncertain. The rule of ejusdern generis is applicable when particular words pertaining to a class, category or genus are followed by general words. In such a case the general words are constructed as limited to things of the same kind as those specified. The rule applies only when;

(a) the statute enumerates the specific words;
(b) the subjects of enumeration constitute a class or category ;
(c) that class or category is not exhausted by the enumeration;
(d) the general terms following the enumeration; and
(e) there is no indication of a different legislative intent."

Section 3(1) of the Bail Act, which has been referred to earlier, stipulates specifically that nothing in the Bail Act shall apply to any person accused or suspected of having committed or convicted of an offence under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 and the Regulations made undE,3r the Public Security Ordinance.

This section thereafter refers to 'any other written law, which makes express provision' in respect of the release on bail of persons accused or suspected of having committed, or convicted of offences under such other written law. Accordingly, it is evident that it refers to two specific laws, viz, the Prevention of Terrorism (Temporary Provisions) Act and the Regulations made under the Public Security Ordinance and to any other written law, which have made express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under those specific laws.

Learned President's Counsel for the appellant contended that the Prevention of Terrorism Act and the Public Security Ordinance are of the same genus or species as they relate to the security of the State and the public and therefore 'any other written law' is to apply to those cases within the genus of which the Prevention of Terrorism Act and the Public Security Ordinance are instances.

However, as referred to by Craies (Statute Law, 7th Edition, pg. 181) to invoke the application of the ejusdem generis rule there must be a distinct genus or category. In the words of Craies (supra),

"The modern tendency of the law, it was said, is to attenuate the application of the rule of ejusdem generis".

The rule of ejusdem generis is based on the theory that "where general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified" (Bindra (supra) at pg. 686) However, as has been already decided Koehuni v State of Madras and Kerala (2)Melieio Fernandes v Mohan Nair (3)it is essential that the specific words must form a distinct genus or a category. In the event there is no such formation of a genus or category there is no possibility for the ejusdem generis rule to be applied. Referring to the application of the ejusdem generis rule, Francis Bennion opined that for the said purpose there must be a sufficient indication of a category that can properly be described as a class or genus, although not specified as such in the enactment. In SS Magnhild (owners) v. Me Intyre Brothers and CO.(4)Mc Cardie, J. said that,

"So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature."

Considering the provisions of section 3(1) of the Bail Act, it is clear that reference is made first to the Prevention of Terrorism (Temporary Provisions) Act and the Public Security Ordinance, followed by a general statement, which states that the provisions of the Bail Act shall not apply in respect of offences committed under certain laws. The contention of the learned President's Counsel for the appellant was that ex facie the Prevention of Terrorism Act and Public Security Ordinance, referred to in section 3(1) of the Bail Act, clearly constitutes a genus, viz., laws relating to the security of the State and as such the phrase "any other written law' must be construed ejusdem generis as contemplating only laws of the same genus.

On a careful consideration of section 3(1) of the Bail Act, a question arises as to whether it would be correct to say that the term 'any other' in Section 3(1) of the Bail Act would clearly constitute a genus to include the third limb of the section to follow the two statutes referred to in the first two limbs of that section, and I would now turn to examine the said question.

The Prevention of Terrorism (Temporary Provisions) Act and the Public Security Ordinance, not only relate to laws containing offences pertaining to the security of the State, but also makes express provision that relates to bail. Therefore they belong to a narrow genus of security of the State and to a broad genus of laws containing provisions relating to the grant of bail. Referring to the application of ejusdem generis principle in a situation where there is a narrow genus as well as a broad genus, Bindra (supra pg. 685) states that,

"if the preceding words do not constitute mere specifications of a genus, but constitute description of a complete genus, the rule has no application. If the subjects of enumeration belong to a broad based genus, as also to a narrower

genus there is no principle that the general words should be confined to the narrower genus (emphasis added.)"

It is therefore quite clear that in terms of section 3(1) of the Bail Act, if there is any other written law which contains express provision for the grant of bail to persons suspected or accused or convicted of offences such enactment would be excluded from the applicability of the Bail Act.

The 'common feature' therefore in section 3(1) of the Bail Act is the exclusion from the application of the Bail Act wherever express provision has been made for the grant of bail to persons accused or suspected or convicted of offences under the specific law.

A general reading of section 3(1) clearly specifies that the Bail Act shall not apply in certain instances and the criterion that should be applied to ascertain the applicability of the Bail Act therefore is to find out whether the law in question contains express provision for the grant of bail to persons accused or suspected or convicted of offences under the said Law.

On an application of the tests for the purpose of deciding whether the ejusdem generis rule should apply, it is thus evident that the general words of the third limb of section 3(1) of the Bail Act takes a meaning beyond the genus, if any, created by the first and second limbs of that section. In fact it is the general words in the third limb, which form the category for exclusion and to apply the rule of ejusdem generis in this case would render the general words contained in the third limb of section 3(1) of the Bail Act meaningless for the reason that there is nothing ejusdem generis to fall within the purview of the said third limb. Further, if such an interpretation is given, it could contravene the more important rule of construction, viz., 'that all words are to be given effect'. Therefore, the answer to the question as to whether the rule of ejusdem generis would be applicable in interpreting section 3(1) of the Bail Act is clearly in the negative. The contention of the learned President's Counsel for the appellant that the Poisons, Opium and Dangerous Drugs Act is subject to the provisions of the Bail Act also fails for other reasons stated in the succeeding paragraphs, which clearly illustrates that the provisions of section 3(1) of the Bail Act shall not apply in respect of offences committed under certain laws.

The applicability of section 3(1) of the Bail Act was referred to by Mark Fernando, J. in S. C. (SO) Nos. 6 and 7 of 1998, which considered the Bill titled 'An Act to Eliminate Ragging and Other Forms of Violence and Cruel, Inhuman and Degrading Treatment from Educational Institutions." Section 10 of the Bill contained provisions restricting the right to release a person suspected or accused of committing an offence under sub-section (2) of section 2 or section 4 of the Bill and considering this section, Mark Fernando, J., observed that (supra pg. 30):

"The Bail Act, No. 30 of 1997, is of some relevance. It recognizes that the grant of bail shall be the rule, and the refusal to grant bail the exception, subject to the exceptions specified in the Act. One exception is that the Act shall not apply to any

person accused or suspected of offences under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Emergency Regulations and any other written law which makes express provision in respect of the release on bail of persons accused or suspected of offences under such written law. If Section 10 is valid, then this Bill, when enacted, would be one those exceptions (emphasis added)."

Thus, Justice Mark Fernando had recognized section 3(1) of the Bail Act as a provision which excludes 'any other written law which makes express provision for the release on bail of persons accused or suspected of offences under that written law.' This position could be further clarified by an examination of the parliamentary proceedings pertaining to the Bail Bill.

Learned Deputy Solicitor General for the respondents contended that the parliamentary proceedings could be used by the Court to ascertain the intention of the legislature.

Until the land mark decision in Pepper v Hart (5)the rule followed by the English judges had been that parliamentary debates reported in Hansard could not be referred to in order to facilitate the interpretation of a statute. However, by the decision in Pepper v Hart (supra), a new practice came into being relaxing the exclusionary rule and permitting reference to parliamentary material, Referring to this new approach, Lord Griffiths in Pepper v Hart (supra) stated that,

"The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

In Sri Lanka, the Courts were reluctant to consider the proceedings in the Parliament for the purpose of interpretation. However, the attitude of our Courts took a new turn tilting towards a purposive approach in J. B. Textiles Industries Ltd. v Minister of Finance and Planning(6)where Samarakoon, C. J., expressed the view that,

"Hansards are admissible to prove that course of proceedings in the legislature." .

Since the decision in J. B. Textile Industries Ltd., (supra), our Courts had acted with approval the acceptability in perusing the Hansard for the purpose of ascertaining the intention of the Parliament Manawadu v Attorney General (7).In fact in De Silva and Others v Jeyaraj Fernandopulle and Others(8)Mark Fernando, J. adopted the observations of Samarakoon,C. J. in L? Textiles Industries Ltd., case (supra) which stated as follows:

"The Hansard is the official publication of Parliament. It is published to keep the public informed of what takes place in Parliament. It is neither sacrosanct nor untouchable."

It is therefore apparent that the Court which now adopts a purposive approach, could refer to the Hansard for the purpose of ascertaining the intention and the true purpose of the legislature in order to interpret the legislation which is ambiguous, obscure or leading to an absurdity.

The speech made by the then Hon. Minister of Justice, Prof. G. L. Peiris at the introduction of the Bail Act, would thus be important in the interpretation of section 3(1) of the Bail Act.

The Bail Act, as has been stated in its long title, was introduced to provide for the release on bail or persons suspected or accused of being concerned in committing or having committed an offence and to provide for the granting of anticipatory bail. Section 2 of the said Act saw a clean departure from the earlier provisions in granting bail which stated that subject to the exceptions that has been provided for in the Act, the guiding principle in the implementation of the provisions of the Bail Act shall be that the grant of bail be regarded as the rule and the refusal to grant bail as the exception. Section 2 of the Bail Act therefore not only provides for the guiding principle in the implementation of the Act, but also clearly states that there would be exceptions to the said guiding principle. This position was clearly emphasized by the then Minister of Justice, when he moved the Bail Bill at the Second Reading in Parliament where he stated that (Government Hansard of 07.10.1997 at pgs. 504- 05).

"It has been necessary to exclude certain statutory regimes from the ambit of application of this law. The Bill which I have the honour to present does not apply to the Prevention of Terrorism Act.

Offence sunder the Prevention of Terrorism Act are not caught up within the ambit of this law because there are special considerations applicable to the safety of the State...

For the same reasons, Mr.Speaker, regulations under the Public Security Ordinance will also not be regulated by the provisions contained in this new piece of legislation nor will this legislation apply to other written laws, which contain express provisions in respect of bail for persons accused of offences under such laws (emphasis added.)"

As stated earlier the guiding principle in the implementation of the provisions of the Bail Act was that the grant of bail be regarded as a rule and the refusal to grant bail was the exception. However, when one considers the intention of the Parliament in introducing the Bail Act, it is observed that this Act would not apply to other written laws which contain express provisions in respect of bail for persons accused of offences under such laws. This statement thus encompasses the laws which makes specific provision relating to bail for persons accused of offences imperative of the fact whether such laws relate to the public security of the country. T he intention of the legislature that there should be situations where bail could be refused is also clear by the statement that stated the principal reasons for the

refusal of bail. Referring to such refusal, the then Hon. Minister of Justice, Prof. G. L. Peiris stated that,

"Mr. Speaker, there are only four principal reasons for the refusal of bail The fact of the reasons, Mr. Speaker, is that the person concerned will not appear to stand trial. In other words, he will abscond, he will be a fugitive from justice. In that situation, obviously, you cannot grant bail. The second reason is interference with witness or obstruction of the course of justice that will frustrate the objectives of a fair, impartial and objective trial..."

Therefore, the framers of the Bail Act, while considering the individual liberty of any accused person had also given their mind to the need for the collective security of the community. Accordingly, on the basis of considering the collective security of the community, the exception to the rule had been stated and by section 3(1), such exception had been laid down, which includes not only the Prevention of Terrorism Act and the Public Security Ordinance, but also the other written laws which contain express provisions in respect of bail for persons accused, or suspected of having committed or convicted of offences under those laws. Thus the Poisons, Opium and Dangerous Drugs Act, also would come within the purview, 'of any other written law' stated in section 3(1) of the Bail Act and therefore the provisions of the Bail Act would have no application to the said Poisons, Opium and Dangerous Drugs Act.

There is one other matter that I have to consider before I part with this judgment.

Learned President's Counsel contended that the Bail Act super cedes Section 83 of the Poisons, Opium and Dangerous Drugs Act when considered in the light of Section 3(1) of the Bail Act and therefore in such instances the provisions of the Bail Act should prevail.

Section83(1)of the Poisons, Opium and Dangerous Drugs (Amendment) Act, NO.13of 1984 makes express provision in respect of the release of persons accused or suspected of having committed offences under such other written law, on bail and states as follows:-

"No person suspected or accused of an offence under section 54A or 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances."

It is thus clearly seen that, in terms of section 83(1) of the Poisons, Opium and Dangerous Drugs Act, the High Court, in exceptional circumstances, could grant bail to a person who is suspected or accused of an offence under Section 54A or 54B of the said Act. Section 3(1) of the Bail Act, on the other hand clearly provides that, when there is express provision under written law in respect of the release on bail of persons accused or suspected of having committed or convicted then the provisions of the Bail Act shall not apply to such persons coming under the relevant written law. If, according to the contention of the learned President's Counsel for the appellant, the provisions of the Bail Act should super cede section 83 of the

Poisons, Opium and Dangerous Drugs Act, then the provisions of section 3(1) should prevail, which clearly states that the provisions expressed in the relevant statute should apply. Therefore, even if I am to agree with the submissions of the learned President's Counsel for the appellants, yet the provisions of section 83(1) of the Poisons, Opium and Dangerous Drugs Act would be applicable and the proper forum for making an application for bail when a person is suspected or accused of an offence under Section 54A or 54B of the Poisons, Opium and Dangerous Drugs Act would be the High Court where such bail would be granted only in exceptional circumstances. The criteria therefore set out by section 3(1) of the Bail Act for exclusions are clearly dealt with by the provisions contained in section 83(1) of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984.

Accordingly, I answer the question on which special leave to appeal was granted in the negative and for the aforementioned reasons, I hold that the provisions in the Bail Act would have no application to the Poisons, Opium and Dangerous Drugs Act. The judgment of the Court of Appeal dated 15.02.2005 is therefore affirmed. This appeal is accordingly dismissed, but in all the circumstances of this case, I make no order as to costs.

WEERASURIYA, J.-I agree.

UDALAGAMA, J. -I agree.

DISSANAYAKE,J.-I agree.

FERNANDO, J.-I agree.

Appeal dismissed

Hiddelarachi v. United Motors Lanka Ltd. And Others - SLR - 411, Vol 3 of 2006 [2006] LKSC 11; (2006) 3 Sri LR 411 (3 May 2006)

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HIDDELARACHI
VS.
UNITED MOTORS LANKA LTD., AND OTHERS

SUPREME COURT,
WEERASURIYA. J,
UDALAGAMA.J,
DISSANAYAKE.J,
SC 35/2004,
CA 1192/2001.
AUGUST 03, 2005.
SEPTEMBER 1, 15, 2005.

Termination of Services of Workmen (Special Provisions) Act, 41 of 1971 as amended by Act, NO.4 of 1976 and Act, No. 51 of 1988 (TEW Act) - Sections 2 (1) (a) (b), Section 3, Section 4, Section 5, Section 6- No Jurisdiction if termination is on disciplinary grounds? - Conduct of appellant - The purpose of the amending Act? - Difference.

The 4th respondent -appellant was the Chief Executive of the petitioner-respondent company. His contract of employment was terminated. The appellant sought an order, under Section 6 of the TEW Act, for reinstatement with back wages. On a preliminary objection raised that the Commissioner has no jurisdiction, the 2nd respondent Inquirer made order directing that the respondent company should commence leading evidence to establish that the termination was effected as a punishment on disciplinary grounds. The Court of Appeal up held the preliminary objection raised, and held that, when the employer states that the termination has been on disciplinary grounds, the jurisdiction of the Commissioner is automatically ousted.

HELD:

(1)Before the TEW (Special Provisions) Amendment Act, No. 51 of 1988 came into the statute book, where termination of a workman was effected by informing the workmen by word of mouth or by an act or deed indicating to him not to come for work and where a complaint, to that effect is made to the Commissioner of Labour and the employer claims that the termination was on disciplinary grounds, the Commissioner had no alternative but to inqure into, as certain whether the termination was effected as a punishment imposed by way of disciplinary action in

terms of sub-section, (4) the Commissioner had no jurisdiction to hear the matter.

(2) If the termination had been imposed as a punishment by way of disciplinary action, the Commissioner had no jurisdiction to hear Appeal allowed. the matter.

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(3) However after coming into effect of the amending Act, No. 51 of 1988 on 7.12.1988 the employer who terminates the employment has to give reasons to the workmen within 2 days of such termination; and if the termination had been effected by reason of punishment imposed by way of disciplinary action, the jurisdiction to entertain an application by the Commissioner made by the workman against such termination is ousted. The present position of the law is where there is such termination the employer is required within 2 days to give his reasons for such termination, where such termination has been effected either by mutual consent or with the prior written approval of the Commissioner as a punishment imposed by way of a disciplinary action, the Commissioner has no jurisdiction to hear and determine the said matter.

(4) In the instant case, the appellants' services were terminated on disciplinary grounds by letter P2 - which sets out the various acts of misconduct allegedly committed by the petitioner. The jurisdiction of the Commissioner is ousted.

Per Nimal Dissanayake, J.

"Until the amendment came into effect the Commissioner of Labour had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2 (1) read with Section 5 and Section 6.".

APPEAL from the judgment of the Court of Appeal.

Cases referred to :

1.Latiff vs. Land Reform Commission - 1984-1Sri LR118
2.Schmidt vs. Secretary of State for Home Affairs - 1969-2 Ch. 149 at 170
3.Ridge vs. Baldwin - 1994 AC 40
4..Gunawardane and Wijesooriya vs. Minister of Local Government, Housing and Construction and Others-1999-2 Sri LR 26

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S. L. Gunasekera with P. Jayawardane for 4th respondent-appellant.
Romesh de Silva PC with Geoffrey Alagaratnam for Petitioner respondent.

Anil Gooneratne for 1-3 respondent-respondents.

cur. adv. vult.

May, 3, 2006
NIMAL DISSANAYAKE, J.

The facts of this case are briefly as follows :-

The 4th respondent-appellant (who shall be hereinafter referred to as the appellant) was employed as the Chief Executive and Managing Director of the petitioner-respondent Company. Upon the appellant reaching the age of 60, the respondent-respondent continued to employ him as Chief Executive Officer and Managing Director of the said company on a fixed term contract for a further period of three years which was due to expire, on 31st March, 2002.

By letter dated 21st September 2000 (P2 annexed to X1) the contract of employment of the appellant was terminated on disciplinary and other grounds. The acts of misconduct allegedly committed by the appellant have been enumerated in the said letter. He had been paid three months salary amounting to Rs. 744,000/-, in lieu of notice. Other terminal benefits have also been paid to him at his request.

At the time of termination the appellant's monthly salary had been Rs. 247,500/- and he was in receipt of the following monthly allowances

(a) entertainment.a11owance- Rs. 25,000/-
(b) reimbursement of club membership subscription upto a maximum of - Rs. 25,000/-
(c) reimbursement of electricity, gas water bills and for maintenance of his residence upto a maximum of - Rs.25,000/-.

Thereafter the appellant by letters dated 30.10.2000 (P5 in X1) and 2nd January 2001 (P17 annexed to X1) addressed to the 2nd Respondent - respondent complained about the termination of his employment sought an order under section 6 of the Termination of Services of Workmen (Special

Provisions) Act No. 45 of 1971 as amended as by LawNO.4 of 1976and Act, No. 51 of 1988. He sought reinstatement in employment with back wages and the monetary value of all employment benefits of which he had been deprived of. (P18 annexed to X1).

By letter dated 2nd January 2001 , the appellant made an application for relief to the Labour Tribunal claiming, only compensation. He did not seek reinstatement.

At the inquiry before the 2nd respondent a preliminary objection was taken on behalf of the petitioner-respondent to the effect that the letter of termination P2 sets out disciplinary grounds for the said termination and therefore the 1st and 2nd respondent-respondents had no jurisdiction to hear and determine the said

application by operation of section 2(4) of the Termination of Employment of Workmen (Special Provisions Act).

The 2nd respondent-respondent communicated his order dated 05.04.2001 (P23 a in annexure X1). He held that he had jurisdiction to inquire into the matter. He fixed the main matter for inquiry on 29.05.2001.

The Petitioner-respondent sought to canvass the said order of the 2nd respondent-respondent(P23A)beforetheCourtofAppealinapplication No.CA 718/2001. However it had been later with drawn by the petitioner respondent reserving their right to invoke the jurisdiction of the Court of Appeal at the appropriate stage.

The inquirybeforethe2nd respondent-respondent had been resumed and despite objections in respect of jurisdiction of the 2nd respondent respondent to hear the same, being taken by the petitioner-respondent, the 2nd respondent-respondent by his order dated 29th May, 2001 (P26(a)in annexureX1)hadmadeorderdirectingthatthe petitioner-respondent should commence leading of evidence to establish that the termination was effected as a punishment on disciplinary grounds.

The petitioner-respondent by his application to the Court of Appeal sought a Writ of Certiorari and/or order setting aside/quashing the decision of 1stand2nd respondents-respondents as communicated to the petitioner in terms of the order dated 29.05.2001, for a Wirt of Certiorari and/or an

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order setting aside/quashing the order of the 1st and 2nd Respondents communicated to the Petitioner on 09.11.2001, and a writ of prohibition, restraining the 1st and2nd respondents-respondents from inquiring further into the petitioner's complaint dated 02.01.2001 made to the 2nd respondent-respondent.

The Court of Appeal by it's judgment dated 15.08.2002 had upheld the preliminary objections of the petitioner-respondent. The Court of Appeal had held that when the employer had stated that the termination has been on disciplinary grounds the jurisdiction of the Commissioner is automatically ousted.

It is from the aforesaid judgment that the appellant sought leave to appeal and this Court granted leave on the following questions :-

(1) Whether the Court of Appeal has erred in holding that when the employer stated that the termination had been on disciplinary grounds, the jurisdiction of the Commissioner was automatically ousted.

(2) Whether the Court of Appeal has erred in holding that the Commissioner of Labour was not empowered to inquire into and determine the question as to whether. an impugned termination before him was on disciplinary grounds or not in

terms of section 2(4) of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 where the employer contends that such termination was on such grounds.

(Further questions submitted by Romeshde Silva PC)

(3) Whether in the circumstances of this case the petitioner has a right and/or jurisdiction to pursue an equitable remedy before the Commissioner of Labour.

(4) In any event, on the facts of this case was the petitioner entitled to the writs prayed for in the Court of Appeal.

Learned counsel appearing for the appellant contended that in terms of the Termination of Employment of Workmen (Special Provisions) Act,

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a mere statement by an employer in a purported letter of termination that termination was effected on disciplinary grounds was not sufficient to oust the jurisdiction of the Commissioner of Labour. It was his contention that the Commissioner had the jurisdiction to inquire into the question whether the termination in question was in fact a disciplinary termination or a non disciplinary termination.

On the other hand learned President's Counsel appearing for the petitioner-respondent contended that in terms of the Amending Act No. 51 of 1988, the employer is required to state, by way of reasons within two days of termination, whether the termination had been on disciplinary grounds or not. Therefore he contended that the intention of the legislature was that, where the employer states that termination was on disciplinary grounds the Commissioner was precluded from inquiring into the matter further.

I shall now examine the correctness or otherwise of the aforesaid two positions.

Section 2(1) and 2(4) of the Termination of Employment of Workmen Act, No. 45 of 1971 (Special Provisions) Act as amended, read as follows:-

2(1) No employer shall terminate the scheduled employment of any work man without-

(a) prior consent in writing of the workman; or
(b) the prior written approval of the Commissioner.

2(4) For the purposes of this Act, the scheduled employment of a workman shall be deemed to be terminated by his employer if for any reason whatsoever otherwise than by reason of a punishment imposed by way disciplinary action.

The services of such workman in such employment are terminated by his employer and such termination shall be deemed to include,

(a) non employment of the workman in such employment by his employer, whether temporarily or permanently, or

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(b) .....

Thus in terms of section 2(1) of the Termination of Employment of Workmen (Special Provisions) Act, services of a workman could be terminated only with

(a) the prior consent in writing of the workman; or

(b) the prior written approval of the Commissioner of Labour.

Section 2(4) has defined that terminations other than those imposed as punishment for disciplinary grounds by the employer amount to termination of employment of workmen.

Section 5 provides that any termination of employment of a workman by an employer in contravention of this Act shall be null and void and have no effect. In terms of section 6 of the said Act the Commissioner is vested with power to annul termination of employment effected in contravention of the said Act and give appropriate orders.

It is to be observed that,, before Termination of Employment of Workmen (Special Provisions) Amending Act, No. 51 of 1988came into the statute book, where termination of a workman was effected by informing the workman by word of mouth or by act or deed indicating to him to not to come for work and where a complaint to that effect is made to the Commissioner of Labour and the employer claims before the Commissioner that the termination was on disciplinary grounds, the Commissioner had no alternative but to inquire into it to as certain whether the termination was effected as a punishment imposed by way of disciplinary action, in terms of sub section (4).

If the termination has been imposed as a punishment by way of disciplinary action, the Commissioner had no jurisdiction to hear the matter.

However after coming into effect of the Amending Act No.51 of 1988on 7th December, 1988,new subsection (5) was inserted immediately after sub section (4) of Section 2, which reads as follows:-

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"(5) Where any employer terminates the scheduled employment of any workman by reason of punishment imposed by way of disciplinary action, the employer shall

notify such workman in writing the reasons for the termination of employment before the expiry of the second working date of such termination. "

Unti.1the aforesaid amendment came into effect, the Commissioner of Labour to whom an application under the aforesaid Act was referred to, had to go on a voyage of discovery to ascertain whether the termination in issue came within his jurisdiction in terms of section 2(1) read with section 5 and 6 of the said Act. .

It is to be observed that in terms of the aforesaid amendment, the employer who terminates the employment has to give reasons to the workman within 2 days of such termination. And if the termination has been effected by reason of punishment imposed by way of disciplinary action the jurisdiction to entertain an application by the Commissioner made by the workman against such termination was ousted. Therefore the present position of the law is where there is a termination of employment the employer was required, within 2 days to give his reason for such termination. Where such termination has been effected either by mutual consent or with the prior written approval of the Commissioner of Labour as a punishment imposed byway of disciplinary action, the Commissioner has no jurisdiction to hear and determine the said matter.

In such circumstances the remedy that lies for the workman is to make an application to the Labour Tribunal under section 318(1)(a) of the Industrial Disputes Act challenging such termination and seek reinstatement or compensation for wrongful termination.

In the instant case the appellant's services were terminated on disciplinary grounds by letter dated 21.09.2000 (P2 in X1). Letter P2 sets out the various acts of misconduct allegedly committed by the Petitioner.

Therefore it appears that the jurisdiction of the Commissioner to entertain such an application was ousted.

This position appears to be very clear on an examination of sections '2(1)(a) (b), 2(4), 2(5),3 and 6 of the Termination of Employment of Workmen (Special Provisions) Act as amended.

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Thus it can be concluded that in terms of the Termination of Employment of Workmen (Special Provisions Act) the Commissioner of Labour is vested with power to hold that terminations other than those under section 2(1)(a),(b), 2(4) and sub section 5, are null and void and have no effect in law.

Has the appellant by his conduct accepted that his services have been terminated?

The services of the appellantwereterminatedbyletterdated21.09.2000 (P2 in X1). Within a few weeks of such termination by letter dated 05.10.2000 (P4 in X1)the

appellant requested the Petitioner-Respondent to make statutory payments that were due to him such as Employees Provident Fund, Employees Trust Fund, gratuity and allowance for unavailed leave. He did not protest to the petitioner-respondent regarding his termination. He did not refute the allegation of the termination as being a punishment made on disciplinary grounds. Further the 2nd respondent-respondent too in seeking enforcement of the aforesaid terminal benefits, has himself accepted the due termination of the Petitioner. The appellant's complaint to the 2nd respondent-respondent was made by letter dated 30.11.2000 (P2 in X1) after a period of more than 5 weeks after termination. **The appellant has also invoked the jurisdiction of the Labour Tribunal too against the termination of his employment.**

The aforesaid conduct of the appellant is also consistent with his acceptance that the termination of his employment was being imposed as punishment byway of disciplinary grounds.

Thus I am of the view that the appellant was not empowered to go before the Commissioner of Labour in so far, that the letter of termination (P2) has stated in no uncertain terms that his services were terminated as punishment on disciplinary grounds.

Thus the petitioner-respondent has a right to seek writs of certiorari and prohibition before the Court of Appeal. The Court of Appeal had rightly decided that the decision of the 2nd respondent-respondent to carry on with the inquiry, when it has been alleged that such termination has been on disciplinary grounds, was flawed.

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For the aforesaid reasons, I answer the following questions of law as follows:

(1) No.
(2) No.
(3) No.
(4) No.

I dismiss this appeal with costs fixed at Rs. 25,000/-

WEERASURIYA.J. -I agree

UDALAGAMA.J. -I agree

Appeal dismissed.

Angela Fernando v. Devadeepthi Fernando And Others - SLR - 188, Vol 2 of 2006 [2006] LKSC 6; (2006) 2 Sri LR 188 (4 May 2006)

ANGELA FERNANDO
VS.
DEVADEEPTHI FERNANDO AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA. J.
FERNANDO, J.
SC 48/2003.
CA 98/94 (F).
DC MT. LAVINIA 1236/P.
DECEMBER 02, 2004.
MARCH 02, 2005.
SEPTEMBER 21, 2005.

Partition Law, No. 21 of 1977, sections 2(1) and 25(1) -If land is not commonly owned is investigation of title necessary? - Ouster - Possession becoming adverse - Long continued possession by a co - owner? - Counter presumption of ouster.

Plaintiff's action to partition the corpus was dismissed as the parties who were said to be entitled to rights in the corpus in fact had separately possessed with clear and permanent boundaries the Lots depicted in the preliminary plan for a long period of time. The Court of Appeal reversed the judgment on the grounds-

(a) that the District Court has failed to investigate title. (b) that the parties had failed to prove ouster to claim prescription.

HELD:

(1) It is imperative that the investigation of title must be proceeded by a careful examination of the preliminary issue, whether the land sought to be partitioned is commonly owned as required under5ection2 (1). The District Judge having carefully examined the question had correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties which in the circumstances was lawful and justified.

Held further:

(2) Adverse possession as between co-owners may arise by absolute exclusion of one of the co-owners or by conversion of undivided shares into divided shares in an informal manner.

(3) Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances where exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant part there was in fact a
denial of the rights of the other co-owners.

Per Weerasuriya, J.

"The decision in Tilakaratne vs. Bastian recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period".

(4) The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances.

(5) The Court of Appeal failed to appreciate the salient feature in the evidence adverted to by the District Judge in respect of the corpus and their relevancy on the question of ouster.

APPEAL from the judgment of the Court of Appeal.

Cases referred to :-

1. Corea vs. Iseris Appuhamy - 1911 15 NLR 65 (PC)
2. Tilakaratne VS.Bastian - 21 NLR 12
3. Orderis VS.Mendis- 1910 13 NLR at 315,316
4. William Singho VS.Ran Naide 1915 1 CWR 92
5. Mailvaganam VS.Kandiah 1915 1 CWR 175
6. ASP VS.Cassim 1914 2 Bal Notes 40
7. Kapuruhami VS.Appu Singho 3 NLR 144
8. Ran Menike VS.Ran Manike 2 SCC 153
9. Selenchi Appuhamy VS.Luvinia 9 NLR 59
10. Obeysekera VS.Endoris 66 NLR 457
11. Simon Perera vs. Jayatunga 71 NLR 338
12. Nonis VS.Peththa 73 NLR 1
13. Abdul Majeed VS.Umma Zaneera 61 NLR 361 at 374

Rohan Sahabandu for substituted 10A defendant respondent -appellant.
N. B. D. S Wijesekara for substituted plaintiff appellant - respondent.

Cur. adv. vult.

May 04, 2006.

WEERASURIYA,J.

The (deceased) plaintiff by his amended plaint dated 28.03.1988sought to partition the land called Lot E of Badullagahawatta alias Kahatagahawatta situated at Karagampitiya within the Dehiwala-Mount Lavinia Municipal Council limits, in Palle Pattu of Salpiti Korale of the Colombo District in the Western Province and depicted as a divided lot in plan No. 191 dated 20.12.1905 made by Licensed Surveyor H. G. Dias, containing in extent 1. Acre and 36 perches less 23.73 perches to the North.

The trial in this case which commenced before the District Court of MountLavinia on 15.09.1992wasconcludedon30.11.1993andthe learned District Judge by his judgment dated 11.02.1994 dismissed the action with costs. Thereafter the substituted plaintiff appealed from the aforesaid judgment to the Court of Appeal and this appeal was taken up for hearing on 19.08.2002. On08.11.2002 the Court of Appeal delivered the judgment allowing the appeal and directed that a fresh trial be held.

The substituted 10A Defendant-Respondent-Appellant sought special leave to appeal from the aforesaid judgment of the Court of Appeal and this Court granted special leave to appeal on the following questions of law:

(i) Did the Court of Appeal err in holding that the District Court has not investigated title?

(ii) Did the Court of Appeal err in holding that the defendants had not proved ouster?

(iii) Did the Court of Appeal misinterpret section 25(1) of the Partition Law when in fact on a question of fact the District Court had held that the plaintiff has not proved his title or that the property is co owned?

(iv) Did the Court of Appeal err in law in ordering a trial de novo and also permitting the plaintiff to institute a fresh action which is contradictory?

(v) Did the Court of Appeal err in coming to the conclusion that the District Court erred in law and in fact?

(vi) Is the judgment of the Court of Appeal valid and legal?

(vii) In the circumstances of this case is the judgment of the District Court lawful, valid and according to law?

(viii) Could the Court of Appeal interfere with the judgment of the District Court which was based on a question of fact when the judgment is not perverse?

(ix) As the partition action has been instituted in 1981, is it just and reasonable to order a retrial after 21yearswhen most of the parties and witnesses are dead and gone and further as it is admitted that the contesting defendants have been in possession/occupation for over 50 years now?

Learned District Judge had dismissed the action on two grounds namely that the corpus was not commonly owned and that the parties had acquired prescriptive rights to the lots they possess.

The Court of Appeal has reversed the judgment of the District Court on the following grounds:-

(1) that the District Court had failed to investigate the title of the parties and

(2) that the parties had failed to prove ouster to claim prescription.

Therefore this appeal raises the question of prescription among co-owners which had received careful and exhaustive consideration both by the Supreme Court and the Privy Council in previous cases.

Investigation of Title (Question No.1)

Section 25(1) of the Partition law provides that "On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed, or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in sub section 26 should be made".

In terms of this section, it is obligatory on the District Court to carefully investigate title of all the parties in the action at the trial and decide on their rights. The binding and conclusive character of a partition decree makes it imperative that the investigation of the title by Court must be full and exhaustive.

It will not be possible for a plaintiff to prove his title by the mere production of several deeds and to merely rely on the shares which the deeds purport to convey. It is significant that there must be clear proof as to how the executants of a deed was entitled to the share which the deed purports to convey. It is not uncommon in this country for a deed of conveyance to purport to convey interests either more or less than what the vendor is entitled to.

Learned District Judge in the course of his judgment had made specific reference to the inconclusive and uncertain nature of the evidence of the 16th defendant who chose to testify on behalf of the plaintiff in respect of the pedigree pleaded by him. It was revealed that the 16thdefendantin the course of his evidence had adverted to the disposing of the rights of some persons twice without realizing that with the first

transaction all their rights would have been exhausted. In certain instances he had failed to state as to how some persons were entitled to the shares which they purport to claim.

It was conceded that the 16th defendant had no claim to soil rights but was pursuing a claim for a roadway over Lot 9 in the preliminary plan. On a careful examination of the totality of his evidence learned District Judge was justified in stating that his evidence was inconclusive and devoid of certainty and clarity in regard to the question of devolution of title.

The inability of the 16th defendant to give conclusive evidence on the pedigree pleaded by the plaintiff stems mainly from the fact that he was an outsider insofar as the pedigree pleaded by the plaintiff is concerned. His evidence which consisted mainly of bare assertions as to the relationship and other matters of pedigree, reflected his lack of personal knowledge in respect of such matters.

It is a prerequisite to every partition action that the land sought to be partitioned must be held in common as seen from the provisions of section 2(1) of the Partition Law. What is understood as common ownership is where persons do not hold on separate and distinct titles or where land is not held as separate and divided lots. When land is not held in common but exclusively by a party even though under prescriptive title, no action can be maintained to partition such land.

It is imperative that the investigation of title must be preceded by a careful examination of the preliminary issue whether the land sought to be partitioned is commonly owned as required by section 2 (1) of the Partition Law. Learned District Judge having carefully examined this question had correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties, which in the circumstances was lawful and justified.

Ouster and the Judgments of the District Court and the Court of Appeal

(Questions (ii), (iii), (v), (vi), (vii) and (viii))

The general principle recognized by our law in respect of co-owners is that the possession of one co-owner is in law the possession of other co owners as well.

In Corea vs. Iseris Appuhaml(1) - the Privy Council laid down (a) that every co-owner is presumed to be possessing in the capacity of a co owner (b) that it was not possible for a co-owner to put an end to such possession by a secret intention in his mind and (c) that nothing short of an ouster or something equivalent to ouster could bring about that result.

Thereafter in 1918 a F~\I Bench of the Supreme Court in the case of Tillekaratne vs Bastian - was called upon to apply the principles laid down in Corea Vs Iseris Appuhamy (supra) and to consider the meaning and the application of the English law principle of presumption of ouster, and it was held (a) that it is open to the court

from lapse of time in conjunction with the circumstances of the case to presume that a possession originally that of a co-owner has since become adverse and (b) that it is a question of fact whenever long continued exclusive possession by one co-owner" is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before the institution of the action.

On the facts of Tillekaratne vs. Bastian (supra) the Court was able to distinguish the decision in Corea vs. Iseris Appuhamy (supra) and to hold that the co-owner in physical control of the land had 'ousted' the other co-owners by a series of overt unequivocal acts.

At page 21 of the judgment Bertram C. J. observed that "where it is found that presumption of law leads to an artificial result it will generally be found that law itself provides for such a situation by means of counter presumption" In these circumstances the presumption in regard to the continuity of common possession may be effectually negative by a counter presumption of ouster.

In Corea vs. Iseris Appuhamy (supra) the Privy Council made reference to this principle but did not declare that it must be considered as being applicable in Sri Lanka as a corollary of the general principle as to continuity of common possession of the undivided property by co-owners. Nevertheless a principle analogous and in distinguish able from the doctrine relating to ouster was explicitly recognized by Middleton J in Odiris vs. Mendis(3- at 315 and 316 even before the decision in Corea vs. Iseris Appuhamy (supra) and thereafter it was consistently applied in a series ?J judgments of the Supreme court (Vide William Singho vs. Ran Naide)) Mailvaganam vs. Kandiya (5- A. S. P. vs. Cassim.(6)

In certain circumstances adverse possession as between co-owners may arise either by absolute exclusion of one of the co-owners or by conversion of undivided shares into divided shares in an informal manner.

This approach had been adopted in the case of Kapuruhami vs. Appusinno - which was decided in 1898. In that case Bonser C. J. observed that where co-owners had verbally agreed among themselves to hold the common property in divided shares, each co-owner may prescribe in respect of his own divided share and that such possession will give him an absolute title against the other co-owners to the divided shares held separately by him.

In Ran Menika vs. Ran Menika(B) - the Supreme Court reiterated the general rule that the possession of a co-owner is not adverse but a common concurrent possession in that the original title being the same, the possession of one is the possession of all. However, it was pointed out in the judgment that exclusive possession referable to the consent of the co-owners may sometimes by change of circumstances become a holding adverse to and independent of other co-owners and such a holding may by lapse of time give rise to a prescriptive right. Selenchi Appuhamy vs. LuviniEi9) - was a similar case where it was held that the partition

suit was not maintainable since there was no common possession between the two co-owners, each party having acquired a prescriptive right to a divided portion of the land. In all the cases referred to in this page, it was apparent that Court considered the attendant circumstances would warrant an inference to be drawn as to ouster.

It is a common occurrence that co-owners possess specific portions of land in lieu of their undivided extents in a larger corpus. This type of possession attributable to an express or classic division of family property among the heirs is sufficient to prove an ouster provided that the division is regarded as binding by all the co-owners and not looked upon solely as an arrangement of convenienc11Jhis position was accepteR1j'lnd acted upon in Mailvaganam vs. Kandiaya - Obeysek[rfp vs. Endoris - Simon Perera vs. Jayatunga(12) - and Nonis VS.Peththa .

Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.

It has to be reiterated that the decision in Tillakeratne VS. Bastian (supra) recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period.

The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances. Nevertheless this counter presumption should not be invoked lightly." It should be applied if, and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past the possession became adverse) to the rights of the co-owners". (vide Abdul Majeed VS.UmmuZaneera - at 374.

Having regard to the principles set out above I shall now proceed to consider, the findings by the trial judge that the corpus sought to be partitioned was dividedly possessed for a long period of time and therefore it had ceased to be owned in common and that the parties had prescribed to the lots they possess before the plaintiff instituted this action.

The trial Judge had found that the parties who are said to be entitled to rights in the corpus in fact had separately possessed with clear and permanent boundaries the lots depicted in the preliminary plan for a long period of time. He had observed further that the land sought to be partitioned and depicted in preliminary plan (X) at a glance seems to be the land shown in plan No. 2153 made by A. M. Fernando, Licensed Surveyor on 23.08.1938.

This observation by the learned Trial Judge has some significance on this question despite the discrepancy in respect of the extent by nearly 27 perches. It will be relevant to note that the extent of land described as an allotment of land called Badullagahawatta in Fiscal conveyance bearing No. 19755 dated 26.04.1944 is a divided portion towards the West of the larger land called Badullagahawatta which was in extent 2 Acres 3 Roods and 27 Perches.

This Fiscal conveyance had been executed on 26.04.1944 in favour of Carolis Fernando after his purchase of the land at the public sale held by the Fiscal in execution of the writ issued by the District Court of Colombo in Case No. L293 against Seemon Peiris, :PiyaseeliPeiris and Karunapali Peiris in place of the deceased plaintiff Rosalin Fernando in the above case.

It is noteworthy that the operative plan for the Fiscal conveyance was Plan No. 625 dated 11.02.1944 made by Licensed Surveyor R. S. Dissanayake. Nevertheless the Fiscal had chosen to describe it in accordance with the earlier plan made in 1938 for purposes of correct description of the land.

The deceased plaintiff too had described this land in the schedule to the plaint as a divided lot towards the West of the larger land called Badullagahawatta and shown as lot E in the plan bearing No. 191 made by Licensed Surveyor H. G. Dias dated 20.12.1905.

On the above material it is clear that Carolis Fernando by Fiscal conveyance (P8)had secured title to a divided portion towards the West of the land called Badullagahawatta in extent 1 Acre 9.87 perches and depicted in Plan No. 625 (P8X) as Lots A, B, and C. Therefore as from 1938 this land was considered a divided and distinct land separated off from the larger land as evident from the Fiscal conveyance.

The division of the larger land prior to the execution of the writ in case No. L 293 as evident from the plan No. 2153 made in the year 1938 and the subsequent survey of the land just prior to the execution of the Fiscal Conveyance on 26.04.1944 for the operative plan 625, would be a clear indication to all the co-owners that the undivided shares of Rosalin Fernando had undergone a change to become divided shares before the execution of the Fiscal Conveyance. The evidence of the contesting defendants in this case were to the effect that this land ceased to be commonly owned with the purchase of the interests of Rosalin Fernando by Carolis Fernando on account of the execution of the writ against her by order of the District Court of Colombo.

As discussed in the earlier paragraph the presumption of ouster of the co-owners in respect of this corpus could be drawn by the additional factor which had taken effect with the seizure and execution of the writ after ascertaining the rights of Rosalin Fernando in lieu of her undivided rights. The 16th defendant in his testimony before the District Court did not allege that plans bearing Nos. 2153 made in 1938 and 625 made in 1944 referred to in the Fiscal Conveyance had been made and the divisions had been effected without the knowledge and

acquiescence of other co-owners. It is to be noted that Carol is Fernando thereafter by deed marked (P9) dealt with property as a divided portion solely owned by him and that subsequently this land had undergone further sub-divisions at the instance of the parties.

In the light of the above material, I hold that the learned District Judge had correctly arrive data finding that the corpus had ceased to be commonly owned before the plaintiff instituted this action. The Court of Appeal had failed to appreciate the salient features in the evidence adverted to by the District Judge in respect of the corpus and their relevancy on the question of ouster.

Questions Nos. (iv) and (ix)

In view of the conclusions drawn in the foregoing paragraphs in respect of the issues involved in questions (i), (ii), (iii), (v), (vi), (vii) and (viii) it would be futile to discuss matters pertaining to these two questions.

For the aforesaid reasons, I set aside the judgment of the Court of Appeal dated 08.11.2002and allow this appeal.

Having considered all the circumstances of this case, I make no order as to costs.

SHIRANIBANDARANAYAKE,J. -I agree.

RAJA FERNANDO,J. -I agree.

Appeal allowed.

Sumanaratne And Others v. Rupatunga - SLR - 368, Vol 3 of 2006 [2006] LKSC 9; (2006) 3 Sri LR 368 (5 May 2006)

SUMANARATNE AND OTHERS
VS.
RUPATUNGA

SUPREME COURT.
JAYASINGHE.J.
DISSANAYAKE.J.
RAJA FERNANDO.J.
SC 56/2004.
HCAVISSAWELLA 58/2002.
MCAVISSAWELLA 2254.
FEBRUARY 9, 2005.
OCTOBER 25,2005.

Code of Intellectual Property 52 of 1979- Section117 (2), Section 150. Penal Code Section 72- Convicted - Protection given to registered owners of trade marks- Is it necessary to establish the actual use of the registered trade mark?- What has to be proved in a charge under Section 117?

The appellants' father was the registered owner of an Ayurvedic drug manufactured and marketed under the registered trade mark. After the death of their father the trade mark was transferred to the appellants and the same was registered. The appellants became aware that in 1998 the respondent was manufacturing and marketing an Ayurvedic drug under a similar name and in a packet very similar to the one manufactured and marketed by the appellants.

On a complaint lodged in the Magistrate's Court the Respondent was convicted on the count framed under Section 117 read with section 150 of the Code of Intellectual Property Act. The High Court set aside the conviction and sentence.

In appeal, the question arose, whether it is necessary to establish the actual use of the registered trade mark in order to seek the protection given to the registered owner of such trade mark under section 117.

HELD:

(1) The charge against the accused-respondent was that he was using a trade mark similar to that which was registered by the petitioner - from a plain reading of section 117 (2) and section 150 it is clear that the rights accrued to the registered trade mark.

(2) What needs to be proved in a charge under section 117 is that (1) One is the owner of the registered trade mark (2) and the other has infringed his rights to the registered trade mark.

Per Raja Fernando J.

"For a charge under section 117 which relates to registered trade marks, what the prosecution has to prove is the registration of the trade mark and that the accused-respondent uses a mark that closely resembles the registered trade mark, and that such mark is likely to mislead the public.

(3) The High Court was in error in that the Court was misled in coming to the finding that in order to violate section 117 one

must prove that one has used the registered. trade mark. If one does not use the registered trade mark there is provision to have the Registrar of Trade Marks to remove such trade mark from the register.

So long as the trade mark remains in the register the imitation of such mark likely to mislead the user public is prohibited.

APPEAL from an order of the High Court of Avissawella.

Case referred to :

(1)Jamis Fernando vs. Officer-in-Charge SC1B (Negombo) - 19943 Sri L.R.35

Bimal Rajapakse with Udeni Gunasekera and Ravindra Anawaratne for petitioner-appellant

Parinda Ranasinghe SC for complainant-respondent-respondent.

Cur. adv. vult.

May 5, 2006
RAJA FERNANDO J.

This appeal is by the aggrieved party (hereinafter referred to as the Appellant) against the Order of the High Court of Avissawella dated 24.11.2003 by which the learned High Court Judge set aside the conviction by the learned Magistrate of Avissawella of the Accused- Appellant Respondent (hereinafter referred to as the Respondent) of the charge under Section 117(2) read with Section 150 of the Code of Intellectual Property Act No. 52 of 1979.

The facts relating to this appeal in brief are as follows:

The appellants' father was the Registered owner of an Ayurvedic drug Manufactured and marketed under the Registered Trade Mark depicted inp2.

After the death of their father the same Trade mark was transferred to the Appellants and the same was registered in their names on 09/ 08/1997.

The Appellants became aware in 1998 that the Respondent was manufacturing and marketing an Ayurvedic drug under a similar name and in a packet very similar to the one manufactured and marketed by the Appellants under the Trademark P2.

On a complaint made to the Police by the Appellants the Respondent was charged in the Magistrate's Court of Avissawella on two counts:

i. under Section 72 of the Penal Code;
ii. under Section 117 read with Section 150 of the Code of Intellectual Property Act No. 52 of 1979.

At the conclusion of the trial in the Magistrate's Court the Respondent was initially convicted under both counts but at the stage of sentencing was discharged of count 1 and on count 2 sentenced to a fine of Rs.1O,OOO/=.

The Respondent appealed against his conviction and sentence on count 2 to the High Court and his conviction and sentence were set aside by the High Court Judge The present appeal was filed by the aggrieved party with leave from this court challenging the order of the High Court.

The issue for determination by this court is:

"whether it is necessary to establish the actual use of the Registered Trade Mark in order to seek the protection given to the registered owner of such Trade mark under Section 117 of the Code of Intellectual Property Act"

In the Magistrate's court, evidence was led to prove that the Trade mark P2 was registered under the name of the Appellants

(aggrieved party) It was also proved that the Accused Respondent was marketing his Ayurvedic produce in the packet marked P4 which was very similar to P2.

The accused-respondents' s position was that drugs marked "Krimiraja" was found in Ayurvedic Literature and that the Petitioner can not have an exclusive right to it. The Defence further cross-examined the prosecution witnesses to show that the packet actually used by the Petitioners at the relevant time was slightly different to the one depicted in the registered mark P2.

The difference being that in the Registered Trade mark P2 the Owner's name is given as "Vaidyacharya M.D. Liveris Amaratunga" whereas the packet actually used depicts the owner's name as M.D. Liveris Amaratunga Saha Puthrayo. Besides this difference in name, the two products were identical in other respects.

The learned Magistrate found the accused Respondent guilty of the charge under Section 117 read with Section 150 of the Code of Intellectual Property Act.

On appeal to the High Court the High Court Judge set aside the conviction on the ground that the Trade mark actually used by the Petitioner was different to that which was Registered and therefore the Petitioners are not entitled to the protection given to their Trade Mark under Section 117(2).

The learned High Court Judge seems to have totally misunderstood the charge against the Accused-Respondent.

The charge against the Accused - Respondent was that he was using a Trade mark similar to that which was registered by the Petitioner.

The learned High Court Judge has confused the Registered Trade mark with the Trade mark that was used by the Petitioners:

Section 117(2) of Act No. 152 of 1979 reads as follows:

"Without the consent of the registered owner of the mark third parties are precluded from the following acts:

(a) any use of the mark or of a sign resembling it, in such a way as to be likely to mislead the public for goods or services in respect of which the mark is registered or for goods or services in connection with which the use of the mark or sign is likely to mislead the public.

(b) any other use of the mark or of a sign or trade name resembling without just cause and in conditions likely to be prejudicial to the interest of the registered owner of the mark.

Section 150 of the Code of Intellectual Property reads: "Any person who infringes the rights of any registered owner, assignee or licensee of a mark shall be guilty of an offence ...

From the plain reading of the section it is clear that the rights accrue to the registered Trade mark Therefore what needs to be proved in a charge under Section 117of .the Code of Intellectual Property Act No. 52 of 1979 is that one is the owner of the registered Trade mark and the other has infringed his rights to the Registered Trade mark. .

The learned High Court Judge in arriving at his decision has sought to rely on the decision in Jamis Fernando Vs. Officer-in-Charge, SCIB, Negombo (1) .

The facts in that case are materially different. In that case the complaint was that the accused were imitating in such a way as to mislead the public the Trade mark which the complainants were using and not the one registered. It was the opposite of this case and the court in that case held that the trade mark used by the complainants was considerably different to the one they have registered.

The learned Magistrate has correctly held that in the present case the packets

used by the Accused-Respondent closely resemble the registered Trade mark of the petitioners.

The question that the petitioner was using a Trade mark that was different to the one Registered may be a factor that will have a bearing on the damages that may be claimed from the Accused-Respondent by the Petitioners.

But for a charge under Section 117 of the Code of Intellectual Property Act which relates to registered trade marks what the prosecution has to prove is the registration of the Trade mark and that the Accused -Respondent uses a mark that closely resembles the registered trade mark; that such mark is likely to mislead the public.

For the foregoing reasons the conviction by the learned magistrate is in keeping with the provisions of Section 117 of the Code (Act No. 52 of 1979) and the evidence in the case.

The learned High Court Judge was in error in that he has misled himself in coming to the finding that in order to violate section 117 of the Code, one must prove that one has used the Registered Trade mark. If one does not use the Registered mark there is provision in the Code to have the Registrar of Trade Marks remove such Trade mark from the register. So long as the Trade mark remains in the Register the imitation of such mark likely to mislead the user public is prohibited.

Therefore the order of the learned High Court Judge quashing the conviction and sentence imposed by the learned Magistrate is set aside and I affirm the order of the learned Magistrate convicting the Accused-Respondent and the sentence imposed.

The appeal of the complainant-appellants is allowed.

I make no order for costs.

JAYASINGHE, J.-I agree.
DISSANAYAKE, J. - I agree.

Appeal allowed
Conviction and sentence affirmed.

Samanthakumara v. Manohari - SLR - 57, Vol 2 of 2006 [2006] LKSC 1; (2006) 2 Sri LR 57 (15 June 2006)

SAMANTHAKUMARA

VS.

MANOHARI

SUPREME COURT.
S.N. SilVA, C. J.
FERNANDO, J.
AMARATUNGA, J.
SC 44/2005.
HC KAlUTARA NO. 118/2003.
MC MATUGAMA NO. 13390.
MARCH 13, 2006.
MARCH 24, 2006.

High Court of the Provinces Act, No. 19of 1990, section 9 - Maintenance Act, No. 37 of 1999, section 14(2) - Maintenance Ordinance, No. 19 of 1889- Maintenance Ordinance, No. 13 of 1925 - Constitution Article 138-Article- 154P 3(b)-13th Amendment - Appeal from the High Court - Applicability of Rules of Supreme Court 1990 - Procedure.

HELD:

(1) The 13th amendment to the Constitution which came into force on 14.11.1987by Article 154P(3)(b)vested the High Court of the Provinces with jurisdiction in respect of orders made by the Magistrates.

(2) The present Maintenance Act section 14 specifically provided for an appeal to the Provincial 'High Court and from there to the Supreme Court with the leave of the Supreme Court and when such leave is refused with special leave of the Supreme Court first had and obtained.

(3) Supreme Court Rules of 1990 have categorized appeals to the Supreme Court into three groups. The instant appeal falls into the category of other appeals Part 1C.

Per Raja Fernando, J.

"When the appeal is with leave of the High Court then Supreme Court Rules under Part 1C applies; if the appeal is with special leave of the Supreme Court, then rules under Part 1A shall apply."

(4) In determining the time for an aggrieved party to lodge an application for special leave to appeal - when no time is fixed by statute or Rules -the time frame is 42 days.

(5) Following the same reasoning the time frame for a petitioner to file an appeal from a High Court order is 42 days from the date leave to appeal is granted by. the High Court.

(6) According to Rule 28(2) every such petition of appeal when leave is granted by the High Court shall be lodged at the Supreme Court Registry not in the Registry of the High Court.

(7) The appellant should also tender a notice of appeal with his petition of appeal- Rule 28(3).

HELD FURTHER:

(7) The petition of appeal has been filed in the Registry of the High Court Kalutara contrary to Rule 28(2).

(8) The appellant has also failed to comply with Rule 28(3) which required the appellant to tender with his petition of appeal the notice of appeal.

APPEAL from an order of the High Court, Kalutara on a preliminary objection raised.

Cases referred to :

1. Tea Small Holders Ltd., vs. Weragoda 1994 3 Sri LR 353
2. Mahaweli Authority of Sri Lanka vs. United Agency Corporation (Pvt) Ltd. 2002 1 Sri LR 8

D. Amarasekera for petitioner.

Rohan Sahabandu with Athula Perera for respondent.

Cur.adv. vult.

June 15, 2006.
RAJA FERNANDOJ.

The applicant Respondent-Respondent, hereinafter referred to as the Respondent instituted action No. 13390 (Maintenance) on 6th July 2000 in the

Magistrate's Court of Mathugama claiming maintenance from the Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) for the child born out of wedlock.

The learned Magistrate by his order dated 17.12.2002 ordered the Respondent to pay a sum of Rs. 750 per month as maintenance for the child.

Being aggrieved by this order the appellant appealed to the High Court under Article 154 P of the Constitution read with section 14 of the MaintenanceAct,No.37 of 1999,and the High Court dismissed the appeal on 10.03.2005.

The Appellant thereafter sought leave to appeal to the Supreme Court in terms of section 14(2) of Act, No. 37 of 1999 read with section 9 of Act, No. 19 of 1990 from the High Court and leave was granted by the High Court on 06.06.2005.

After leave to appeal to the Supreme Court has been granted by the High Court on 06.06.2005 the appellant on 13.06.2005has filed a petition of appeal addressed to the Supreme Court in the Registry of the High Court. .

When the matter came up before this Court counsel for the Respondent took up a preliminary objection that the Petition of Appeal has not been filed in terms of the Rules after the High Court granted leave.

Written submissions of both parties were filed on 24.03.2006.

It was the position of the respondent that the Petition of Appeal has been filed out of time and that the Petition of Appeal ought to have been filed in the Supreme Court whereas the appellant has lodged the petition in the High Court and therefore there is no valid appeal before Court.

Under the old Maintenance Ordinance No. 19of 1889 as amended by Act, No. 13 of 1925 an appeal from the order under the Maintenance

Ordinance was to the then Supreme Court and the procedure was the same as if the order was by the Magistrate in a criminal case. (Vide section 17of the Maintenance Ordinance No. 19 of 1889).

In 1978 with the new Constitution when the Court of Appeal was established Article 138vestedthe Court of Appeal with appellate jurisdiction in respect of orders made by courts of first instance, resulting in all appeals under the Maintenance Ordinance which hitherto came to the Supreme Court being directed to the Court of Appeal.

The 13th Amendment to the Constitution which came into force on 14.11.1987 by Article 154 P 3(b) vested the High Court of the Province with jurisdiction in respect of orders made by the Magistrate.

The present Maintenance Act, No. 37 of 1999 repealed the Maintenance Ordinance and Section 14 specifically provides for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the High Court and when such leave is refused with the Special Leave of the Supreme Court first had and obtained. (vide Section 14 of Act, No. 37 of 1999).

The Appellant in this case has in terms of section 14 of the Maintenance Act, No. 37 of 1999 read with Article 154 P 3 (b) of the Constitution made an appeal to the High Court of the Province. He has obtained leave to appeal to this Court from the High Court.

The Appellant has thereafter filed a petition of appeal addressed to the Supreme Court in the registry of the High Court.

This procedure is being challenged by the Respondent as being contrary to the Supreme Court Rules of 1990.

The Appellant submits that no Rules exist at present governing appeals from the Provincial High Court to the Supreme Court and there is no default on his part.

Supreme Court Rules of 1990 have categorized Appeals to the Supreme Court into three groups:

Part 1A - Appeals with special leave obtained from the Supreme Court
Part 1B - Appeals with leave to appeal from the Court of Appeal

Part 1C - Other appeals

Part 1C- Rule 28 of the Supreme Court rules read as follows:

"(1)Saveas otherwise specifically provided by Parliament, the provisions of the rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal **or any other court or Tribunal**"

The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore the instant appeal clearly falls into the category of other appeals and hence rules in Part 1C dealing with other appeals would apply.

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect. An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with special leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the appeal is with leave of the High Court then Supreme Court rules under Part 1C (other appeals) shall apply; if the appeal is with special leave of the Supreme

Court then SupremeCourtrulesunderPart1A (special leave to appeal) shall apply mutatis mutandis since Rule2 relates to every application for special leave to appeal.... "

As regards the procedure in the instant case the rules applicable to other Appeals in Part 1C of the Supreme Court rules shall apply.

A question arises in fixing the time within which the Appeal is to be filed in the Supreme Court for the reason that the Rules are silent on the matter.

In determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in the statute or the rules; this Court has in the case of Tea Small Holders Limited vs. Weragoda (1)and in the case of Mahaweli Authority of Sri Lanka vs. United Agency Construction (Pvt.) Ltd. (2)heldthat the Petitioner should make his application within a reasonable time, and relying on the time period prescribed in the rules for similar applications has held that 42 days is reasonable time.

Following the same reasoning I am of the view that the time frame for a petitioner to file an appeal should be 42 days from the date leave to appeal is granted by the High Court.

Coming to the preliminary objection with regard to the place of filing of the appeal papers after having obtained leave from the High Court; Part1C (other appeals) is clear in its provisions as to the papers that need to be filed and also the place where it has to be filed.

According to rule 28(2) "every such appeal shall be upon a Petition in that behalf lodged at the Registry" (Supreme Court).

It is undisputed that the petition of appeal has been filed in the Registry of the High Court contrary to the provisions of Rule 2a(2) of Supreme Court Rules 1990.

-Further the Appellant has failed to comply with rule 28(3) which requires the Appellant to tender with his petition of appeal a notice of appeal.

Therefore I hold that the Appellant is guilty of non-compliance of the Rules and hence the preliminary objection raised by the Respondent must succeed.

Accordingly this appeal of the Appellant is rejected.

The Respondent is entitled to the costs of this application.

Registrar is directed to return the record to the High Court of Kalutara to be forwarded to the Magistrate's Court of Matugama.

S. N. SILVA C. J. - I agree. **AMARATUNGA, J.** - I agree. **Appeal rejected.**

Sumanadasa And 205 Others v. Attorney General - SLR - 202, Vol 3 of 2006 [2006] LKSC 7; (2006) 3 Sri LR 202 (19 June 2006)

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SUMANADASA AND 205 OTHERS
VS.
ATTORNEY GENERAL

SUPREME COURT.
S. N. SILVA, C. J.
JAYASINGHE. J.
TILAKAWARDENA. J.
SC SPI 1-199-200-206.
JUNE 19,2006.

Fundamental Rights - Articles 4 (d), 13 (1), 13(2), 16(1), 15(7) 118(b), 136(1) (d), 140, 170- Application by remandees - Immigration and Emigration Act - Section 45, Section 47- Non Bailable - Criminal Procedure Code No. 15 of 1979- Section 23 (1), Section 114, Section 115, Section 116, Section 404 - Continuous detention without any recourse to a remedy - Violation of Article 13(2) ? Accused Suspect - differance?.

Complaints (205) were addressed to the Supreme Court by persons held in custody upon orders of committal to remand by Magistrates in respect of offences punishable in terms of Section 45 of the Immigration and Emigration Act. As the offence being non bailable the applications filed in the Court of Appeal under Section 404 have also been dismissed. They alleged an

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infringement of their fundamental rights guaranteed by Article 13(2) resulting from continuous detention in custody without any recourse to a remedy under any procedure established by law.

HELD:

(i) In terms of Article 118(b) the Supreme Court is vested with jurisdiction for the "Protection of fundamental rights" The word protection is wider than "enforcement" . It is incumbent on the Supreme Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.

(2) Fundamental rights form part of the sovereignty of the people and Article 4

(d) being a basic provision on which the structure of the Constitution is founded requires that fundamental rights be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied in the manner and to the extent provided.

(3) Any abridgment, restriction or denial has to be based only on specific provisions of the Constitution itself, and Article 16(1) does not amount to a specific restricting of the fundamental rights guaranteed by Article 13(2). The permitted restrictions are contained in Article 15(7) and the provisions of Section 47(1) of the Immigration and Emigration Act could never be construed as restricting fundamental rights guaranteed by Article 13(2).

(4) There is no law as defined in Article 170 with regard to grant and issue of writs. However, from the promulgation of the Constitution and even writs have been previously granted on the basis of the common law principles as evidenced by Judgments of the Superior Courts. Provisions of Article 13 (2) shall be similarly given effect to and the continued detention of persons accused of offences under Section 45 should be adjudicated upon according to the procedure applicable to non-bailable offences. S 403 of the Code of Criminal Procedure and Case law.

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Per Sarath Silva, C. J.

"It has to be noted that the Divisional Bench in A. G vs. *Sumathapala* has not made any findings as to the content and ambit of the fundamental right guaranteed by Article 13(2) and the observation of the Divisional Bench - that if there is a conflict between the specific provisions of section 47(1) of the Immigration and Emigration Act and individual liberty it is for the legislature to make necessary amendments has to be considered as "Obita Dicta" " Application under Article 126 of the Constitution.

Cases referred to :

(1) Attorney General vs. Sumathipala - 2006- 2 Sri LR 126 (SC)DB (distinguished)

(2)Attorney General Vs. Nilanthi - 1997 2 Sri LR 203

(3)Tunnaya alias Gunapala vs. O. I. C. Galewela -1993 - 1 Sri LR

(4)Attorney General Vs. Punchi Banda - 1986 -1 Sri LR 40.

Nuwan Peiris with Pradeepa Nilmini and Champika Nilantha for petitioners. Yasantha Kodagoda DSG with Ms. Harshika de Silva SC for respondent

Cur. adv .vult.

June 19, 2006

SARATH SilVA. C. J.

Proceedings in these cases commenced on the basis of complaints addressed to this Court by persons held in custody, upon orders of committal to remand made by Magistrates in respect of offences punishable in terms of Section 45 of the Immigrants and Emigrants Act. They allege an infringement of their fundamental rights guaranteed

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by Article 13(2) of the Constitution resulting from continuous detention in custody without any recourse to a remedy under any procedure established by law.

The case of the Petitioners is that in view of the provisions of Section 47(1) of the said Act, as interpreted by a Divisional Bench of this Court in the case of Attorney General vs. Sumathipala(1) - no Court has jurisdiction to release them on bail and they have to necessarily languish in remand indefinitely pending the conclusion of the cases against them.

Since the persons are in prison and in view of the fact that there are 207 such complaints of continued incarceration without any remedy the Court decided to entertain these complaints in terms of Rule 44(7)(b) of the Supreme Court Rules 1990 and granted leave to proceed, in respect of the alleged infrigement of the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution. In the order granting leave to proceed, the Court has noted that the complainants did not have means to prosecute their complaints in the manner provided for in a regular application and that they continue to suffer substantial prejudice by reason of the alleged infringement being deprived of their liberty without a remedy before any Court.

Since the matter in issue is the same, Court made a further order that the Petitions will be considered together and the State may present a motion 'to each case as there are no disputed questions of fact, to obviate the need to file affidavits and formal pleadings. The contents of the motions that may be filed have been specified in the order dated
29.05.2006.

The Petitioners have been arrested in connection with offences under Section 45,of the Immigrants and Emigrants Act. They have been denied bail in terms of Section 47(1) of the said Act, as amended., The relevant provisions of the section

are as follows:

"Notwithstanding anything in any other law

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(a) every offence under paragraph (a) of sub- section (1)of section 45 ;
every offence under sub-section (2) af Section 45 so .far in as it relates to paragraph (a) of sub-section (1) of that section ;
(b)....
(c)....
(d)....
(e)....

shall be non - boilable and no .person accused of such an offence shall in any circumstances be admitted to .bail."

In view of the provision that the offence shall be non -boilable and that a person accused of such offence shall not in any circumstances be admitted to. bail, Magistrates have committed the Petitioners to. remand custody.

It was submitted by Counsel appearing far the Petitioners that they have filed applications far bail in the Court of Appeal, in terms of section 404oaf the Code of Criminal Procedure Act Na.15 of 1979.The basis of these applications have been that although there is a bar to .their release by the magistrate, in view of the provisions of the second part of section 404 of the Code, the Court of Appeal may direct that the persons be released an bail.

The Divisional Bench of this Court in the case of Attorney General vs Sumathipala (supra) referred to. above held inter alia as follows :

"I*t is thus clearly evident that the effect of Section 47(1) of the Immigrants and Emigrants Act is that no. person accused of such an offence shall be admitted to. boil. The restriction thus de valves an an accused, who .would have to. be incarcerated with out a remedy until the conclusion of the trial. Compared with the provisions of the fundamental rights enshrined in our Constitution, it is an arguable paint this position leads to. an injustice as even a suspect would be deprived of his liberty irrespective of the fact that in*

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terms of the provisions contained in the Chapter an fundamental rights of the Constitution, the basic rights of the individual must be safeguarded.

However, it is to. be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of section 47(1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is

far the legislature, viz ; the Parliament to. make necessary amendments if there is a conflict between the specific provisions and individual liberty."

The resulting position as noted in the judgment of the Divisional Bench is that the Petitioners have to. continue in custody until the conclusion of the proceedings against them although reference has been made to. the fundamental rights of persons who. have to. be incarcerated with out a remedy, it has to .be noted that the Divisional Bench' has not made any findings as to .the content and ambit of the fundamental right guaranteed by Article 13(2) of the Constitution. Indeed such a matter was not directly in issue in the case presented to. the Divisional Bench.

The observation of the Divisional Bench that if there is a conflict between the specific provisions of Section 47(1) of the Immigrants and Emigrants Act and individual liberty it is far the legislature to. make the necessary amendments, has to. be considered as obiter dicta since the two. questions an which special leave to. appeal had been granted and the matter set dawn far hearing before the Divisional Bench relate only to. the interpretation of section 404 of the Code of Criminal Procedure Act and Section 47(1)af the Immigrants and Emigrants Act.

In this background we have to .address the present complaints of the infringement of Article 13(2) of the Constitution. This provision reads as follows.:

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"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge f the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

(i) the right to be brought up before the judge of the nearest competent court according to the procedure established by law and;

The provision guarantees to every person held in custody, detained or otherwise deprived of personal liberty, two specific rights; they are:

(ii) the right not to be further held in custody, detained or deprived. personal liberty except upon and in terms of an order of such judge made in accordance with the procedure established by law.

The procedure established by law in respect of the right referred to above in (i) above is contained in Sections 115and 116of the Code of Criminal Procedure Act. It is not in dispute that this procedure has been complied with and that the Petitioners have been produced before the judge of the nearest competent court.

The alleged infringement is in respect of the second right as contained in (ii)

above, namely the absence of a procedure established by law in accordance with which the persons would be further held in custody, detained or deprived of personal liberty. The stipulation that there be a procedure established by law necessarily envisages that such procedure would contain provisions for an adjudication of the matter of continued detention by the judge before whom the person is produced or by a court having jurisdiction in the matter

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The findings of the Divisional Bench referred to above is that the restriction in section 47(1) "devolves on an accused, who would have to be incarcerated without remedy until the conclusion of the trial". In the result the person held in custody is denied a procedure established by law in terms of which his continued detention would be adjudicated upon.

Deputy Solicitor General submitted that the restriction contained in Section 47(1) is only in respect of a person accused of any offence punishable under Section 45 and that a person who has been produced in court and remanded and against whom no charges have been framed will not come within this restriction. He submitted that such a person would be only a suspect and the Magistrate would have jurisdiction to consider the release of such persons on bail in terms of Section 403 of the Code of Criminal Procedure Act, on the basis that he is produced in respect of a non bailable offence. This has certainly not been the case of the State previously since all persons have been routinely remanded by the Magistrate on the basis that there is a bar on their release on bail in terms of Section 47(1). It is on that premise that applications had been made to the Court of Appeal in terms of Section 404 of the Code. Counsel appearing for the Petitioners who filed applications in the Court of Appeal submitted that their applications have been dismissed by the Court of Appeal on the strength of the judgment of the Divisional Bench. If the contention of the Deputy Solicitor General had been presented to the Magistrate this situation would not have arisen. It is clear from the routine orders made by Magistrates remanding these persons that it has been done on the basis that the bar in Section 47(1) applies from the time a person is produced before the judge. In any event since the submissions have been made with regard to the meaning of the term "accused" as appearing in Section 47(1), it is incumbent to consider this matter further.

It is to be noted at the outset that the Divisional Bench in its judgment has not made any distinction between a person "accused of" or "Suspected of" having committed an offence in terms of section 45.

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The Deputy Solicitor General submitted that since the word "accused" is imprinted in bold letters in the judgment it should be considered that the terms would not extend to a person who is suspected of having committed an offence. Such an inference cannot be drawn by the mere fact that the word appears in bold type. In fact in a later sentence of the passage cited above the judgment of the

Divisional Bench states that "even a suspect would be deprived of his liberty".

We have pointed out to Deputy Solicitor General in the course of submissions that the Code of Criminal Procedure Act uses the words "accused" and "suspect", interchangeably. In Section 114of the Code which refers to a situation where it is found that there is not sufficient evidence or reasonable suspicion to justify producing the person arrested in court and such person is released on a bond by the Police, he is referred to as the "accused". Thus a person is described as an "accused" well before a plaint is filed. In Section 115(1) which covers situations where the person is produced in court the reference is to a "suspect". On the other hand the provisions in section 402 with regard to the release of a person brought before the court the reference is to an "accused". Similarly in Section 403 the reference is to an "accused".

It is in this context that in the case of *Attorney General vs Nilanth*(2) at page 203, the Court of Appeal upheld the submission of the Deputy Solicitor General who appeared in that case that the words "charged' with" or" accused of" as contained in Section 10 of the Offensive Weapons Act should necessarily be given a meaning which is akin to "suspected of."

Deputy Solicitior General persisted in his submission and placed reliance on the judgment of this Court in Tunnaya alias Gunapala vs OIC, Galewela(3)

It is to be noted that the findings in that case relate to what constitutes commencement of proceedings in terms of the Code of Criminal Procedure Act. The Court departed from previous dicta in Attorney

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General vs Punchi Banda(4) at 40, that the production of a suspect in terms of Section 116(1) of the Code amounts to an institution of proceedings in terms of section 136(1)(d). The observations made in that judgment had been considered in the case of *Attorney General vs Nilanthi (supra)* and the Court held that they are inapplicable to consider the meaning of phrases" charged with" and "accused of. We are in entire agreement with that finding.

In terms of Article 13(1) of the Constitution every person arrested has to be informed of the reasons for his arrest.\ Section 23(1) of the Code of Criminal Procedure Act require that the person arrested be informed of the nature of the charge or allegation upon which he is arrested. Thus, a person is accused of having committed an offence at the very point of his arrest. He is produced before the Magistrate as a person accused of having committed an offence. Throughout the proceedings in the Magistrates court or any other court before which proceedings are continued such person is referred to as an accused in view of the accusation on which the criminal justice process commences against him.

The term "suspicion" or "suspect" derives from the material on which such accusation is made. This suspicion transforms to a charge after a plaint or

indictment is filed. After a trial it transforms into a conviction or ends by way of an acquittal, as the case may be. Therefore we see no merit in the submission of the Deputy Solicitor General that section 47(1) applies only after plaint has been filed against the person. The Petitioners have been in custody throughout on the basis that there is a bar to their release on bail in terms of Section 47(1).

The next matter to be considered is the alleged infringement of the fundamental right guaranteed by Article 13(2) due to the absence of a procedure established by law, in terms of which the continued detention could be adjudicated upon. 2 - CM 8433

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Deputy Solicitor General submitted that Section 47(1) as interpreted by the Divisional Bench which denied to the Petitioners a procedure upon which their continued detention could be adjudicated upon, is existing law since the amendment was in 1961 and should be held as being valid and operative in terms of Article 16(1) of the Constitution as existing law. Article 16(1) relied upon by the Deputy Solicitor General reads as follows:

"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."

In this regard it has to be noted that this Court is not required to pronounce upon the validity of Section 47(1) which has been interpreted as noted above by the Divisional Bench. The Court has to consider the ambit of the fundamental right guaranteed by Article 13(2) and the relief, if any, to be granted to the Petitioners in the absence of a procedure established by law to adjudicate on their continued detention. In this context we note that in terms of Article 118(b) of the Constitution this Court is vested with jurisdiction" for the protection of fundamental rights". The word "Protection" is wider than the word "enforcement". It is incumbent on this Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded.

Fundamental rights forms part of the sovereignty of the People and Article 4(d) of the Constitution being a basic provision on which the structure of our Constitution is founded, requires that fundamental rights be "respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided.

Hence the rights guaranteed to the Petitioners in terms of Article 13(2) should be secured and advanced by this Court and not be abridged, restricted or denied. Any such abridgment, restriction or denial has to be based only on specific provisions of the Constitution itself.

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Article 16(1) relied on by the Deputy Solicitor General does not amount to a specific restriction of the fundamental rights guaranteed by Article 13(2) of the Constitution. The permitted restrictions are contained in Article 15(7) of the Constitution and the provisions of Section 47(1) of the Immigrants and Emigrants Act could never be construed as restricting the fundamental right guaranteed by Article 13(2) of the Constitution.

The next matter to be considered is the relief to be granted by this Court, in the absence of a procedure established by law in terms of which continued detenton of a person could be adjudicated upon. In this context we have to note that Article 140 of the Constitution which empowers the Court of Appeal to issue writs has a similar provision which states that such writs shall be issued "according to law".

There is no law as defined in Article 170 of the Constitution with regard to the grant and issue of these writs. However, from the promulgation of the Constitution and even previously, writs have been granted on the basis of the common law principles as evolved by the judgments of the Superior Courts. We are of the view that the provisions of Article 13(2) should be similarly given effect to and the continued detention of persons accused of offences under the relevant provisions of Section 45 of the immigrants and Emigrants Act should be adjudicated upon according to the procedure applicable to non -bailable offences.

In this context the Deputy Solicitor General submitted that the principles of law evolved in terms of section 403 of the Code of Criminal Procedure Act should be taken into account in considering the contined detention of these persons.

We are inclined to agree with the submission and hold that the continued detention of the persons who are produced with having committed offences in terms of section 45 of the Immigrants and Emigrants Act should be considered on the basis of the provisions of Section 403 of the Code of Criminal Procedure Act and the applicable case law

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We have had to deal with these complaints as a matter of urgency, in view of the continuing flow of complaints from persons who are in custody without an adjudication by any Court of law as to the basis of their detention. It was submitted that about 10 days ago a female suspect in the Negombo prison being one of the Petitioners who was held in a crowded cell died, since there was no response to urgent appeals for medical assistance when she fell ill in the night.

Continued detention of such large numbers necessarily resulting in over crowding in prisons, without proper adjudication of the basis of their detention negates the very essence of the fundamental right guranteed by Article 13(2) of the Constitution.

We accordingly hold that the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution have been infringed by executive or administrative

action, since the Petitioners have been detained in custody merely upon their being produced in court and incarcerated without a remedy until the conclusion of their trials. On the basis of the findings stated above the respective Magistrate Courts are directed to decide on the continued detention of these persons in accordance with the procedure applicable to persons accused of non bailable offences. Registrar is directed to send copies of the judgment to the Magistrates Court of Negombo, Chief Magistrates Court, Colombo, Magistrate Court of Fort, Colombo and Kalutara.

Applications are allowed. No costs.

JAYASINGHE J., -I agree.

TILALAKAWARDENAJ., -I agree

Application allowed.

Fundamental rights of the petitioners have been infringed. The Magistrate's courts are directed to decide on the continued detention in accordance with the procedure applicable to non- bailable offences..

Tuan Ishan Raban And Others v. Members Of The Police Commission And Pradeep Priyadarshana v. Members Of The Police Commission And Others - SLR - 351, Vol 2 of 2007 [2006] LKSC 15; (2007) 2 Sri LR 351 (7 July 2006)

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TUAN ISHAN RABAN AND OTHERS
V
MEMBERS OF THE POLICE COMMISSION AND
PRADEEP PRIYADARSHANA
V
MEMBERS OF THE POLICE COMMISSION AND OTHERS

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
FERNANDO, J. AND
MARSOOF, J.
S.C. (F.R.) APPLICATION 599/2003 AND
S.C. (F.R.) APPLICATION 650/2003
5TH JULY, 2006

Fundamental Rights - Right to equality - Articles 14(1) and 12(1) of the Constitution. Police Ordinance - Section 26(8), Section 26(H) - Thirteenth Amendment.

The petitioners in these two applications joined the Sri Lanka Police Force as Reserve Sub-Inspectors of Police. In their petitions they state that they were assigned to carry out the same duties that were performed by the Sub-Inspectors of the Regular Police Force. In their petitions they further state that they had received identical salaries and emoluments that were given to the Sub-Inspectors of the Regular Police Force and were subjected to same disciplinary procedures and Code of Conduct in the manner applicable to the Sub-Inspectors of the regular Force. It is the position of the petitioners that there is hardly any difference between the Sub-Inspectors of the Reserve Force and the Regular Force in the Police. In these circumstances petitioners in both petitions state that it is unequal, unfair and arbitrary for them to be treated differently from the Sub- Inspectors of the regular Police Force. Accordingly, they alleged that it is unequal, unfair and arbitrary for them to be treated differently from the Sub-Inspectors of the Regular Force in terms of the Circular marked P1 by which they have to serve six years in the Regular Force prior to promotion and in the circumstances violated their fundamental rights guaranteed under and in terms of Article 12, 12(1) and 14(1) of the Constitution.

Held:

(1) Equality as postulated in Article 12(1) of the Constitution means the right of a person to be treated alike among his equals and sUch rights to be administered equally. Accordingly, Article 12(1) of the Constitution ensures the protection from arbitrary and discriminatory actions by the executive and/or the administration;

per Shirani Bandaranayake, J.

"However such guaranty does not forbid reasonable classification which is founded on intelligible differentia. The concept of equality only forbids actions which are unreasonable, arbitrary and capricious and not the classification that is reasonable."

(2) The officers of the Regular Force and the Reserve Force of the Police belong to two different categories and therefore the Clause 2.1.111in the Circular 'P1' cannot be regarded as unequal, unfair, arbitrary or violative of the petitioners fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

APPLICATION for infringement of fundamental rights.

Cases referred to:

(1) Ram Krishna Dalmia v Justice Tendolkar (A.I.R. 1958 S.C. 538).

(2) The State of Jammu and Kashmir v Triloki Nath Rhosa and others (A.I.R. 1974 S.C. 1) Romesh de Silva, P.C. with Sugath Caldera for petitioners. Rajiv Goonatillake, State Counsel for respondents.

Cur.adv. vult.

July 07, 2006
DR. SHIRANI BANDARANAYAKE, J.

The petitioners in these two applications (S.C. Application Nos. 599/2003 and 650/2003), joined the Reserve Cadre of the Sri Lanka Police Force and had functioned as Sub-Inspectors of Police for varying periods. According to the petitioners, an undated Circular was issued on 21.10.2003, signed by the 9~h respondent in S.C. (Application) No. 599/2003, which stated In Clause 2.1.111, that Sub-Inspectors of Police/Women Sub Inspectors of Police, who had been serving in the post of Sub-

Inspector of police for six years after confirmation would be eligible to apply for the post of Inspector of Police (P1).

The petitioners stated that although they had entered the Sri Lanka police Force as Reserve Sub-Inspectors of Police, they were assigned to handle identical duties that were carried out by the Sub-Inspectors of the Regular police Force. Moreover, the petitioners had received the Identical salaries and emoluments that were given to the Sub-Inspectors of the Regular Police Force and were subjected to the same orders, code of conduct, disciplinary procedures as were applicable to the sub-Inspectors of the Regular Force. Accordingly, the petitioners claimed that they are in fact identical and equal to the Sub-Inspectors of the Sri Lanka Regular Force. In the circumstances, the petitioners alleged that it is unequal, unfair and arbitrary for them to be treated differently from the Sub- Inspectors of the Regular Force and that the aforementioned Clause 2.1.111of the undated Circular (P1) by which they have to serve six years in the Regular Force prior to promotion is also unequal, unfair, arbitrary and violative of their fundamental rights guaranteed in terms of Articles 12, 12(1) and 14(1)(g) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution. Learned President's Counsel for the petitioners submitted that for the purpose of promotion, experience is needed and the rationale behind the need for having such experience is to see whether the relevant Officer is qualified to serve in the next rank. Learned President's Counsel contended that at the point of entry the qualifications for enlistment as Sub-Inspectors of the Sri Lanka Reserve Force, was similar to the enlistment of Sub-Inspectors in the Regular Force and considering the nature of the functions of the Regular Force and Reserve Force being identical, the years of service of the petitioners spent in the Reserve Force should be taken into account when considering the promotions to the rank of Inspector.

Admittedly, the petitioners do not have six (6) years of service as Sub-Inspectors in the Regular Force and therefore

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they are precluded from applying for the said promotion. The contention of the petitioners therefore is that, the service of the petitioners as Sub-Inspectors in the Reserve Force should be considered along with their service as Sub-Inspectors in the Regular Force, so that they would have the necessary six years as Sub-Inspectors, to apply for the promotion in question.

Learned State Counsel for the respondents contended that the petitioners, being officers of the Reserve cadre cannot be equalled with the Officers of the Regular Service for several reasons and therefore the petitioners' applications in S.C. (FR) No. 599/2003 and S.C. (FR) No. 650/2003 cannot be allowed.

The question that arises for consideration therefore is whether the Regular Force and the Reserve Force of the Sri Lanka Police could be equalled on the

basis of duties and functions of the respective Officers or whether they should be recognised as unequals, who belong to two separate categories.

Admittedly the petitioners in both these applications at the point of entry, joined the Reserve Force of the Sri Lanka Police. The Police Ordinance refers to a General Police Force as well as a Police Reserve for the purpose of assisting the Police Force in the exercise of its powers and the performance of its duties.

Learned State Counsel for the respondents strenuously contended that the Regular Officers and Reserve Officers of the Sri Lanka Police belonged to two different classes of Officers, who were classified as such for objective reasons, which included the following:

1. the Reserve Force and the Regular Force are categorized separately under the Police Ordinance;

2. different requirements are applicable for recruitment and for promotions in the Regular Force and Reserve Force; and

3. different terms of employment are applicable in the regular and the Reserve Force.

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In order to consider the submissions of the learned State Counsel for the respondents, let me now turn to examine the aforementioned reasons, separately."

1. The Reserve Force and the Regular Force are categorized separately under the Police Ordinance

The Police Ordinance (hereinafter referred to as the Ordinance) clearly refers to the establishment of a General police Force as well as a reserve Police Force. Whilst section 3 of the Ordinance refers to a General Police Force for the purpose of effectual protection of persons and property, section 24 deals with the Reserve Police Force to assist the Police Force in the exercise of its powers and the performance of its duties. Thus the Reserve Police Force was established for the purpose of assisting the regular Force in the performance of their duties and it is apparent that in terms of the provisions of the Ordinance that Officers of the Reserve Force had to be mobilised and de-mobilised from time to time. section 26B(1) of the Ordinance deals with this aspect and this section reads as follows:

"The Commandant shall, on the directions of the Inspector-General of Police, **mobilize such officers** of the police reserve as are required to assist the police force in the exercise of its powers and performance of its duties. No such officer shall be **de-mobilized** by the Commandant except on the direction of the Inspector-General of Police (emphasis added}."

The provision for mobilization and de-mobilization clearly explains the

rationale for a Reserve Force in the Sri Lanka Police. Since the establishment of the reservists is only for the purpose of assisting the Police Force, such mobilization is for an emergency or for a situation which requires a large number of Police Officers to carry out their functions. Therefore when the emergency or the situation that justified the mobilization of the Reserve Force is no longer in existence, it would become necessary to demobilize such officers, who were mobilized to cater for a special situation.

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The fact that the Reserve Police Officers are required for an exigency is clear from section 26F of the Police Ordinance, which requires in law for all employers of such Reservists to give all facilities to undergo and render such training and service as may be required without any adverse impact to their normal careers.

It is also to be noted that an officer of the Reserve Force could use his police powers only during his mobilization. Section 26G of the Police Ordinance clearly stipulates that it would be illegal for a Reservist to wear his uniform without being mobilized.

Admittedly such conditions or restrictions such as mobilization and de-mobilization, as referred to earlier, are not applicable to the regular Force of the Sri Lanka Police in terms of the provisions of the Police Ordinance.

Learned President's Counsel for the petitioners contended that no Officer of the Reserve Force has been de-mobilized for the last 25 years and therefore that the term 'Reserve' is only a nomenclature of the past. Learned State Counsel did not dispute the fact that for a long period there has been no demobilization of the Reserve Force. However, his position was that there has been a prolonged State of Emergency in the country requiring the Regular Police Force to carry out para military duties, enabling the Reserve Force to be mobilized over many years. His contention was that these special circumstances did not change the character of the Reserve Force.

On a consideration of the provisions pertaining to the character of the Reserve Police Force, especially regarding mobilization and de-mobilization, it is apparent that, although there has been no de-mobilization for a very long period, that has not taken away the concept of mobilization and demobilization of the Reserve Police Force and therefore no provision has been made for the change of the character of the Reserve Police Force. In such circumstances, merely for the reason that there has been no de-mobilization, it cannot be

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considered that the reserve Police Force has been equalled to the Regular Police Force.

2. Different requirements are applicable for recruitment and for

promotions in the Regular Force and Reserve Force;

On an examination of the requirements that are necessary for joining the Reserve Force, it is apparent that such requirements had been lower than what was required for the entry to the Regular Police Service. For instance, paragraph 2.2 of Sri Lanka Police Gazette No. 618A of 11.07.1990 refers to officers in the Reserve Force 'who have lesser educational qualifications than the required educational qualifications in respect of similar posts in the Regular Service' (P3).

The aforementioned Gazette Notification also draws attention to specific provisions regarding absorption of Reservists with the required educational qualifications and with lesser educational qualifications. Accordingly, paragraph 3 allows absorption of reservists with the required educational qualifications to the Regular Police Force after 3 years of satisfactory continuous service. Paragraph 4 on the other hand states that Reservists with lesser educational qualifications could be absorbed to the Regular Police Force only after 5 years of continuous service in the Reserve Force (P3).

In 1992 these requirements were amended by I.G.'s Circular No. 1044/92 dated 17.12.1992 by increasing the 3 year period to 5 years and the 5 year period into 8 year of service in the Reserve Force, respectively.

It is to be noted that in terms of I.G.'s Circular No.1 044/92, three Advanced Level passes were required to join the Reserve Police Force as a Sub-Inspector of Police (Annexure I). However, according to the affidavit of the 7th respondent and the document marked 7R1 (S.C. application No. 599/2003), which contains the details of the qualifications, date of enlistment and the date of absorption of the petitioners in S.C. (Application) No. 5S9/2003, indicates that out of the 27 petitioners, 19 petitioners had not qualified in the Advanced

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Level Examination, 7 have passed the Advanced Level Examination and 1 petitioner had completed one subject of the said Examination. Accordingly in terms of the present criteria, some of the petitioners would not have qualified to be Sub-Inspectors in the Reserve Police Force.

3. Different terms of employment in the Regular and the Reserve Force

Until the year 1992, officers of the Reserve Police Force were paid on a daily basis and were not eligible for a pension. By I.G.'s Circular No.1 044/92 dated 17.12.1992 provision was made for the Reservists to be paid a monthly salary, provided that the period of their mobilized service was not less than 26 days for the calendar month and a complete 12 months of mobilized service for an increment. Moreover in terms of the aforesaid Circular, an Officer in the Police Reserve was entitled to a pension only after he had completed an aggregate of not less than twenty years mobilised service. Therefore the Reservists were allowed to contribute

to the Widows and Orphans Pension Fund, only if and when they complete an aggregate of 20 years of mobilized service.

Considering the aforementioned circumstances, it is evident that the learned State Counsel had quite correctly contended that although there were changes in the mode of payment of emoluments and the consideration given for the Reservists to be entitled to a pension, that a reservist could still be demobilized. It appears that the consideration given for the changes in the mode of payments of salary and the entitlement to a pension have been to accommodate the Reserve Force, who had been in long periods of service due to the prolonged situation in the country.

Accordingly it is obvious that the Regular Force and the Reserve Force still remain as two different entities. This factor is further established on a consideration of the provisions which came in along with the 17th Amendment to the Constitution. Prior to the 17th Amendment, the Public Service Commission

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was empowered to appoint and promote the Police Officers. However, the Public Service Commission had no authority regarding such appointments and/or promotions of the Reserve Force and the mobilization and de-mobilization of the Reserve Force was carried out by the Inspector General of Police in terms of the Police Ordinance. Since the introduction of the 17th Amendment to the Constitution, the powers and functions regarding the appointments and transfers of the Regular Police Force was given to the National Police Commission in terms of Article 155(G)I(a) of the Constitution. However, this did not include the Reserve Force and Reservists are still subject to the provisions contained in section 26B(i) of the Police Ordinance, which includes mobilization and de-mobilization and section 26(H), which deals with the recruitment, conditions of service and matters with regard to discipline.

It is thus apparent that the Regular Police Force and the Reserve Police Force do not belong to a single category, and therefore the reserve Force cannot be equalled to the Regular Police Force.

Having considered the nature of the Regular and the Reserve Force of the Sri Lanka Police let me now turn to examine whether there is any infringement in terms of Article 12(1) of the Constitution as complained by the petitioners.

Article 12(1) of the Constitution deals with the right to equality and reads as follows.

"All persons are equal before the law and are entitled to the equal protection of the law".

Equality as postulated in Article 12(1)of the Constitution means the right of a person to be treated alike among his equals and such rights to be administered equally. Equality thus means that there should not be any discrimination among

those who are equally circumstanced. Thus Article 12(1) of the Constitution ensures the protection from arbitrary and discriminatory action by the executive and/or the administration. The objective of Article 12(1) of the Constitution therefore is to give persons equal treatment.

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However, such guaranty does not forbid reasonable classification, which is founded on intelligible differentia. The concept of equality only forbids action which is unreasonable, arbitrary and capricious and not the classification that is reasonable. This is based on the theory that a classification which is good and valid cannot be regarded as arbitrary. The concept of reasonable classification was considered in detail in the well known decision in Ram Krishna Dalmia v Justice Tendolkar(1),where it was clearly stated that for a valid classification two conditions have to be satisfied. These conditions could be specified as follows:

(a) that the classification must be founded on an intelligible differentia, which distinguish persons that are grouped in from others who are left out of the group; and

(b) that the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved.

A classification to come within the framework of Article 12(1) of the Constitution there must therefore be some rational nexus between the basis of classification and the objects intended to be achieved by such classification. In The State of Jammu and Kashmir v Triloki Nath Rhosa and others(2), the question of classification of Assistant Engineers between Diploma holders and Degree holders for promotion as Executive Engineers came before the Indian Supreme Court where it was decided that such a Rule does not violate the equality Clause of the Constitution. Considering the question at issue, Chandrachud, J. in State of Jammu and Kashmir (supra) stated that,

"Since the Constitutional Code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class. A classification of employees can therefore be made for first identifying and then distinguishing members of. one class from those of another ... though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for ;

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purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The rule providing that graduates shall be eligible for such promotion to the exclusion of diploma holders does not violate Articles 14 and 16 of the Constitution and must be upheld."

On a careful comparison of the characters of the Reserve Police Force and the Regular Police Force, on the basis of the aforementioned analysis, it is evident that they belong to two different categories without any rational nexus to link the two groups for the purpose of putting them together.

In such circumstances, it is abundantly clear that the Officers of the Regular Force and the Reserve Force belong to two different categories and therefore the decision of the respondents to include Clause 2.1.111in the undated Circular P1 cannot be regarded as unequal, unfair, arbitrary or violative of the petitioners fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

I therefore hold that the petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated. For the reasons aforementioned these two (2) applications are dismissed.

I make no order as to costs.

FERNANDO, J - I agree.
MARSOOF, J.-I agree

Applications dismissed.

Dr. Karunanada v. Open University Of Sri Lanka And Others - SLR - 225, Vol 3 of 2006 [2006] LKSC 8; (2006) 3 Sri LR 225 (3 August 2006)

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DR.KARUNANADA
VS.
OPEN UNIVERSITY OF SRI LANKA AND OTHERS

SUPREME COURT.
SHIRANI BANDARANAYAKE, J.
DISSANAYAKE,J.
FERNANDO, J.
SC FR 450/2003
SEPTEMBER 2, 2005.
FEBRUARY 27, 2006.
APRIL 24, 2006.
MAY 31,2006.

Fundamental Rigflts-Article 12(1)-Constitution - Article 126- Non appointment as a Professor- Academic decisions -Could these decisions be challenged? -Can Universities be considered pari-passu with other State institutions? - Difference between academic issues and other disputes relating to academic matters - Distinction?

The petitioner, a senior lecturer attached to the Open University complained against his non-appointment as a Professor/Assistant Professor in Computer science, stating that, the said non-appointment is unreasonable, mala-fide, discriminatory and arbitrary and is in violation of Article 12 (1).

HELD:

(1) The Universities of Sri Lanka are creatures of statutes as they have been established under and in terms of the Universities Act.

HELD FURTHER:

(2) This Court may not interfere with purely an academic issue, the Court would not hesitate to intervene in any other dispute relating to academic matters if it infringes rights guaranteed in terms of the provisions stipulated in the Constitution more particularly the.

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fundamental rights jurisdiction and its exercise is determined in terms of Article 126(1).

Per **Shirani Bandaranayake, J.**

"I am not in agreement with the view .that academic decisions are beyond challenge, there is no necessity for the Courts to unnecessarily intervene in matters 'purely of academic nature' since such issues are best dealt with by academics who are fully equipped to consider the questions in hand; however if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment".

(3) The case of the petitioner refers to the failure of the respondents to appoint him as Professor/Assistant Professor where he had the required marks-the petitioner has not questioned the correctness of the assessment of the external experts or the examination panel, the question at issue does not revolve around matters relating to allocation of marks of examinations, methodology of teaching or matters regarding the curriculum, which ore purely of an academic nature.

Held further:

(4) The procedure followed in the evaluation process of the petitioner's application for the promotion had been dealt with unfairly without adhering to procedural fairness. Procedural safeguards should be the cornerstones of individual liberty and their right to equality.

AN APPLICATION under Art. 126(1) of the Constitution.

Cases referred to :

(1)Regina vs. Higher Education Finding Council Ex-parte Institute of Dental Surgery - 1944-1WLR 242

(2)Phillips vs. Bury - 1558-1774-AII ER 53

(3)Sf. Johns College, Cambridge vs. Todington- (1751)-1 Bur 200

(4) Rv. Bishop of Ely - (1794)- STR 477

(5)Ex-parte Thomas Lamprey - (1737) West T. Hard 209

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(6)R vs. Hertford College, Oxford - (1878) 3 OBO 693

(7)Attorney General vs. Stephens - (1737) 1 AIR 358

(8)In Re Dean of York - (1841) 2 OB 1

(9) R vs. The Chancellor Masters and Scalars of the University of Cambridge (Dr. Bentleys case) - (1723) 1 Str. 557

(10)Clark vs. University of Lincolnshire - (2000) 2 AI ER 752

(11)Thorne vs. University of London - (1864) - 33 LJ ch 625

(12)Thomson vs. University of London - (1996) - 1 All ER 338

(13)Patel vs. University of Bradford Senate and others 0-(1979) 2 All Er 582

(14)Hines vs. Birkbeck College - 1985 - 3 All ER 156

(15)Manohara vs. President, Peradeniya Campus University of Sri Lanka - BALR (1983) - Vol. Part II - 45

(16)W. K. C. Perera vs. Prof. Daya Edirisinghe - 1995 - 1 Sri LR 148

(17) Cula subadhra vs. University of Colombo - 1985 - 1 Sri LR 244

(18) Sannasgala vs. University of Kelaniya - 1991 - 2 Sri LR 193

(19) Mcnabb vs. United States - 1943 - 318 US 332

(20) Shaughnessy vs. United States - 1953 -345 - US 332

J. C. Weliamuna with Shantha Jayawardane for petitioner. Harsha Fernando SSC for 1st -7th and 11th respondents.

August 3, 2006.

SHIRANI BANDARANAYAKE, J.

The petitioner, who is a Senior Lecturer attached to the Open University of Sri Lanka, has complained against his non-appointment as a professor/Associate Professor in Computer Science of the Faculty of Natural Science of the 1st respondent University stating that the said non-appointment is unreasonable, mala-fide, discriminatory and arbitrary and in violation of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution, for which this Court had granted leave to proceed.

The facts of the petitioner's case are briefly as follows:

The petitioner is a Bachelor of Science (Honours) Graduate in Mathematics of

the University of Colombo, who obtained his degree in 1985 (P1A). He had obtained the Degree of Master of Philosophy in Computer Science from the Open University of Sri Lanka in 1993 (P1B)

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and the Degree of Doctor of Philosophy in Computer Science -Artificial Intelligence from the University of Keele, United Kingdom in 1995 (P1C). Since his graduation in 1985, he had served in the capacities of Lecturer, Senior Lecturer and the Head of the Department of Mathematics and Computer Science at the 1st respondent University. The petitioner has carried out extensive research in the area of Computer Science and Artificial Intelligence, had published around 80 research papers in international and national journals and had made presentations at International Conferences. He has also published around 10 books in Sinhala on Computer Science for the use of schoolchildren, general public and University Students. The petitioner had been instrumental in introducing Computer Science as a subject for the Degree of Bachelor of Science in the 1st respondent University. He had developed the entire curriculum and had taught the subject at undergraduate and post graduate levels. '

The petitioner had submitted his application for the post of Professor! Associate Professor in Computer Science of the 1st respondent University in terms of University Grants Commission Circular No. 723 dated 12.12.1997 (hereinafter referred to as the Circular). The Senate of the 1st respondent University in terms of the Circular, had appointed two external Experts and the Panel to evaluate the said application. Thereafter the petitioner had become aware that the two External Experts and the panel of Members had submitted their evaluation reports in respect of the petitioner's application. In July 2002, the 1st respondent University had convened the Selection Committee to consider the petitioner's application.

By letter dated 18.07.2002, the petitioner was informed by the Senior Assistant Registrar (establishment) of the 1st respondent University that the Selection Committee had not recommended the petitioner for promotion either as Professor or Associate Professor on the basis that the petitioner had failed to obtain the required minimum marks in accordance with the marking scheme (P6).

The petitioner stated that although it was the practice of all the Univt3rsities in Sri Lanka to call the applicant before the Selection Committee and inform the results, the petitioner was not called before the Selection Committee for the said purpose. Nevertheless, the 3rd

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respondent, on a request made by the Selection Committee, had informed the petitioner that he had not obtained the minimum marks for 'research and creative work', since one of the external experts had awarded him less than 25 marks. The 3rd respondent had also informed him that as he had failed to obtain the minimum marks for 'teaching and academic development' the application of the petitioner

was not referred to a 'third external expert'.

As the petitioner had firmly believed that in terms of the marking scheme he was entitled to more than 20 marks for 'teaching and academic development', he was of the view that a grave injustice had been caused to him on the evaluation of his application by the Panel, which consisted of internal academics of the 1st respondent University. Therefore by his letter dated 09.08.2002, he had made a request to the 2nd respondent to re-consider his application (P7). A Grievance Committee was appointed as a result of his letter and such Committee had recommended, inter-alia that the application of the petitioner be re-considered. Accordingly, a 'new panel' and a third External Expert were appointed by the Senate to evaluate the petitioner's application.

Subsequently' the Selection Committee was re-convened on 16.07.2003 and by letter dated 07.08.2003 the petitioner had inquired from the 1st respondent as to why his application has not been processed for over 2 1!2 years (P9). On 08.08.2003 the 2nd respondent had informed the petitioner that his application is still being processed. (P10).   ;

The petitioner alleged that by the failure of the 1st respondent University to appoint him as an Associate Professor or a Professor when he had obtained the necessary marks, the respondents have infringed his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

At the hearing learned Senior State Counsel, by way of a preliminary objection raised on behalf of the respondents, contended that the Universities cannot be considered pari passu with other State institutions, which are subjected to judicial review under Articles 126 and 140 of the Constitution. His contention was that in a classical sense the University is or ought to be a 'community of scholars'

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irrespective of the fact that the organizational aspects of the University may have the trappings of an institution. The post of Professor is one of the most senior academic positions and therefore the process for the conferment of such position is also highly specialized and unique that such would be executed only by persons, who are qualified and placed in equal or higher standing.

Learned Senior State Counsel further contended that the scheme of evaluation which stipulated the criteria for the promotion to the posts of Professor or Associate Professor would take into account the specific attributes a Professor should possess which would include research and creative work, dissemination of knowledge, contribution to teaching and academic development to the University and national development. Accordingly, the contention of the learned Senior State Counsel is that such attributes could be assessed only by an 'academic mind' and that such evaluations may not be on par with the reasoning of a judicial mind and therefore such assessments could only be carried out by similarly qualified peers from the academic community. He further submitted that the petitioner's intention is

to invite this Court to 'step into the shoes' of the petitioner's academic peers and decide whether the evaluation carried out by them is right or wrong. The contention of the learned Senior State Counsel is that this Court should not perform such function in the absence of allegations of serious mala-fides or grave procedural impropriety.

In support of his contention learned Senior State Counsel referred to Wade and Forsyth (Administrative Law,9th Edition, Oxford University Press, 637), where it was stated that-

"The Courts will, in any case, be reluctant to enter into 'issues of academic or pastoral judgment', which the university was equipped to consider in breadth and in depth but on which any judgment of the Courts would be jejune and inappropriate".

He also referred to the decision in Regina vs. Higher Education *Funding Council Ex-parte Institute of Dental Surgery*(1) where it was stated that-

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" we would hold that where what is sought to be impugned is on the evidence no more that an informed exercise of academic judgment, fairness alone will not require reasons to be given.&quot ;

Learned Counsel for the petitioner's submissions on the objections taken by the respondents were two fold: firstly it was submitted that the authorities relied on by the respondents do not support their contention and that it is not correct to state that the academic decisions are beyond challenge. In support of his contention learned Counsel for the petitioner referred to the decision in R vs. *Higher Education Funding Council, Ex-parte Institute of Dental Surgery, (supra)* a decision which the learned Senior State Counsel had relied on, where Sedley, J. had stated that-

"This is not to say for a moment that academic decisions are beyond challenge."

Secondly, he took up the position that the respondents have based their submissions on the misconceived premises that the petitioner is challenging an academic decision of the respondents whereas the contention of the petitioner is that the failure to appoint him as a Professor or an Associate Professor when he had obtained the required marks is unreasonable and therefore violative of Article 12(1) of the Constitution.

Regarding the second matter, learned Counsel for the petitioner submitted that the petitioner is not challenging the assessment by the External Experts or the panel. The question is issue according to the learned Counsel for the petitioner, is the appointment of a professor or an Associate Professor and for this purpose the Circular No. 723 of the University Grants Commission sets out the entire procedure and the fact that an application for promotion is evaluated by an academic does not make the assessment/evaluation an academic issue.

Having set down the submissions by both learned Counsel for the petitioner and the respondents, let me now turn to consider the objection raised by the learned Senior State Counsel.

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The question that is at issue on the basis of the objection raised by the learned Senior State Counsel for the respondents is that whether an academic issue could be -subjected to judicial review in terms of Article 126 of the Constitution.

The petitioner's complaint, as stated earlier, clearly refers to the failure of the 1st respondent University to appoint him to the post of Professor or Associate Professor and that it amounts to an infringement or an imminent infringement of the petitioner's fundamental rights.

There is another matter that I wish to state in this regard. Learned Senior State Counsel referred to several English authorities, which were cited earlier, in support of his contention that Courts would be reluctant to enter into issues of academic or pastoral judgments of the University.

It is to be borne in mind that in England, since the ancient times, where Universities and Colleges' were established for 'the promotion of learning', provision was made to appoint a 'visitor' for the purpose of administering justice regarding internal matters. The powers and duties of such a visitor was clearly described in Philips vs. Bupy (2) where'8ir Jon Holt, C. J., stated that,

"The office of visitor by the common law is to judge according to the statutes of the college and to expel and deprive upon just occasions, and to hear 'appeals of course. And from him, and him only, the party grieved ought to have redress, and in him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations life final and examinable in no other Court whatsoever."

Since that decision, the Courts have repeatedly taken the view that, if a visitor is appointed and if he had been given the jurisdiction to hear and determine the complaints of the members of the college, no action could be instituted in the courts of law. St. John's College, Cambridge vs. Todington (3),R vs. Bishop of Ely(4), Ex parte Thomas Lamprey (5) R vs. Hertford College,Oxford(6),Attorney Generalvs.Stephens(7).

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However, in later decisions, the scope of the visitatorial jurisdiction was given careful consideration and it was held that the visitor cannot claim to be entirely free from any kind of control by the common law Courts and in the event of the visitor exceeding his jurisdiction that the Courts could declare his acts null and void Dean of *Yorks case*(8).

It is also necessary to note that the mere existence of a visitor was not sufficient to exclude the jurisdiction of the Court, as the fact that there is a visitor should also be brought to the notice of the Court. For instance in R vs. The Chancellor, Masters and Scholars of the University of Cambridge (9)commonly known as Dr. Bentley's case, where a doctor had refused to submit to the jurisdiction of the Vice-Chancellor of the University in an action against him when he was deprived of his academic qualifications. Writ of mandamus was granted to restore him of his degrees, chiefly due to the reason that the existence of the visitor was not raised as a defence. Considering the actions taken by the University, Pratt, C. J. stated thus.

" I think the return has fully justified us in sending the mandamus as it is not pretended there is any visitor, or any other jurisdiction, to examine into the reasonableness of the deprivation, but that of this Court."

It is therefore evident that the Universities are amenable to the jurisdiction of the Court irrespective of the fact, whether the question in issue is academic or otherwise and the only exception, where the jurisdiction of the Court would be excluded was only when there was a visitor. There again the visitor's mere presence alone was not sufficient for the purpose of excluding the jurisdiction of the Court, and it was an essential requirement that in such instances the fact that there being visitor must be brought to the notice of the Court.

There is one other factor which is of vital importance regarding the question of jurisdiction of Court vis-a-vis the presence of a visitor in a University. Most of the older English Universities had provision for a charter and thereby for a visitor. The modern Universities are mostly creatures of statute and therefore would not have provision for a visitor. This position was confirmed in Clark vs. University of Lincolshire(10), where it was held by Sedley L. J. that,

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"The University of Lincolshire and Humberside is one of the new Universities brought into being by the Education Reform Act, 1988. Section 121 gave the status of bodies corporate to advanced further education Institutions meeting statutory enrolment criteria of which ULH (as I will call it) was one. By section 123 they are called higher education corporations. The Further and Higher Education Act, 1992 gave all such institutions the full status of a University and made provision for their internal government, but without altering their legal character. Such an institution, therefore, unlike the majority of the older English and Welsh Universities, have no charter and no provision for a visitor, if it had, it is common ground that the common dispute would lie within the visitor's exclusive jurisdiction But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers."

Having said that let me also refer to Sedley, J.'s views expressed in Clark vs.

University of Lincolnshire (supra) regarding the jurisdiction of Courts in a situation, where there is no recourse to a visitor. In such a situation, according to Sedley, J., the issues would not be susceptible to adjudication as contractual issues. However, it is to be borne in mind, that Sedley, L. J., had made this observation in the light of decisions such as Thomson vs. University of London(11),Thorne vs. University of Londod(12)and Patel vs. University of Bradford Senate and another(13). In Thomsons's case (Supra) the question at issue was of the award of a gold medal, where as Thorne's and Patel's cases (Supra) were regarding the plaintiff's academic competence. Accordingly, Clark's case was distinguished from the aforementioned cases on the ground that it was a case which did not belong to the earlier group. Referring to such distinction Sedley, L. J. stated that,

"It is on this ground, rather than on the ground of non justiciability of the entire relationship between student and university, that the judge was in my view right to strike out the case as then pleaded. The allegations now pleaded by . way of amendment are, however, not in this class. **While capable, like most contractual disputes, of domestic**

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resolution, they are allegations of breaches of contractual rules on which, in the absence of a visitor, the Courts are well able to adjudicate (emphasis added)".

Thus it is quite clear that, in situations where there is no visitatorial jurisdiction in process, the academic matters would be divided into two categories, which would include issues capable and not capable of being decided by Courts. As stated by Hoffman, J. in Hines vs. Brikbeck College(14) the Courts have no difficulty in deciding whether principles of natural justice have been observed or rules of procedure incorporated into contracts of employment correctly applied. Allegations of breach of contractual rules also would therefore fall into the category of cases that would be able to be adjudicated by Courts.

The Universities of Sri Lanka are creatures of statutes as they have been established under and in terms of Universities Act, NO.16of 1978 as amended. The Act does not provide for a visitor as in the case of majority of the English and Welsh Universities. Long line of cases, filed against the decisions of Sri Lankan Universities indicate that there had been no objections taken by the University administration that the Courts cannot intervene in reviewing their decisions. Manohara vs. President, Peradeniya Campus University of Sri Lanka(15),W. K. C. Perera vs. Prof. Daya Edirisinghe(16),148 Cula Subadhra vs. University of Colombo (17), Sannasgala vs. University of Kelaniya(18).In fact in *W. K. C. Perera vs. Prof. Daya Edirisinghe (Supra)*, learned Senior State Counsel had contended that this Court should not compel the award of a degree by way of granting the writ of mandamus, but only to request the relevant authorities to **consider** the question of awarding the degree in question. It was also contended that there was no public duty to award a degree and that no one had a right to the award of a degree. Further it was submitted that, any institution awarding degrees had a residual

discretion to withhold a degree, even if the candidate had satisfied the relevant regulations. Considering the submissions of the Senior State Counsel, Mark Fernando, J. was of the view that,

"..... Article 12 ensures equality and equal treatment even when a right is not granted by common law, statute or

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regulation, and this is confirmed by the provisions of Article 3 and 4(d). Thus, whether the Rules and Examination Criteria, read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such Degree without discrimination, and even when the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretion."

It is to be borne in mind that in W K. C. Perera's case (supra) the question at issue was whether the appellant was entitled to the award of the degree which was clearly an academic issue, which this Court had decided in favour of the appellant.

Therefore, although this Court may not interfere with purely an academic issue the Court would not hesitate to intervene in any other dispute relating to academic matters if it infringes the rights guaranteed in terms of the provisions stipulated in the Constitution. More importantly the fundamental rights jurisdiction and its exercise is determined in terms of Article 126(1) of the Constitution. In terms of that Article the Supreme Court shall have sole and exclusive jurisdiction to hear and determine **any question** relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized under Chapter III or Chapter IV of the Constitution. Article 12(1), which is contained in Chapter III of the Constitution clearly stipulates that all persons are equal before the law and are entitled to the equal protection of the law. In terms of the aforementioned constitutional provisions, the Court would have to inquire into, for the purpose of ascertaining whether there is an infringement or an imminent infringement in connection with the equal protection guaranteed to the petitioner is in terms of Article 12(1) of the Constitution. If there is prima facie such an infringement, then it is the duty of this Court to inquire into the matter before Court.

Therefore, although there may be cautionary remarks .indicating reluctance to enter into academic judgment, I am not in agreement with the view that academic decisions are beyond challenge. There is no necessity for the Courts to unnecessarily intervene in matters "purely of academic nature," since such issues would be best dealt

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with by academics, who are 'fully equipped' to consider the question in hand. However, if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126 of the Constitution, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment. In fact in R vs. Higher Education Funding Council ex-parle Institute of Dental Surgery (Supra) Sedley, J. referring to a question which he termed as 'an academic judgment' stated thus:

"The question 'why' in isolation as it can now be seen to be, is a question of academic judgment. We would hold that where what is sought to be impugned is on the evidence no more than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. **A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more that an informed exercise of academic judgment** (emphasis added)".

The case of the petitioner refers to the failure of the respondents to appoint the petitioner as a Professor or an Associate Professor, where he had the required marks and therefore his allegation is that such non-appointment is unreasonable and arbitrary and therefore is violative of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioner has not questioned the correctness of the assessment of the external experts or the examination panel. The question at issue does not revolve around matters relating to allocation of marks at examinations, methodology of teaching or matters regarding the curriculum, which are purely of an academic nature. Therefore even if I am to accept the position that decisions, which are purely academic by nature cannot be questioned by this Court, I am unable to agree with the contention of the learned Senior State Counsel that this is a matter, which cannot be looked into by this Court.

For the reasons aforementioned, the preliminary objection raised by the learned Senior State Counsel is overruled.

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Having stated that let me now consider the alleged infringement complained by the petitioner.

The contention of the learned Counsel for the petitioner is that the non-appointment of the petitioner to the post of Professor or Associate Professor when he had obtained the requisite marks, is in violation of Article 12(1) of the Constitution.

It is common ground that the promotion to the post of Professor or Associate Professor on merit of the 1st respondent University is governed by UGC Circular No. 723 dated 12.12.1997 (P3). This Circular clearly stipulates that the applications would be evaluated on the basis of the contribution to teaching and academic development, research and creative work and dissemination of knowledge and contribution to University and national development.

The minimum marks for each component of evaluation and the minimum total mark that an applicant for the promotion of Associate Professor or Professor of a given discipline should obtain, in order to qualify for the relevant appointment in terms of the Circular (P3) was as follows:

Table 1

		Associate Professor() Internal	Associate Professor( ) External	Professor
1	Contribution to Teaching and Academic Development	20	10	20
2	Research and creative work	25	35	45
3	Dissemination of knowledge and contribution to University and national development	10	10	15
4	Minimum total mark	65	65	90

"(ii) The Senate shall appoint two (2) experts in the relevant field from outside the higher education institution concerned to evaluate the applicant's contribution to :-

- research and creative work
- dissemination of knowledge.

The experts should not be teachers/supervisors of the candidate at post-graduate level.

(iii) Evaluation of the contribution to :

- teaching and academic development
- University and national development

will be carried out by a panel appointed by the Senate which shall consist of the following"

- Vice-Chancellor/Deputy Vice-Chancellor/Dean of the Faculty concerned.

- Two (2) Professors, one of whom is either from within or outside the Institution concerned and has a knowledge of the discipline or a related discipline and the

other from another Faculty of the Higher Educational [Institution concerned. The Head of the Department concerned shall report on the attendance of the candidates at meetings of the Faculty Board and Senate (where relevant) and other statutory bodies and he may be called upon to serve as an observer in the panel.

The Circular refers to the method of selection process and the said process with regard to Associate Professor/Professors was as follows:

(iv) The final selection will be made by the Selection Committee based on the evaluation reports specified in (ii) and (iii) above and in conformity with the Procedure of appointment. Appointments on merit promotions are made on 'personal- to- the-holder' basis and do not necessarily reflect cadre positions. "

On the basis of the aforementioned criteria, the Senate had appointed two external experts and the panel, to evaluate the petitioner's

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application and in July, 2002, the 1st respondent University had convened the Selection Committee to consider the reports of the two external experts and of the panel. Since this panel had not recommended the petitioner his promotion as he had not obtained required marks for Research and Creative work, on the basis of an application made by the applicant to the 'Grievance Committee' of the University a second panel was appointed and the marks allocated by the two panels as submitted by the 2nd respondent was as follows:

Table II

	External Expert I	External Expert II	External Expert III	Minimum Marks required for Associate Professor	Minimum Marks required for Professor
Research and creative work	9.8	34.85	71.5	25	45
Dissemination of knowledge and contribution to University and National	4.5	10.00	22.0	10	15
Total marks				65	90

" The marks given by the external expert III for Research and creative work and by Panel 2 for dissemination of knowledge and contribution to University and National Development are reflected in column 3 of the above table and it appears that the petitioner was awarded 71.5 and 22 marks respectively.

Thereafter the Selection Committee was reconvened and had met on 16.07.2003 and had observed that even with the marks of the 3rd External Expert there was a high degree of variance. At that point, according to the 2nd respondent the Selection Committee had decided to refer all the material pertaining to the application made by the petitioner to the original evaluation of Panel 1,and to the 3rd External Expert requesting them to reconsider the marks they had awarded to the petitioner. Out of the three, two members including the 3rd External

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Expert had informed that they did not see any basis that warranted changes to the original marks they had awarded, whereas one person did not respond. On the basis of the aforesaid response, the Selection Committee had considered the circumstances and was of the opinion that the petitioner cannot be recommended for the post of Professor or an Associate Professor as he had not obtained the necessary points or marks according to the UGC Circular No. 723. As it appears, this decision had been purely on the basis of the original marks that were awarded to the petitioner.

Admittedly the petitioner was not recommended for promotion either to the post of Associate Professor or to the Post of Professor as the 1st respondent University had taken the view that he had not satisfied the minimum standard required for Research and Creative work. By her letter dated 02.12.2003, the 2nd respondent informed the petitioner of her decision which stated as follows:

"Application for the Post of Professor/Associate Professor

This has reference to your letter dated 11th November, 2003 on the above matter.

Since you have not satisfied the minimum standard required for Research and Creative work the Selection Committee did not recommend the promotion either to the Post of Associate Professor or to the Post of Professor (P14)."

It is not disputed that on the basis of the appeal submitted by the Petitioner, the 1st respondent University had decided to appoint a 3rd External Expert to evaluate the work carried out by the petitioner for his promotion. In fact it had been a decision of the 1st respondent University on the basis of the appeal submitted by the petitioner after considering it at the Council, which is the governing authority of the University that the complaint should be referred to a Grievance Committee. The said Grievance Committee consisted of three (3) members of the Council of whom two were UGC appointed members and one a representative of the Committee of Vice-Chancellors and Directors (CVCD). That Committee, after considering the grievance of the petitioner had made the following recommendation:

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"One of the experts appointed for evaluation had given 34 points and the other had given 9.8 points.

To qualify for promotion he should obtain 25 points under this category.....Since there is a high variance ..... recommended to obtain an evaluation report from a 3rd expert."

The consideration given and the recommendation made by the Grievance Committee clearly indicates that, they had accepted the fact that,

(a) there was a high variance of assessment between the 1st and the 2nd External Experts, and

(b) due to the aforementioned fact that it is necessary to obtain an evaluation report from a 3rd External Expert.

However, after the appointment of the 3rd External Expert and after obtaining the evaluation report, the decision of the Selection Committee had been to refer the material pertaining to the petitioner to panel I and to the 3rd External Expert to re-consider the marks they had awarded to the petitioner.

A series of questions arise at this juncture. Whether the procedure adopted by the 1st respondent University is fair, reasonable and justifiable? What was the purpose of appointing a 3rd External Expert when there was a high degree of variance of assessment between the 1st and the 2nd External Experts, if the marks were to be ignored thereafter? Wasn't it fair and reasonable to have considered the average of the two positive marks, if the 3rd External Expert had awarded more than the minimum marks? Couldn't the Selection Committee have considered the average of the three sets of marks available to them? In such circumstances, couldn't the Selection Committee have considered recommending the petitioner to be promoted to the Grade of Associate Professor of the 1st respondent University?

Looking at Table II, referred to earlier, which stipulated the marks given by the three External Experts, (2R1) it is apparent that both External Expert II and External Expert III had given more than the minimum marks required for the promotion to the post of Associate Professor. Thus it is apparent that the procedure followed in the evaluation process of the petitioner's application for the promotion of Professor or Associate Professor had been dealt with unfairly without

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adhering to procedural fairness. Procedural fairness, in my view, cannot be regarded as a matter which is unimportant. Procedural safeguards should be the cornerstones of individual liberty and their right to equality. Referring to the importance of procedural fairness, *Frankfurter, J. in McNabb VS.United States*[19]stated that,

"The history of liberty has largely been the history of the observance of

procedural safeguards."

A decade later considering an issue on the same lines, Jackson, J. in Shaughnessy VS. United States[20] stated that,

Procedural fairness and regularity are of the indispensable essence of liberty. Several substantive laws can be endured if they are fairly and impartially applied."

On a consideration of the aforementioned circumstances, it is evident that the 1st respondent University has acted arbitrarily, unreasonably and contrary to the provisions stipulated in Circular P3. I therefore hold that the respondents had acted in violation of the petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution. The 2nd respondent and the 3rd - 10th respondents, who were the members of the Selection Committee, are directed to take all necessary steps within the scope of their powers, duties and functions to re-consider the application made by the petitioner on his promotion to the post of Associate Professor/ Professor in Computer Science, in terms of the UGC Circular No. 723 dated 12.12.1997 (P3), and the assessments given by the three (3) External Experts, according to law.

I make no order as to costs.

DISSANAYAKE, J. -I agree

FERNANDO, J. -I agree

Application allowed.

Goonathilaka And Another v. Thollappan - SLR - 394, Vol 2 of 2007 [2006] LKSC 16; (2007) 2 Sri LR 394 (25 August 2006)

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GOONATHILAKA AND ANOTHER
V
THOLLAPPAN

SUPREME COURT.
SARATH N. SILVA, CJ.
FERNANDO, J.
AMARATUNGA, J.
S.C. APPEAL NO. 19/2005, S.C. (SPL.) LA NO. 211/2004
C.A. NO. 211/2004
AUGUST 25, 2006

State Land (Recovery of Possession) Act NO.7 of 1979 as amended by Act No. 58 of 1981, Section 18, - What is State land in terms of Section 18? - Land is taken to include buildings? - Evidence Ordinance- Section 114.- Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987.

Bagawantalawa Plantations Ltd., was an estate vested in the Land Reform Commission and later in the Sri Lanka State Plantations Corporation (SLPC). The respondent was an employee of the SLPC and was permitted to occupy the land in question on the payment of a sum of Rs.50/- per month as rent. Subsequently the estates vested in the SLPC was leased out to companies established in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act. Bogawantalawa Plantations Ltd. was incorporated in terms of the said Act, the estate within which the land occupied by the respondent is situated was leased by SLPC to Bogawantalawa Plantations Ltd.

The Court of Appeal issued a writ of certiorari on the basis that the respondent had been given on rent a building and that the land is mere appurtenant to the building. The notice to quit was issued by the original respondent-appellant as the Competent Authority for the purpose of the State Land (Recovery of Possession) Act on the basis that the respondent (V.N. Thollappan) is in unauthorized occupation of state land. The land described in the schedule to the notice to quit is a portion of field 4 of the Bogawantalawa Estate.

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Held:

The purpose of the State Lands (Recovery of Possession) Act as amended is to recover possession of the state lands from persons in unauthorized possession or occupation of such land. Section 18 makes it abundantly clear that land is taken to include buildings standing thereon. The specific reference in the definition that land includes any building standing thereon has been ignored in the judgment of the Court of Appeal. The fact that there is a building on the land and that a person is in occupation of that building cannot remove such land from the operation of the Act.

In terms of section 114 of the Evidence Ordinance a Court may presume inter alia "that judicial and official acts have been regularly performed". In this case the respondent has produced the letter by which he is appointed as the Competent Authority in respect of the Sri Lanka State Plantations Corporation. As the petitioner has not disputed that averment, no further proof is required in regard to the authority of the appellant to perform his official functions under the Act.

APPEAL from the Judgment of the Court of Appeal.

Gomin Dayasiri with Manoli Jinadasa for petitioner. S. Mandaleswaranwith S. Shanthisan and Tharanga Aluthge for the respondent.

Cur.adv. vult.

August 25, 2006
SARATH N. SILVA, CJ.

This is an appeal from the Judgment of the Court of Appeal dated 6.7.2004. By that Judgment the Court of Appeal issued a writ of certiorari to quash the quit notice produced marked X13. The Notice was issued by the original respondent-appellant as the Competent Authority for the purpose of the State Land (Recovery of Possession) Act, stating that the petitioner respondent (V.V. Thollappan) is in unauthorized occupation of state land described in the schedule to the Notice and requiring him to vacate the land together with dependents, if any, on or before 31.12.2001. The land described in the schedule to the Notice is a portion of field NO.4 of the Bogawantalawa estate of which the boundaries are given containing an extent of 57ft x 65 ft.

It is not disputed in this case that Bogawantalawa Plantations Ltd., was an estate vested in the Land Reform Commission and later in the Sri Lanka State Plantations Corporation (SLPC). According to the documents the respondent ,was an employee of the SLPC and was permitted to occupy the land in question on the payment of a sum of Rs. 50/-per month as rent. Subsequently the estates vested in the SLPC were leased to Companies established in terms of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies

Act No. 23 of 1987.

Bogawantalawa Plantations Ltd., was thus incorporated by an order dated 22.6.1992 made in terms of the said Act. The Bogawantalawa estate within which the land Occupied by the petitioner is admittedly situated was leased by the SLPC to Bogawantalawa Plantations Ltd., by Lease bearing No. 83 dated 18.1.1994 attested by J. Kottage, Notary Public.

The lease is for a period of 99 years and contains a provision for prior termination. Therefore the land remains vested in the Sri Lanka State Plantations Corporation.

In terms of section 18 of the State Lands (Recovery of Possession) Act, as amended by Act No. 58 of 1981, "State land includes ...any land vested in or owned by or under the control of .. the Sri Lanka State Plantations Corporation". Thus the provisions of the Act, as amended would apply in respect of the land and premises in question.

Although the Court of Appeal also arrived at the conclusion stated above as to the application of the Act in respect of the Bogawantalawa Estate, the Court of Appeal issued the writ of certiorari on the basis that the petitioner had been given on rent a building and that the land is mere appurtenant to the building. On that reasoning it was held that the provisions of the Act cannot be invoked to evict a person from a building. On that reasoning it was held that the provisions of the Act cannot be invoked to evict a person from a building under the guise of an eviction from land. It is specifically stated in the judgment that the impugned notice to quit is an abuse of the process of

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the special law meant to evict those who are in unauthorized and unlawful occupation of the State land.

It was further held that the respondent has not adduced any proof of his authority to issue the impugned notice to quit as a Competent Authority in terms of the said Act.

Counsel for the appellant contended that the Court of Appeal has misdirected itself as to the meaning to be attached to the phrase "State Land" and has failed to take into account its definition as given in section 18 of the Act. The operative portion of the definition of the phrase "State Land" in the Act, as amended by Act No. 58 of 1981 reads as follows:

"State land means land to which the State is lawfully entitled or which may be disposed of by the State together with any building standing thereon and with all rights, interests and privileges attached or appertaining thereto "

The latter part of this definition referred to above extends it to the SLPC.

According to the long title of the main Act, it is intended to make provision for the

"Recovery of possession of State land from persons in unauthorized or unlawful occupation thereof."

The purpose of the Act is therefore to recover possession of the state land from persons in unauthorized possession of such land. The definition in Section 18 makes it abundantly clear that land is taken to include buildings standing thereon. The Court of Appeal has failed to give effect to the manifest purpose of the Act, which is the recovery of possession of land from persons in unauthorized or unlawful occupation. The fact that that there is a building on the land and that a person is in occupation of such building cannot remove such land from the operation of the Act.

The interpretation given by the Court of Appeal imposes into the Act a restriction which is not warranted by its provisions. The interpretation would result in a curtailment of its provisions, wherever there is a building on such land. The specific reference in the definition that land includes any building

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standing thereon has been ignored in the judgment of the Court of Appeal. Furthermore in reference to the particular facts of this case it is revealed from the documents produced by the respondent himself that he was permitted to occupy an extent of 15 perches situated in the Bogawantalawa estate. Letter dated 9.4.1986 (X2) states as follows:

"This is to certify that Mr. V.N. Thollappan, an employee of the Sri Lanka State Plantations Corporation Board " is resident on Bogawantalawa State Plantations. He is living in a temporary shed of wattle and daub which is not inventorized in the plantation. This temporary shed is close to the cemetery and has about 15 perches of vegetable garden attached to it. "

The extent described in the notice to quit is approximately 15 perches and significantly one boundary is the cemetery referred to in document X2. If the Court of Appeal had given sufficient heed to document X2, the conclusion would not have been drawn that the petitioner was in occupation of a building with some appurtenant land. The contrary appears to be the correct position where the respondent was permitted to occupy an extent of about 15 perches of land with a temporary shed that was standing thereon.

For the reasons stated above I am of the view that the land as described in the notice to quit comes within the definition of state land in section 18 of the State Lands (Recovery of Possession) Act, as amended by Act No. 58 of 1981.

The next matter to be considered is in respect of the authority of the respondent to function as the Competent Authority in terms of the Act. The definition of phrase "Competent Authority" as contained in the Act as amended No. 58 of 1981 includes

  ; *"(h) an officer generally or specially authorized by a corporate body, where such land is vested in or owned by or under the control of such corporate body".*

The respondent produced in evidence document "R1"dated 25.8.1999 issued by the Ministry of Plantation Industries, which

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specifically states that the respondent is appointed as Competent Authority for the Sri Lanka State Plantations Corporation in respect of the State Land (Recovery of possession) Act NO.7 of 1979. The petitioner has not denied this averment in the respondent's affidavit filed in the Court of Appeal. Therefore the Court of Appeal is clearly in error when it held that the respondent did not adduce any proof of his, appointment as "Competent Authority."

In terms of section 114 of the Evidence Ordinance a Court may presume inter alia "that judicial and official acts have been regularly performed". In this case the respondent has produced the letter by which he is appointed as the Competent Authority in respect of the Sri Lanka State Plantations Corporation. The petitioner has not disputed that averment. Therefore no further proof is required in regard to the authority of the appellant to perform his official functions under the Act.

For the reasons stated above the appeal is allowed and the judgment of the Court of Appeal dated 6.7.2004 is set aside. No costs.

FERNANDO, J. **I** agree.
AMARATUNGA,J. **I** agree.

Wijesekera And Others v. Attorney General - SLR - 38, Vol 1 of 2007 [2006] LKSC 12; (2007) 1 Sri LR 38 (16 October 2006)

WIJESEKERA AND OTHERS
V
ATTORNEY GENERAL

SUPREME COURT
SARATH N. SilVA, C.J
JAYASINGHE, J.
UDAIAGAMA, J.
FERNANDO, J.
AMARATUNGA, J.
SC FR 243/06
SC FR 244/06
SC FR 245/06
SEPTEMBER 15, 2006

Fundamental Right - Constitution 13th Amendment - Art 4(c) Art 12(1) Art 35(1), Art 80(3), Art 105(1), Art 154 A(2) - Art 152(3) & Art 155(2) - Proclamation resulting in merger of two provinces flawed Non-observance of mandatory conditions - Amendment of condition done by Emergency Regulations Ultra vires? - Provincial Councils Act 42 of 1987 S37(1) 37(2)a, 37(2)b - Amendment 27 of 1990 - S5A - Public Security Ordinance S5 - Time bar - continuing violation.

The petitioners residents of Trincomalee and in the Digamadulla Districts within the Eastern Province complained that - the proclamation declaring the provisions of S37(1) of the Provincial Councils Act shall apply to the Northern and Eastern Provinces, which resulted in these two provinces forming one administrative unit-merger-deny the petitioners equal protection of the law guaranteed by Art 12(1).

Held:

(1) The Constitution reserves the power of affecting a merger strictly within the legislative power of the Parliament to be done by or under any law.

(2) An exception to the bar on abdication of legislative power is the empowerment of a person or body to make subordinate legislation for prescribed purposes as contained in Article 76 (B).

(3) The power reposed in the President is in the nature of a delegate legislative power and the proclamation issued has to be characterized as subordinate legislature.

(4) S37 (1) (b) confers a specific condition to be satisfied prior to the making of a Proclamation declaring that the provisions of sub section (1) should apply to the Northern and Eastern Provinces, which would have the effect of the two provinces being merged as one administrative unit until a poll is held on the question or merger in each of the provinces not later that 31.12.1988. The specific conditions to be satisfied in S 37 (1) (b) are the surrender of weapons and cessation of hostilities contained in clause 2.9 of the Indo Sri Lanka Accord.

(5) The President himself had stated that there had been only a formal handing over of arms and the LTTE has violated the agreement. It is beyond any doubt that the two conditions for the merger as stated in S37 (1)(b) had not been met.

(6) The amendment of S37 (1) (b) by providing an alternative to the two conditions by the President by an Emergency Regulations made under the Public Security Ordinance 6 days prior to, the order effecting the merger is not within the meaning of Art 170 setting out an alternative condition to what was already stated in the law S37 (1) (b). It is inconsistent with Art 154 A(3) and is invalid.

(7) In terms of Art 154A (3) only the Parliament could by or under any law provide for two and three adjoining provinces to form one administrative unit " The Parliament exercising power reposed in sub Art (3) provided by law - S37 (1) (b) that two special conditions shall apply in respect of the merger, hence a further alternative condition could, if at all be provided only by law.

Per S.N. Silva. CJ.

"An Emergency Regulation made by the President would be written law. The term law in Art 154 (A) (3) should in my view be restricted to the meaning in Art 170, considering the context in which it occurs in relation to Parliament. Therefore any provision for the merger could be made in terms of Art 154 (A) (3) which is in itself an exception to the general rule in Art 154 A (1) and (2) that a separate Council be established and constituted for each province only by a law enacted by Parliament."

(8) Power reposed in the President by S5 of the Public Security Ordinance to make Emergency Regulation amending any law has to be read subject to the provisions of Art 155(2) and an Emergency Regulation cannot have the effect of amending or overriding the provisions of the Constitution. The purported amendment of S37(1) (b) effected by the Emergency Regulation in effect overrides the provisions of Art 154(A)(3) which only empowers the Parliament to provide by law for the merger of two or three provinces.

(9) The impugned Emergency Regulations cannot be reasonably related to any of the purposes provided in S5(1) of the Ordinance, manifestly it has been made for the collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act contravention of specific conditions laid down in the law.

(10) The preclusive clause contained in Art 80(3) which bars judicial review of a Bill that has become law upon certification does not extend to Emergency Regulations being in the nature of delegated legislation. Held further:

(13) The right to have a Provincial Council constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the people and its denial is a continuing infringement of the right to the equal protection guaranteed under Art 12(1). The objection of the time bar is rejected.

(11) The impugned Emergency Regulation is ultra vires and made in excess of the power reposed in the President - it is invalid and of no effect or avail in law.

(12) The Proclamation made by the then President declaring the merger has been made when neither of the conditions specified in S37(1)(b) were satisfied. The order is therefore invalid.

AN APPLICATION under Art 126 of the Constitution.

Cases referred to

(1) Wickremabandu v Herath - 1990 2 Sri LR 348
(2) Joseph Perera v Attorney-General- 1992 1 Sri LR 199
(3) Karunatilake v Dissanayake - 1991 - Sri LR 157

H. L. deSilvaPC with S.L Gunasekera, Gomin Dayasiri and ManoNJinadasa instructed by Paul Ratnayake Associate for the petitioner in S.C. (FIR) 243/2006

Gomin Dayasiri with Manoli Jinadasa for the petitioner instructed by Paul Ratnayake Associates in S.C. (FIR) 244/2006

S.L. Gunasekera for the petitioner instructed by Paul Ratnayake Associates in S.C. (FIR) 245/2006

P.A Ratnayake PC, Addi. Solicitor General, Anil Gunaratne, DSG, A. Gnanathasan DSG, Indika Demuni de Silva SSC, Janak de Silva SSC, Milinda Gunatilaka SSC and Nerin Pulle SSC for the respondents.

K. Kanag-Iswaran PC with M.A. Sumanthiran and - L. Jeyakumar for intervenient petitioners

Batty Weerakoon with Percy Wickramasekera and Lal Wijenaike for intervenient petitioners.

October 16, 2006

SARATH N. SilVA, C.J.

The three petitioners being residents of the Trincomalee and the Digamadulla Districts, within the Eastern Province, have been granted leave to proceed on the alleged infringement of their fundamental rights to the equal protection of the law, guaranteed by Article 12(1) of the Constitution.

The executive action impugned as denying to the petitioners equal protection of the law relates to the Proclamation declaring that the provisions of section 37(1) of the Provincial Councils Act No. 42 of 1987 shall apply to the Northern and Eastern Provinces, which resulted in these two Provinces forming one administrative unit, a process commonly described as the merger of the two Provinces. The case for the petitioners articulated by Mr. H.L de Silva, is that the Proclamation (P2) resulting in the merger is "fatally flawed" due to the non-observance of the mandatory conditions as contained in section 37(1)(b). That, the amendment of the condition as laid down in section 37(1)(b), purportedly done by an Emergency Regulation (P1), rendering the conditions ineffective, is ultra vires section 5 of the Public Security Ordinance which empowers the President to make Emergency Regulations and is therefore null and void. And, although there was no valid merger the poll required to be held in terms of section 37(2)(a), not later than 31.12.1988, to enable the electors of each Province to decide whether or not the respective Provinces should remain linked as one administrative unit, has been purportedly postponed from time to time by successive Presidents, the last being Order P5 made by the former President by which the poll in the Eastern Province is postponed to 17.11.2006 and in the Northern Province to 1.12.2006. Thereby, the petitioners and similarly circumstanced voters of the Eastern Province have been continuously denied their rights to have a lawfully elected Provincial Council constituted for the Eastern Province as required by Article 154 A(2) of the 13th Amendment to the Constitution.

The petitioners submitted that the election for the purportedly merged North-East Provincial Council held in terms of notice dated 19.9.1988 (3R2) published under section 10 of the Provincial Councils Election Act No.2 of 1988 was a sham, since candidates of only one political party, the E.P.R.L.F, submitted nomination papers for the 3 Districts (Jaffna, Mannar and Vavuniya), in the Northern Province, resulting in these candidates being returned uncontested and in the Eastern Province, in Ampara, being the only predominantly Sinhala Polling Division out of 94,068 only 5617 voted (less than 6%) vide 3R3. The petitioners rely on P3 a contemporary publication which states that the Chief Minister appointed for the North-East Provincial Council being the leader of the E.P.R.L.F, made several demands on the Government of Sri Lanka, proclaimed a "unilateral declaration of independence" and finally surreptitiously left the country with about 250 of his supporters in March 1990. According to paragraph 17 of affidavit 2R3, thereupon the Governor of the North-East Provincial Council made a communication in terms of section 5A of the Provincial Council (Amendment) Act No. 27 of 1990, that "more than one half of the membership of the Council expressly repudiated or manifestly disavowed obedience to the Constitution." In terms of section 5A introduced by the Amendment certified on 6.7.1990, a few months after the events referred to above, which appears to have been made especially to provide for the situation that had arisen, upon such communication by the Governor the Council stands dissolved. Section 4

of the Amendment provides that where a Council stands dissolved in terms of section 5A referred to above, the Commissioner of Elections is deemed to have complied with section 10 of the Provincial Council Election Act No.2 of 1998 (being the notice calling for nominations for an election to the Council) if he publishes a notice referred to in that section within a period of one week.

The Legislative and Executive action referred above, which worked in combination, seemingly set the stage for a new election to the merged North-East Provincial Council. I used the word seemingly because although it appeared to be thus, it was never intended to be so, as revealed by the immediately succeeding events. The Commissioner of Elections by notice dated 11.7.1990 (P4) under section 10 of the Provincial Councils Elections Act specified the nomination period for the election as being from 25.7.1990 to 1.8.1990. Thereupon the then President on 12.7.1990 (the very next day) made Emergency Regulation under section 5 of the Public Security Ordinance (Document "0" annexed to affidavit 2R3) which stated that the notice published by the Commissioner of Elections fixing the date and time of nominations "shall be deemed for all purposes to be of no effect." The electoral process stopped there and has remained ever since as it were frozen, upto date. There has been no election for either the North-East Provincial Councilor separately for the Northern Provincial Councilor the Eastern Provincial Council. Whereas in respect of the Councils for the other seven Provinces in the country elections have been held on the due dates in 1988, 1993,1998 and 2004.

Reverting to the merger referred to above, it is to be noted that the poll required to be held under section 37(2)(a) of the Provincial Councils Act not later than 31.12.1988 to enable the electors of the Northern and Eastern Provinces to decide whether or not such Provinces should remain linked as one administrative unit, has been postponed from time to time under section 37(2)(b), the last being the Order P5 referred to above. The respondents produced the relevant order of postponement marked 3R7A to 3R7Z the particulars of which are set are set out below in sequence.

Document	Gazette No. and Date	Postponed Date of Poll for Northern Province	Postponed Date of Poll for Eastern Province
3R7A	538/8dated28.12.1988	31stDecember 1988	31stDecember 1988
3R7B	538/9dated29.12.1988	5thJuly,1989	5thJuly,1989
3R7C	564/3dated28.6.1989	29thJanuary,1990	29thJanuary, 1990
3R7D	593/19dated19.1.1990	14thJune,1990	14thJune,1990
3R7E	614/5dated11.6.1990	19thJanuary,1991	19thJanuary, 1991
3R7Z	Gazette not produced	22ndAugust,1991	22ndAugust,1991
3R7F	674(1dated7.8.1991	24thFebruary, 1992	24thFebruary, 1992
3R7G	698/6dated22.1.1992	28thAugust,1992	28thAugust,1992
3R7H	725/15dated28.7.1992	5thMarch,1993	5thMarch,1993
3R7I	18.2.1993	23rdAugust,1993	23rdAugust,1993
3R7J	780/20dated20.8.1993	28thApril,1994	18thFebruary, 1994
3R7K	805/10dated9.2.1994	19thMay,1994	31st March,1994
3R7L	812/09dated29.3.1994	14thJuly,1994	26thMay,1994
3R7M	818/12dated11.5.1994	25thMay,1995	23rdFebruary, 1995
3R7N	856/19dated3.2.1995	15thFebruary, 1996	16thNovember, 1995
3R7O	893/13dated19.10.1995	1st December, 1996	16thNovember, 1996
3R7P	3.10.1996	1st December, 1997	14thNovember, 1997
3R7Q	996/12dated9.10.1997	1st December, 1998	16thNovember, 1998
3R7R	1050/15dated22.10.1998	1st December, 1999	16thNovember, 1999
3R7S	1102/31dated21.10.1999	1st December, 2000	16thNovember, 2000
3R7T	1156/18dated31.10.2000	1st December, 2001	16thNovember, 2001
3R7U	1209/13dated7.11.2001	1st December, 2002	16thNovember, 2002
3R7V	1254(1dated18.9.2002	1st December, 2003	17thNovember, 2003
3R7W	1314/1dated10.11.2003	1st December, 2004	17thNovember, 2004
3R7X	1365/17dated3.11.2004	1st December, 2005	17thNovember, 2005
3R7Z	1420/27dated23.11.2005	5thDecember, 2006	16thNovember, 2006

Thus the electoral and consultative processes being the vital concomitants of Democracy ingrained in the name of the Republic in Article 1 of the Constitution, have been effectively stymied.

The infringement pleaded is the failure to constitute a Provincial Council for the Eastern Province as required by Article 154A(2) of the 13th Amendment to the Constitution and the continued denial to the electors of the Eastern Province including the petitioners the right to vote at an election for the members of such Council which stems from the invalid merger effected by P1 and P2 made in

derogation of the mandatory conditions in section 37 (1) (b) of the Provincial Council Act.

Additional Solicitor General appearing for the respondents submitted that the condition as contained in Section 37(1)(b) have been validly amended by the Emergency Regulation P1 and in any event the petitioners cannot seek a declaration of nullity in respect of P1 and P2 due to time bar and/or the immunity enjoyed by the President in terms of Article 35(1) of the Constitution. He submitted that the poll required to be held in terms of section 37(2)(a) to enable the electors to decide whether or not the two Provinces should remain linked as one administrative unit has been validly postponed from time to time by orders under section 37 (2)(b) produce marked 3R7 (a) to (z) and as such the petitioners do not have a right to secure an order from Court that a Provincial Council be constituted by election as required by Article 154(2) of the Constitution for the Eastern Province.

Mr. Kanag-Iswaran for the intervenients, who according to his submission are three Tamil persons from the Trincomalee District and Ampara District, claimed that the merger is based on the Indo- Sri Lanka Accord of 29.7.1987 (P6) which in clause1.4 recognized that "the Northern and Eastern Provinces have been areas of historical habitation of Sri Lankan Tamil speaking people who have hitherto lived together in this territory with other ethnic groups." He supported the submission of the Additional Solicitor General that the condition in section 37(1)(b) has been validly amended by P1 and that petitioners are not entitled to relief sought. Mr. Batty Weerakoon submitted that the Court should be slow to declare P2 invalid since the merger was effected pursuant to the Indo-Sri Lanka Accord.

The material adduced by the intervenients represented by Mr. Kanag-Isvaran as to areas of "historical habitation" resulted in the petitioners producing volumes of material to establish the divisions that existed in historic times and that the Eastern Province was a part of the Kandyan Kingdom at the time of British conquest. Mr. Gomin Dayasiri representing the Muslim petitioner adduced material in support of 'ethnic cleansing' resorted to by Tamil militants in the Jaffna District resulting over 90,000 Muslims bring driven away from the District in 1990. It was submitted that the process of 'ethnic cleansing' is yet being perpetrated by the Tamil militants against the Muslims in the Eastern Province. It was submitted by Mr. H. L. de Silva, that the 'forced merger' would result in a destabilization of the ethnic balance in the Eastern Province. Both Mr. de Silva and Mr. Dayasiri relying on the material produced submitted that according to the 1981 census the demographic composition of the Eastern Province was:

Tamil - 40%
Muslims - 32%
Sinhala - 26%

Whereas in a merged North-East Province the demographic composition would be

Tamil - 60%
Muslims - 18%
Sinhala - 13%

It was submitted that the merger would result in the Muslim and Sinhala communities in the Eastern Province being permanently subjugated to a minority which situation would be exacerbated by the process of "ethnic cleansing" carried out by the Tamil militants as referred to above. On the other hand Mr. Kanag-Iswaran submitted that the 'merger' sets right the imbalance brought about by the high increase of the Sinhala population in the Eastern Province in the period 1947 to 1918. He submitted that whereas the national increase of the Sinhala population in country was during the period was 238%, the increase in the Eastern Province was 883%.

Taking note of the volatile and ethnically incendiary material produced and trend of submissions based thereon, reminiscent of the ethnic mistrust that led to terrorism, violence, death and devastating destruction that has characterized our body-politic, the Court indicated to Counsel that the case would be considered only from the perspective of securing to every person the equal protection of the law guaranteed by Article 12(1) of the Constitution. The essential corollary of the equal protection of the law is the freedom from discrimination, based "on the grounds of race, religion, language, caste, sex, political opinion, place of birth or anyone of such grounds" guaranteed by Article 12(2). The elements of race, religion and language characterize ethnicity that tend to divide people. Caste, sex, political opinion and place of birth are sub-elements of further divisions between people. In contrast the equal protection of the law unifies people on the basis of the Rule of Law and the peaceful resolution of disputes that characterizes the exercise of judicial power in terms of Article 4(C) read with Article 105(1) of the Constitution. From this perspective the physical identification of a unit of devolution of legislative and executive power, being the bone of contention, diminishes in significance. Whilst ethnic criteria would be relevant to define the territory of a unit of devolution since a homogeneous unit could be better managed and served, the overriding consideration would be current criteria (not historic material or speculative assumptions for the future) that contribute to the functional effectiveness and efficiency of a unit from the perspective of service to the people, being the sole objective of representative Government. The 13th Amendment to the Constitution was certified on 14.11.1987, being the date on which the Provincial Councils Act No. 42 of 1987 was also certified. The Amendment introduced a new chapter XV11A to the Constitution providing for extensive devolution of legislative and executive power to Provincial Councils in respect of the subjects and functions as contained in List 1 of the 9th schedule. The legislative competence of Parliament was restricted to the subjects and functions in List II (Reserved List). There could be "joint action" in respect of the subjects and functions in List III (Concurrent List) exercised in the manner specifically provided in the Amendment. These Lists are based on the context of from Article 246 and the seventh schedule of the Constitution of India.

Article 154A (1) of the 13th Amendment to the Constitution empowers the President to establish a Provincial Council for each of the Provinces in the Eighth Schedule. Accordingly, by Order 3 R 1 the then President established Provincial Councils for each of the nine Provinces, including the North and East, separately, with effect from 3.2.1988. Steps were taken to constitute a Provincial Council by election for each of the 7 Provinces in terms of Article 154(2), excluding the Northern and Eastern Provinces. In respect of the Northern and Eastern Provinces action was taken as provided in Article 154A (3) by the process impugned in these cases. Sub Article 3 reads as follows:

"Notwithstanding anything in the preceding provisions of this Article, Parliament may by, or under, any law provide for two or three adjoining Provinces to form one administrative unit with one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers and for the manner of determining whether such Provinces should continue to be administered as one administrative unit or whether each such Province should constitute a separate administrative unit with its own Provincial Council, and separate Governor, Chief Minister and Board of Ministers. "

An analysis of the provision reveals that the law to be enacted by Parliament thereunder should have two components providing for-

i) the formation of one administrative unit consisting of two or three adjoining Provinces; and

ii) when the Provinces are so brought together as one administrative unit, the manner of determining where such Provinces should continue to be administered as one unit.

As noted above, the law enacted by Parliament in terms of sub- Article 3 for the merger of two or three Provincial Councils as one administrative unit and for the manner of determining the continuance of such merger is contained in section 37 of the Provincial Councils Act. The material provisions of which read as follows:

"37(1)(a) The President may by Proclamation declare that the provisions of this subsection shall apply to any two or three adjoining Provinces specified in such Proclamation (hereinafter referred to as "the specified Provinces"), and thereupon such Provinces shall form one administrative unit, having one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers, for the period commencing from the date of the first election to such Provincial Council and ending on the date of the poll referred to in subsection (2) of this section, or if there is more than one date fixed for such poll, the last such dates.

(b) The President shall not make a Proclamation declaring that the provisions of subsection 1(a) shall apply to the Northern and Eastern Provinces unless he is satisfied that arms, ammunition, weapons, explosives and other military equipment,

which on 29th July, 1987, were held or under the control of terrorist militant or other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and that there has been a cessation of hostilities and other acts of violence by such groups in the said Provinces.

(2)(a) Where a Proclamation is made under the provisions of subsection (1)(a), the President shall by Order published in the Gazette, require a poll, to be held in each of the specified Provinces, and fix a date or dates, not later than 31st day of December 1988, for such poll, to enable to the electors of each such specified Province to decide whether-

(i) such Province should remain linked with the other specified Province or Provinces as one administrative unit, and continue to be administered together with such Province or Provinces;

or

(ii) such Province should constitute a separate administrative unit, having its own distinct Provincial Council, with a separate Governor, Chief Minister and Board of Ministers."

The arguments of Counsel narrow down to the exercise of power reposed in the President under section 37 (1). Whilst subparagraph (a) empowers the President to make a Proclamation declaring that two or three adjoining Provinces would form one administrative unit, sub-paragraph (b) contains as exception in respect of the Northern and Eastern Provinces where special conditions have to be satisfied as to surrender of weapons and cessation of hostilities before an order of merger is made. The provisions of sections 37(2) as to a poll being held prior to 31.12.1988 to enable electors of each Province merged to decide on the continuance of the merger is common to a Proclamation for the merger of any two or more Provinces.

The first matter to be considered in the light of the submissions made is whether the President in making a Proclamation under section 37(1) (a) exercises executive power or delegated legislative power. This aspect has to be considered by examining the provisions of Article 154A(3) of the Constitution cited above which provides for the merger of two or three adjoining Provinces to form one administrative unit as an exception to the general rule in Article 154 A(1) and (2) that there should be a separate Council for each of the nine Provinces. A plain reading of sub-Article (3) shows that there is not even a reference to the President contained therein. Thus the Constitution reserves the power of effecting a merger strictly within the legislative power of Parliament, to be done "by or under, any law".

Articles 76 (1) of the Constitution states as follows:

"Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power"

An exception to the bar on abdication of legislative power is the empowerment of a person or body to make subordinate legislation for prescribed purposes as contained in Article 76 (3) which states as follows:

"It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes, including the power .....

a) to appoint a date on which any law or any part thereof shall come into effect or cease to have effect;

b) to make by order any law or part thereof applicable to any locality or to any class of persons; and

c) to create a legal person, by an order or an act"

It is plain to see that the power reposed in the President to specify the Provinces in respect of which section 37(1) will apply comes fairly and squarely within sub-paragraph (b) of Article 76 (3).

Hence the power reposed in the President is in the nature of a delegated legislative power and the Proclamation issued has to be characterized as subordinate legislation.   ;

Section 37 (1)(b) contains a specific condition to be satisfied prior to the making of a Proclamation declaring that the provisions of sub-section (1) (a) shall apply to the Northern and Eastern Provinces, which would have the effect of the two Provinces being merged as one administrative unit until a poll is held on the question of merger in each of the Provinces not later than 31.12.1988. They are:

i) that arms, ammunition, weapons, explosive and other military equipment which on 29.7.1987 were held or under he control of terrorist militants of other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and;
ii) that there has been a cessation of hostilities and there acts of violence by such groups in the Province.

It is a common ground that, the date specified in (i) above, 29.7.1987 is the date of the Indo-Sri Lanka Accord (P6) which in clause 2.1 to 2.6 contains provisions for the interim merger of the Northern and Eastern Provinces as a single administrative unit. The conditions contained in section 37 (1)(b), as to the surrender of weapons and the cessation of hostilities are contained in clause 2.9 of the Accord which states as follows:

"The emergency will be lifted in the Eastern and Northern Provinces by August 15. 1987. A cessation of hostilities will come into effect all over the island within 48

hours of the signing of the agreement. All arms presently held by militants groups will be surrendered in accordance with an agreed procedure to authorities to be designated by the Government of Sri Lanka. Consequent to the cessation of hostilities and the surrender of arms by militant groups, the Army and other security personnel will be confined to barracks in camps as on May 25. 1987. The process of surrendering of arms and the confining of security personnel moving back to barracks shall be completed within 72 hours of the cessation of hostilities coming into effect. "

A copy of the Accord was tabled in Parliament by the then President when he addressed the House on 25.2.1988 (Document "A" annexed to 2R3). In the address in reference to the surrender of weapons and the cessation of hostilities the President stated as follows:

"Peace prevailed in the North and the East for a few weeks after the agreement was signed. A formal handing over of arms took place in Palaly, Jaffna, on 5th August 1987, and the process continued in the two provinces with the terrorist groups handing over arms. This process was not completed as one group, the LITE, violated the Agreement and publicly said they were doing so in early October. Since then violence has continued in these areas and the Indian Peace Keeping Force was compelled to take firm action to recover arms and explosives and had therefore to increase their number in the North and East. This has gone on for almost six months and I hope that very soon the Indian Forces with such help as the Sri Lanka forces can give, both on land and sea, will be able to ensure that the LITE gives up arms and violence and accepts the Agreement. They will then be entitled to the amnesty mentioned in the agreement and could enter the main stream of democratic politics and seek election to the Provincial Councils."

Thus in the words of the President himself there had been only a "formal handing over of arms" as submitted by Counsel for the petitioners. The LTTE had violated the Agreement and publicly said so in October 1987 within 3 months of the Accord and violence had continued in these areas for the past 6 months, that is upto the date the address was made in Parliament. There could be no better evidence to establish that the conditions contained in section 37(1)(b) had not been satisfied as at 25.2.1988 (being the date of the address), although in terms of the Accord there should have been a cessation of hostilities within 48 hours and a surrender of weapons within further 72 hours of the Agreement being signed on29.07.1987. Nevertheless in the very same address the President stated as follows:

"I will be holding elections to these Councils in April and I hope to constitute the newly elected Councils for the Provinces, including the temporal}' North/East Province in May 1988."

On the basis of this Address Mr. de Silva submitted that the President very clearly intended to make an order of merger in respect of the Northern and Eastern Provinces whether or not the conditions as to the surrender of weapons and cessation of hostilities was satisfied.

The Address to Parliament by the President was on 25.2.1988 and the impugned order of merger (P2) was made on 8.9.1988. Hence it is necessary to ascertain from the material before Court whether the situation described by the President continued upto 28.9.1988. Throughout this period the President issued monthly Proclamations under Public Security Ordinance to extend the State of Emergency. Every month these Proclamations were presented to Parliament for approval and a statement was made by a Minister on behalf of the Government specifying the terrorist activities in the North and the East with reference to the number of murders committed, attacks on Police stations and so on and a summary of incidents in the other parts of the country. In the year 1988 Proclamation had been made by the President every month, the first being on 17.1.1988 and the last for the year was on 13.12.1988. The Hansards containing the statements made by the respective Ministers seeking approval of Parliament for the Proclamations have been produced marked 81 to 812 annexed to the affidavit 2R3. The statements establish that far from the LTTE surrendering weapons and there being a cessation of hostilities, there were intensified attacks now on the Indian Peace Keeping Force (IPKF). As regards the specific period in which the order P2 was made that is from 16.8.1988 to 15.9.1988, the situation that existed could be gathered from the following extract of the speech made by the Minister (89).

"The terrorists have concentrated their campaign of violence in Jaffna, Vavuniya, Batticaloa, Ampara and Trincomalee during the period 16th August 1988 to 15th September 1988, 62 civilians and 19 security personnel were killed during this period. In every instance when the terrorists carried out mass attacks, security forces repulsed the attacks. Considerable amounts of arms and explosives have been captured by security forces. "

Thus it is beyond any doubt that the two conditions for the merger as stated in section 37(1)(b) referred above as to weapons being surrendered by 'terrorist militants' and a cessation of hostilities had not been met.

Neither the Additional S.G. nor Mr. Kanag-Isvaran sought to justify the order P2 on the basis that the factual conditions as stated in section 37(1)(b) were met at the time the President made such order. They sought to support the order on the basis that the provisions of section 37(1)(b) had at that time been amended by the President by an Emergency Regulation (P1) made under the Public Security Ordinance 6 days prior to Order P2 effecting the merger. The petitioners have sought a declaration of nullity in respect of P1 as well on the basis that the Regulation is ultra vires since it cannot be rationally related to any of the purposes for which Emergency Regulations could be validly made in terms of section 5 of the Public Security Ordinance.

It is necessary at this stage to advert to the contents of P1. It has been made under section 5 of the Public Security Ordinance and states that section 37(1)(b) referred to above shall have effect as if the words:

"Or that operation have been commenced to secure complete surrender of arms, ammunition, weapons, explosives or other military equipment by such groups" are included at the end of the provisions.

The purpose of P2 appears to be to include an alternative to the two conditions contained in section 37(1)(b) as to the surrender of weapons and a cessation of hostilities. In terms of Articles 154A (3) only Parliament could "by or under any law provide for two or three adjoining Provinces to form one administrative unit " The Parliament exercising the power reposed in sub-Article (3) provided by law (Le. section 37(1)(b)) that two special conditions shall apply in respect of the merger of the Northern and Eastern Provinces. Hence further alternative condition could, if at all, be provided only by law.

Article 170 of the Constitution defines the term "law" as follows:

"law" means any Act of Parliament, and any law enacted by any legislature at ant time prior to the commencement of the Constitution and includes an Order in Council".

The term 'written law' has a wider meaning and is defined as follows:

"written law" means any law and subordinate legislation and includes Orders, Proclamations, Rules, By-laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same. "

An Emergency Regulation made by the President would be written law. The term 'law' in Article 154A (3) should in my view be restricted to the meaning in Article 170, considering the contest in which it occurs in relation to Parliament. Therefore any provision for the merger of two or three Provinces could be made in terms of Article 154A(3), which is in itself an exception to the general rule in Article 154A(1) and (2) that a separate Provincial Council be established and constituted for each Province, only by a law enacted by Parliament. The provision purportedly made by the President by Emergency Regulation P1 which is not law within the meaning of Article 170, setting out an alternative condition to what was already stated in the law (Le. section 37(1)(b)) is inconsistent with Article 154A(3) of the Constitution and is invalid as correctly submitted by Counsel for petitioners.

Additional Solicitor-General and Mr. Kanag-Isvaran relied on section 5(2)(d) of the Public Security Ordinance which empowers the President to make an Emergency Regulation amending any law.

In terms of Article 155(1) of the Constitution the Public Security Ordinance, being existing legislation, is deemed to be a law enacted by Parliament. Article 155(2) reads as follows:

"The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending

the operation of the provisions of any law except the provisions of the Constitution. "

Hence the power reposed in the President by Section 5 of Public Security Ordinance to make an Emergency Regulation amending any law has to be read subject to the provisions of Article 155(2) of the Constitution and an Emergency Regulation cannot have the effect of amending or over-riding a provision of the Constitution. The purported amendment of section 37(1)(b) effected by regulation P1 in effect over-rides the provisions of Article 154A(3) which only empowers the Parliament to provide by law for the merger of two or three Provinces

Mr. de Silva assailed the validity of P1 on the ground that it cannot reasonably come within any of the purposes provided in section 5(1) of the Ordinance. This section empowers the President to make emergency regulations for-

(1) Public security and the preservation of public order;
(2) the suppression, mutiny, riot or civil commotion;
(3) for the maintenance of supplies and service essential to the life of the community;

The impugned regulation cannot be reasonably related to any of the aforesaid purposes. Manifestly, it has made for the collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act in contravention of specific conditions laid down in the law.

The preclusive clause contained in Article 80(3) of the Constitution which bars judicial review of a Bill that has become law upon certification does not extend to Emergency Regulations, being in the nature of delegated legislation. In England Judicial review of "administrative legislation" (a Broad label for delegated legislation) is governed by the same principles that govern judicial review of administrative action. (Administrative Law by Wade and Forsyth 9th ed. P.858).

This Court has in the cases of Wickremabandu v Herat/i..1), Joseph Perera v Attorney Genera~2) and Karunatilake v Dissanayaket.. 3),entertained and decided questions regarding the validity of Emergency Regulations and of executive action taken thereunder, which was held to be not precluded by the immunity from suit enjoyed by an incumbent President in terms of Article 35(1) of the Constitution. Such review pertains to two levels. They are:

(1) whether the impugned regulation is per se ultra vires in excess of the power reposed in the President;
(2) if the regulation per se is valid whether the impugned act done under the Regulation is a proper exercise of power;

I hold that both grounds urged by Mr. de Silva, as to the inconsistency with Article 154A(3) of the Constitution and being in any event outside the scope of section 5 of the Public Security Ordinance establish that Regulation P1 is ultra vires and made

in excess of the power reposed in the President. Accordingly, the purported amendment of the provisions of section 37(1)(b) of the Provincial Councils Act by the President is invalid and of no effect or avail in law.

The next question to be decided is in relation to the validity of Order P2 effecting a merger of the Northern Provinces. Section 37(1)(b) contains two mandatory conditions that have to be satisfied before a Proclamation effecting a merger is issued. The address made by the President to Parliament and the statements made as to the security situation seeking an approval of the Proclamations of the State of Emergency in the year 1988 referred to in the preceding analysis clearly establish that the President could not have been possibly satisfied as to either of these mandatory conditions. The endeavour to amend the mandatory conditions by recourse to the Emergency Regulations demonstrates that the President in his own mind knew that the two mandatory conditions have not been satisfied. An axiomatic principle of Administrative Law is thus formulated by Wade and Forsyth early in the treatise as follows:

"Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, a fortiori, if it infringes the limits which Parliament itself has ordained. " (9th Edition page 5)

The Proclamation P2 made by the then President declaring that the Northern and Eastern Provinces shall form one administrative unit has been made when neither of the conditions specified in section 37(1)(b) of the Provincial Council Act No. 42 of 1987 as to the surrender of weapons and the cessation of hostilities, were satisfied. Therefore the order must necessarily be declared invalid since it infringes the limits which Parliament itself has ordained.

Finally, I have to address the objection of time bar raised by the Additional Solicitor General. The impugned orders P1 and P2 were made in September 1988 and the poll to be held in terms of section 37(2)(a) has been postponed over past 17 years by the documents 3R7A to 3R7Z, The last postponement was made on 23.11.2005 fixing the date of poll on 16.11.2006 and 5.12.2006 for the Eastern and Northern Provinces respectively. The petitioners have failed to invoke the jurisdiction of this Court within one month of any of the impugned orders as required by Article 126(2). It is therefore submitted that the petitioners are precluded from obtaining relief.

The counter submission of Mr. de Silva is that the rights of the petitioners and those similarly circumstanced in the Eastern Province to have a Provincial Council constituted in terms of Article 154A(2) by election of members is a continuing right and its denial by the ultra vires orders P1 and P2 is a continuing denial to the petitioner and those similarly circumstanced the equal protection of the law guaranteed by Article 12(1) of the Constitution. He further submitted that the purported postponement of the poll by 3R7A to 3R7Z are no force or effect in law since they seek to derive validity from P1 and P2.

As noted above the 13th Amendment which introduced a new Chapter XVIIA to the Constitution provides for extensive devolution of legislative and executive power to Provincial Councils. Although the Amendment was certified on 14.11.1987 and a Provincial Council was established for the Eastern Province and each of the other 8 Provinces by Order dated 3.2.1988 (3R 1) made in terms of Article 154A(1) of the Constitution a Provincial Council has not been constituted for the Eastern Province by an election of members as required by Article 154A(2) due to the impugned order of merger P2. The right to have a Provincial constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the People and its denial is a continuing infringement of the right to the equal protection of law guaranteed by law Article 12(1) of the Constitution, as correctly submitted by Mr. de Silva. Therefore the objection of time bar raised by the Additional Solicitor General is rejected.

For the reasons stated above I allow the applications and grant to the petitioners the relief prayed for in prayers (c) and (e) of the respective petitions. No costs.

JAYASINGHE, J. - I agree.

UDALAGAMA, J. - I agree.

FERNANDO, J. - I agree.

AMARATUNGA, J. - I agree.

Relief granted.

Rambukwella v. United National Party And Others - SLR - 329, Vol 2 of 2007 [2006] LKSC 14; (2007) 2 Sri LR 329 (6 November 2006)

RAMBUKWELLA
v
UNITED NATIONAL PARTY AND OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
JAYASINGHE, J. AND
DISSANAYAKE,J.
S.C. (EXPULSION) NO. 1/2006

Expulsion of a member of a recognised political party who is a Member of Parliament - Articles 3.3.(c), 3.3(d), 3.4.(d) and 9.7 of the Constitution; Validity of the expulsion in terms of proviso to Article 99 (13)(a) of the Constitution; Procedural impropriety - Right to representation by an Attorney-at-Law - Section 41(2) of the Judicature Act No.2 of 1978.

The petitioner was a Member of Parliament representing the United National Party which is a recognized political party. He successfully contested the Parliamentary Elections held in the years 2000, 2001 and 2004 as a nominee of the 1st respondent for the Kandy District. On 13.01.2006 at a meeting of the Kandy District Balamandalaya of the Party, attended by the 2nd respondent as the leader of the U.N.P. and over 400 party activists including Members of the Parliament, Members of the Provincial Council and other District level representatives, chaired by the petitioner who made a speech and among other matters he had stated thus " at this critical juncture in the affairs of the country people's representatives should join together setting aside political divisions to strengthen the hand of the President to defeat the terrorism "

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Few days after the said meeting he received letter dated 16.01.2006 from the President which referred to the statement made by the petitioner regarding cooperation with the Government across party barriers and the letter ended with a request by the President to accept a Ministerial portfolio. On 25.01.2006 the petitioner was appointed as the Minister of Policy Development and Implementation and was also appointed as the National Security and Defence spokesman of the Government.

Upon the acceptance of the Ministerial portfolio by the petitioner the Working Committee of the party initiated the process of disciplinary action against the petitioner. The petitioner pleaded that no explanations were called for from the

petitioner and that he was denied legal representation. Subsequently, he was expelled from the Party on a decision of the Working Committee.

Held:

(1) The standard of review of a decision of expulsion should be akin to that applicable to the review of the actions of an authority empowered to decide on the rights of persons in Public Law. Such review comes within the rubric of Administrative Law.

(2) Where a person has the right to be heard the provisions of section 41(2) of the Judicature Act will apply and such person is entitled to be represented by an Attorney- t-Law. The Panel of Inquiry acted in breach of the principles of natural justice in denying legal representation to the petitioner.

Per S.N. Silva, C.J. -

"This court has consistently held that the member affected has a right to be heard in compliance with the principles of natural justice. The phrase "quazi judicial" has evolved through decisions of Courts to encompass an act which adversely affect the right of a person, bringing within the scope of its exercise the duty to act judicially...",

(3) In terms of section 41(2) of the Judicature Act NO.2 of 1978 the right to representation by an Attorney-at-Law can be denied only if there is express provisions by law to the contrary, the guidelines issued by the then General Secretary cannot be considered as an express provision of law.

Per S.N. Silva, C.J. -

" A political party comes into existence as a matter of private arrangement (contract) between persons who have the object of gaining power at elections but the character of such Association alters to a certain extent after gaining recognition as a Political Party as provided in section 7 of the Parliamentary Elections Act NO.1 of 1981. Thus a Political Party which commences as a private Association gains statutory recognition in reference to its Constitution with specific legal powers generally in regard to elections and it plays a vital role in the realm of Democratic Governance..."

APPLICATION in terms of Article 99(13)(a) of the Constitution challenging expulsion from the United National Party.

Cases referred to:

(1) Council of Civil Service Union and others v Minister for the Civil Service 1985 AC 374.

(2) Associated Provincial Picture Houses Ltd. v Wednesbury Corporation 1948

1KB 223.

(3) Edward v Bairstow 1956 AC 14.

(4) Gamini Dissanayake v Kaleel 1993 2 SLR 135.

(5) Jayatilake v Kaleel 1994 1 SLR 319.

(6) Sarath Amunugama v Karu Jayasuriya 2000 1 SLR 173.

D.S. Wijesinghe, P.C. with Wijedasa Rajapakse, P.C., Upali Senaratne, Kapila Liyanagamage and Kaushalya Molligoda for the petitioner.

K.N. Choksy, P.C., with Daya Pelpola for the 1st, 2nd and 3rd respondents.
L.C. Seneviratne, P.C., with Ronald Perera for 4th, 5th and 6th respondents.
Ms. Indika Demuni de Silva D.S.G. for the 7th and 8th respondents.

Cur.adv. vult.

November 6, 2006.
SARATH N. SilVA, C.J.

The petitioner being a Member of Parliament has filed this application in terms of Article 99(13)(a) of the Constitution, for a determination that his expulsion from the 1st respondent, the United National Party (UNP), communicated to the Secretary General of Parliament being the 8th respondent and the petitioner by letters dated 10.8.2006, by the General Secretary of the UNP, being the 3rd respondent, is invalid and for a declaration that he continues to be and remains a Member of Parliament.

The petitioner has pleaded without contradiction by the respondents that he joined the Democratic United National Front (DUNF) in 1992 and successfully contested the Provincial Council Election for the Central Province and was appointed a Minister of the Provincial Council in 1994. In 1999 he contested the Provincial Council Election as a nominee of the UNP and although he was in remand custody throughout the period of campaign, he secured the highest number of votes at that Election. Similarly, he successfully contested the Parliamentary Elections held in the years 2000, 2001 and 2004 as a nominee of the UNP for the Kandy District and secured large numbers of preferential votes. He also served as a Minister in the Government of which the Leader of the UNP, the 2nd respondent was the Prime Minister. At the Presidential Election of November 2002, the petitioner was in charge of the election campaign in the Kandy District and the 2nd respondent secured a significant majority of votes in that District.

As regard subsequent events, the petitioner has stated that when the Budget was presented by the President, in December 2005 considering the beneficial proposals, on several occasions both in and out of Parliament, he "praised" its contents in proof of which he produced publication marked P3. The petitioner

produced publications dated 3.1.2006, 6.1.2006 and 11.1.2006 marked P4 in which it was specifically stated that he will be appointed a Minister by the President.

On 13.1.2006, the 2nd respondent as the Leader of the UNP was present at a meeting of the Kandy District Balamandalaya of the Party attended by over 400 Party activists including members of Parliament, Members of the Provincial Council, Pradeshiya Sabha's and other District level representatives, chaired by the petitioner as the Kandy District President. The petitioner has produced a copy of the minutes of that meeting marked P5. A copy of the minutes had been sent by the District Manager annexed to his letter dated 17.1.2006 to the General Secretary of the UNP (P5(a)), receipt of which was acknowledged by letter dated 24.1.2006 of the Deputy General Secretary (P5b).

These minutes contain a record of the speech made by the petitioner at the said meeting. Amongst other matters he had stated at this critical juncture in the affairs of the country, people's representatives "should join together setting aside political divisions to strengthen the hand of the President to defeat terrorism and find a political solution to ethnic issues whilst preserving the sovereignty of the People and the territorial integrity of the country. He stated that such a course of action would be in keeping with the repeated statements made by the 2nd respondent at the Presidential Election campaign that if he wins he would seek the cooperation of the SLFP and other parties and would give them ministerial appointments to seek a solution to the "national question."

The petitioner has pleaded that a few days after the said meeting he received letter dated 16.1.2006 (P6) from the President which referred to statements made by the petitioner regarding cooperation in Government across party barriers and states that such views have been expressed by other members of the UNP including its senior leadership. The letter ends with a request by the President to accept a Ministerial portfolio to advance the endeavour to establish peace. Thereafter on 25.1.2006, the petitioner was appointed the Minister of Policy Development and Implementation and was also appointed as National. Security and Defence spokesman of the Government of Sri Lanka, in which capacity he is yet functioning.

The acceptance of the Ministerial portfolio by the petitioner set in motion the process of disciplinary action against him. The steps in this process and the specific grounds of challenge raised by the petitioner would be dealt with hereafter. Quite apart from these legal grounds, Counsel for the petitioner made a general submission on the basis of the facts outlined above that have been extensively pleaded and supported with contemporary documents, contents of which have not been refuted by the respondents, that the course of action taken by the petitioner was not shrouded in secrecy amounting to deception on his part. He made statements in and outside Parliament which received wide publicity of his intention to support the President for reasons that were stated culminating in the speech at the District Balamandalaya attended by the Leader of the Party. The Leader who spoke after the petitioner at the meeting did not censure or check him on the proposed course of action. The petitioner has specifically pleaded that neither the

1st, 2nd and 3rd respondents nor the Party Working Committee sought his explanation as to the publicly declared course of action announced by him. In these circumstances Counsel submitted that disciplinary action was not warranted. Counsel for the 1st, 2nd and 3rd respondents submitted that it is not alleged that the petitioner is guilty of deception in relation to the Leader or the Party Working Committee. However, he submitted that silence on the part of the 1st to 3rd respondents and the Party Working Committee cannot be construed as tacit approval of the petitioner's conduct and the petitioner should have sought specific approval for his proposed course of action. In the absence of which he is liable to disciplinary action in terms of the Constitution of the Party.

Although membership of the Party has a concomitant liability to disciplinary action in terms of the Constitution of the Party as correctly submitted by Counsel for the respondents, in deciding on the validity of an expulsion, which has the further implication of the loss of the seat in Parliament, the overall conduct of the person subject to such action has to be taken into account. The years of dedicated service that resulted in electoral gains for the Party and the attendant circumstances such as the repeated statements of the Leader of the Party that if he wins the Presidential Election, he would offer Ministries to members of the SLFP and other parties, may be relevant in considering the validity of the impugned expulsion of the petitioner from the perspective that the decision is arbitrary and unreasonable. But, the main thrust of the petitioner's case is directed at the legality per se of the expulsion, which has to be dealt with first in the light of the process of disciplinary action to which I would now advert.

As noted above the petitioner received an invitation from the President to accept a Ministerial Portfolio on 16.1.2006 (P6) and he was appointed a Minister on 25.1.2006. On 26.1.2006 a person by the name of Methsiri Paranavithana residing at New Mulleriyawa handed over a letter (P11) at the UNP Headquarters requesting that disciplinary action be taken against Mr. Mahinda Samarasinghe and the petitioner being Members of Parliament elected on UNP nomination lists accepted Cabinet Portfolios committing a "clear violation of the constitution, code of conduct and the policies and principles of the UNP. " The 1st to 3rd respondents have produced marked 3R4 an extract from the minutes of the Party Working Committee held on the same day, the 26th January at 4.30 at which the complaint against the petitioner was tabled and a decision taken to appoint a disciplinary panel consisting of the 4th, 5th and 6th respondents to inquire into the matter. The minute does not contain any record of the discussion that took place at the meeting.

The 3rd respondent being the General Secretary of the Party sent letter dated 2.2.2006 (P7) to the petitioner stating that the Party Working Committee appointed a Panel of Inquiry consisting of the 4th, 5th and 6th respondents to inquire into "certain matters" relating to his "conduct as a member of the party" and that a further communication would be addressed to the petitioner by the panel.

The Chairman of the Panel, the 4th respondent sent letter dated 24.3.2006 (P8) to the petitioner calling for his explanation on the complaint of Methsiri Paranavithana, referred to above. The petitioner replied by letter dated 6.5.2006

(P12), having obtained a copy of the complaint, stating that appointment of the Panel of Inquiry is contrary to the Constitution of the UNP and that the Panel has no jurisdiction to seek his explanation. Without prejudice to the plea on jurisdiction, he denied having violated Constitution as alleged by Paranavithana.

In the meanwhile, the said Paranavithana of New Mulleriyawa made another complaint by letter dated 4.4.2006 alleging that Mr. Mahinda Samarasinghe and the petitioner against whom he made the previous complaint "now openly campaign for the PA whilst promoting the Mahinda Chinthanaya, which is directly in conflict with the policies of the UNP". The complaint (P15) had also been hand delivered at the Party Headquarters. The Working Committee at its meeting on 7.4.2006 (3R5) decided to refer this complaint as well to the Panel of Inquiry and the Chairman of the Panel by his letter dated 11.5.2006 called for the petitioner's explanation on his complaint (P14). The petitioner replied by letter dated 23.5.2006 (P16) on the same lines denying jurisdiction of the Panel. I would pause at this point, to note that the said Paranavithana from New Mulleriyawa appears to have been a ready complainant, virtually at the door step of the Party Headquarters, hand delivering complaints that promptly got tabled at Working Committee meetings with a swift reference to a Panel of Inquiry without there being any record of the discussions that took place on the matter amongst the members of the Committee. The complaints of Paranavithana that run into a few lines contain bald statements of matters that should have been within the knowledge of the Working Committee.

Viewed from another perspective, considering that the petitioner was himself a member of the Working Committee from 1990(paragraph 10 of the petition admitted by the respondents) and Paranavithana was only a member of the Party (not an elected representative or an office bearer of anyone of the several representative bodies in the organizational structure of the Party), a question arises whether the members of the Working Committee had to get activated against a colleague on a complaint of a mere member of the Party, in respect of matters in the public domain since Paranavithana only relied on newspaper publications annexed to his letter to support his complaint.

Be that as it may, the next stage in the process, was the charge sheet issued on the petitioner by letter dated 16.6.2006 of the General Secretary (P17). The letter states that the Panel of Inquiry "has not been satisfied with the explanation contained in the petitioners letters P12 and P16 and has forwarded the charge sheet." The petitioner was requested to be present for an inquiry at the Party Headquarters on 5.7.2006 at 4.00 p.m. It has to be noted that the petitioner in his replies did not seek to explain the contents of Paranavithana's letters sent to him by the Panel but raised the question as to the jurisdiction of the Panel to seek his explanation. Hence, there is no question of the Panel not being satisfied with the explanation of the petitioner. The proper course of action would have been for the Panel to have referred the question of jurisdiction raised by the petitioner to the Working Committee on whose authority the Panel acted. If such a course of action was taken the question of jurisdiction (power to decide) in the matter of taking disciplinary action, that has loomed large in these proceedings would have been at the least considered prior to the impugned decision being taken. Counsel for the

petitioner raised the further matter in this regard that as evident from the contents of P17 the charge sheet had not emanated from the Disciplinary Committee which was appointed by the Working Committee (3R6) on 26.1.2006 being the same day on which Paranavithana's complaint was received at the Party Headquarters.

To continue with the narrative of events, the petitioner replied by letter dated 1.7.2006 (P18) requesting a postponement of the inquiry to enable him to make adequate arrangements and requesting that he be informed whether he could have legal representation at the inquiry in view of the position taken up by him in his letters i.e. with regard to jurisdiction. The General Secretary replied by letter dated 3.7.2006 that the inquiry is postponed to 28.7.2006 at 4.00 p.m. and the letter specifically states as follows: "Please note that legal representation is not permitted at these inquiries."

Thereupon the petitioner sent letter dated 27.7.2006 (P20) stating that the attempt to hold a disciplinary inquiry before an illegally constituted Panel of Inquiry is a violation of the Constitution of the UNP and the prohibition against legal representation is a violation of the principles of natural justice and a denial of his legitimate rights and that he is firmly convinced that the inquiry will not be fair and as such he would not be attending the inquiry. The next communication received by the petitioner is the letter of expulsion dated 10.8.2006 (P21) which states that the Working Committee at its meeting on 8.8.2006 "having considered the Report of the Disciplinary Committee and the findings of the Panel of Inquiry decided that he is guilty of all the charges included in the charge sheet.

The letter culminates as follows:

"Accordingly the working committee has found that you are in breach of Article 3.3(c), 3.3(d), 3.4(d) and 9.7 of the Constitution or anyone or more of them. The Working Committee unanimously decided to expel you forthwith from United National Party. "

Counsel for the petitioner contended that the sentence setting out the finding of the Working Committee has two parts that are inconsistent. The first part states that he is found to be in breach of the four Articles that have been specified. The second part states that he is in breach of "anyone or more of them". It was submitted that the finding is nothing but a cursory   ; citation of Articles of the Party Constitution and reflect a doubt on the part of the Working Committee as to which of them have been breached by the petitioner. That, an expulsion carrying serious implications cannot be based on such a vague and imprecise finding as to the Articles of the Constitution the petitioner is found to be in breach of. Based on the foregoing the petitioner has raised the following 3 grounds to establish the invalidity of the expulsion:

i) that in terms of Article 6.3(a) of the Constitution of the UN P the body empowered to take disciplinary action is the National Executive Committee (NEC) and not the party Working Committee which has taken the impugned decision (P21).

ii) that the Panel of Inquiry acted in breach of the principles of natural justice in denying legal representation to the petitioner which was necessary for the petitioner to establish the absence of jurisdiction.

iii) that the provisions of the Constitution cited as having been breached by the petitioner and set out in the charges do not in any event apply to him. Further that the finding as contained in the impugned decision P21 that the petitioner has been found to be in breach of "anyone or more" of specified Articles of the Constitution of the UN P is vague, and;

a) reveals that the Working Committee has misdirected itself on the applicable provisions and;"

b) denied to the petitioner an opportunity of seeking review from the Court as to the validity of a specific breach;

The grounds urged by the petitioner seeking to invalidate the decision to expel him, require a consideration of the nature of the power exercised by a Political party in expelling a member having the consequence of that member losing his Parliame ntary seat and the basis of the review of the validity ; of such decision of expulsion by this Court in terms of proviso to Article 99(13)(a) of the Constitution.

Mr. Choksy, P.C. for the respondents submitted that a Political Party is a private organization consisting of its members who come together on the basis of a Constitution of such Party. He persistently stated that the membership of a Political Party is akin to membership of a 'club' and the expulsion of a member should be viewed from same perspective of the expulsion of a member from a club or similar private organization, without introducing the high standard of review that apply in Public law. He submitted that the relationship between a member and a party is essentially contractual and a matter of Private Law. On the other hand, Mr. Wijesinghe, P.C., for the petitioner submitted that although the relationship between the member and the Party may be contractual and a matter of private Law, the consequence of expulsion has a serious impact on the rights of the member in that he loses the seat in Parliament to which he has been lawfully declared elected upon the preferential votes of the electoral district whom he represents.

In view of the added and serious consequence of a decision of expulsion, it was submitted that the standard of review of the validity of such expulsion should be the same as that which applies to the review of validity of a decision of an authority exercising power under Public Law.

The submission of Mr. Choksy, as to the basic nature of a Political Party being akin to that of a "club" and the relationship between the members and the party being one of contract, a subject in realm of Private law, is correct. However there is merit in Mr. Wijesinghe's submission that in the exercise of the power of expulsion the matter transcends the realm of Private Law and attracts the standard of review of the public law. A Political Party comes into existence as a matter of private arrangement (contract) between persons who have the object of gaining political

power at elections but the character of such Association alters to a certain extent after gaining recognition as a Political Party, as provided in section 7 of the Parliamentary Elections Act No.1 of 1981. Section 7(4)(b) requires Secretary of a Political Party at the time of making an application for recognition to furnish to the Commissioner of Elections a copy of the Constitution of such Party and a list of its office bearers. Thus, a Political Party which commences as a private Association gains statutory recognition in reference to its Constitution with specific legal powers generally in regard to Elections and it plays a vital role in the realm of Democratic Governance.

Under the law as it stood prior to the present Constitution of 1978 the expulsion of a member from a Political Party did not have the consequence of such Member vacating his seat in Parliament. Article 99 of the present Constitution, departed from the previous electoral system of "first past the post elections" to one of proportional representation, in terms of which a Party is declared entitled to such number of Members of Parliament in proportion to the votes gained by the Party in an Electoral District. In terms of Article 99(2) as it stood, the Party when submitting a nomination paper was also required to set out the names of the candidates in order of priority on the basis of which the candidates were declared elected depending on the proportion of votes gained by the Party. This system of Elections is generally described as the "List System" or "Crude List System". Article 99(13) (a) in regard to expulsion of a member from a Party with the consequence of his vacating the seat in Parliament, with judicial review by this Court as to the validity of such expulsion, was introduced as a part of this system of Elections.

The Fourteenth Amendment to the Constitution, certified on 24.5.1988 repealed Article 99 and substituted a new provision which removed the power of the Party to indicate a priority of candidates in the nomination paper and empowered the electors to indicate their preference of not more than 3 candidates nominated by the same recognised political party. Thus the "List System" or "Crude List System", was replaced with the "Preferential System" which is now operative.

However, the provisions of Sub-Article 13(a) of the original Article 99 ""ere included verbatim in the newly enacted Article 99 as contained in the 14th Amendment. In view of the change of the Electrical System effected by the Fourteenth Amendment the review af the validity of a decision of expulsion has to be, in my view, now considered not only from the perspective of a vacation of 1he seat of the Member in Parliament but also from the perspective of the impact on the Electorate from which he was declared on the basis of preferential votes cast in his favour. As a result of the. expulsion by the Party the voters preferred candidate is removed from his seat in Parliament and replaced by a candidate who at the original election failed to obtain adequate preferential votes to gain election to Parliament. In short the winning candidate is replaced by a candidate ""ho has lost, as a result of the expulsion. Thus in consequence of the expulsion not only the member loses his seat in Parliament but also there is a subversion of the preference indicated by the electors in exercising their franchise. It) view of these far reaching consequences I am inclined to agree with the submission of Mr. Wijesinghe, that the standard of review of a decision of expulsion should be akin to that applicable to the review of

the action of an authority empowered to decide on the rights of persons in Public Law. Generally such review comes with the rubric of Administrative Law.

In the case of "Council of Civil Service Union and others v Minister for the Civil Service'~1) Lord Diplock grouped these grounds of review at Public Law as illegality, irrationality, and procedural impropriety. He also referred to possible fourth ground of proportionality being the standard of review in civil law countries in Europe. At 410 and 411 Lord Diplock briefly outlined the contents of these three grounds as follows:

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

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v Wednesbury Corporation(2). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question. to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v Bairstow(3) of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice " I am of the view that the foregoing statement of Lord Diplock which has been cited in all leading authorities on the subject should generally apply in deciding on the validity of an expulsion in" terms of Article 99(13}(a) of the Constitution considering it's far reaching consequences as set out above. The grounds urged by the petitioner would be accordingly considered from this perspective.

The first and third grounds which relate to lack of jurisdiction of the Party Working Committee to decide on the expulsion and the misdirections with regard to the provisions of the Constitution of the Party in reference to which a breach is said to have been established, pertain to illegality. The second ground of denial of legal representation relate to procedural fairness and the petitioner has buttressed this

ground in reference to a right of representation by an Attorney-at-Law as contained in section 42(2) of the Judicature Act NO.2 of 1978. I would first deal with the matter of illegality. In Judicial Review of Administrative Action - De Smith, Woolf and Jowell - 5th Ed. page 295 the basis of review on illegality is summed up as follows:

"The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners. "

In this instance the power of expulsion stems from the Constitution of the UNP to which the petitioner as a member has subscribed to. There the basis of review is to ascertain whether the expulsion falls within the "four corners" of the Constitution of the Party which gains statutory recognition in terms of section 7 of the Parliamentary Elections Act referred above. The petitioner has contended that in terms of the Constitution of the UNP, produced marked P1, the power to take disciplinary action, including expulsion or suspension, against any individual member is vested in the National Executive Committee (NEC) in terms of Article 6.3(a). Admittedly, the expulsion of the petitioner was at no stage considered by the NEC. Mr. Choksy, in his submissions conceded that expulsion has not even been reported to the NEC. The petitioner has raised the objection as to the jurisdiction from his very first response referred to above on this premise. The decision as to expulsion has been taken by the Party Working Committee, which according to the petitioner consists of nominees of the Party Leader. The complaint of the petitioner with regard to the composition of the Party Working Comr11itteeis not without merit. In terms of Article 7 of the constitution, the Party Working Committee consists of Office Bearers of the Party and not exceeding 50 members of the NEC nominated by the Party Leader. In terms of Articles 8.5 and 8.6 all Office Bearers of the UNP are nominated by the Leader and ratified at the Annual Convention. Whereas the NEC is a more representative body in terms of Article 6 of the Constitution.

The respondents submitted in their objections that the powers, duties and responsibilities of the NEC have been vested in the Working Committee by a Resolution of the NEC in August 2002, produced marked 3R3. The petitioner has in his counter affidavit specifically stated that the Resolution (3R3) as appearing on the face of the document itself was merely read at the meeting by one member and translated to Tamil by another member.3R3 does not state that it was seconded by any person or put to the vote of the National Executive Committee, but it is merely recorded that the Party Leader being the then Prime Minister confirmed the Resolution. Further the petitioner contended that power of disciplinary action resulting in expulsion of a member with such serious consequences as noted above, cannot be delegated or vested in the Party Working Committee without any provision in the Constitution for a delegation of such a power to the Party Working Committee.

Admittedly, Article 6 of the Constitution which deals with NEC does not empower the NEC to vest or delegate any of its powers. However, the respondents rely on Article 7.15 included In the chapter with regard to the Party Working

Committee which states that the Committee will have the power to exercise the powers, functions and duties vested in it by the NEC. The respondents also relied on previous Judgments of this Court in the cases of Gamini Dissanayake v Kaleel(4) and Jayatilake v Kaleel(5). These expulsions appear to have been made under the previous Constitution of the UNP. The petitioner submitted that in that Constitution there is no specific provision similar to Article 8(1) of the present Constitution, which provides for specific delegation of powers to the Working Committee by the NEC. Further it is noted that although Fernando, J., in Gamini Dissanayake's case observed that the minutes of the Executive Committee relied on to establish the vesting of power in the Working Committee were "undoubtedly defective" (at 158) the petitioner who obtained leave to reply even in their counter affidavits did not claim that the Resolution had not been passed, instead they merely questioned the effect of that Resolution, by asserting that it did not enable the Working Committee to exercise disciplinary power vested in the Executive Committee. He further observed as follows:

"If the petitioners were seriously contending that this Resolution had been proposed but not passed, that allegation should have been made clearly specifically and directly." (at 158).

In this case too ex facie the Resolution is defective, since there is no person seconding it or the matter being discussed or put to the vote of NEC. Unlike in Gamini Dissanayake's case the petitioner has questioned the jurisdiction of the Working Committee from the very outset and in his counter affidavit specifically stated that "the Resolution was not seconded or considered by the House."

In the circumstances the respondent had to adduce further material by way of the confirmation of the minutes which appears to have been done in Jayatilake's case (supra). In the absence of even such material considered to be adequate by Kulatunga, J. (at 378), I have to accept the ground urged by the petitioner as to the invalidity of the Resolution in so far as it relates to the exercise of disciplinary power. There is further support for such finding derived from provisions of article 6.3(a), which not only empowers the NEC to take disciplinary action including expulsion or suspension and contains a further requirement that the NEC should report such action at the next "Annual Convention" of the Party, being the highest body in the organizational structure of the Party. In this instance the Working Committee has not even reported the decision to the NEC, being the body empowered with disciplinary power and as such the decision could never be communicated to the next Annual Convention of the Party being a mandatory requirement in terms of Article 6.3(a) of the Constitution.

The next ground is illegality urged by the petitioner in respect of provisions of the constitution of the UNP which are alleged to have been breached by him so as to warrant the expulsion. The decision of expulsion (P1) repeats the 5 charges contained in the charge sheet P17, without reference to the particular Articles of the Constitution in respect of each of the five grounds. After the narration of the five grounds (P21) states as follows:

"Accordingly the Working Committee has found that you are in breach of Article 3.3(c), 3.3(d) and 9.7 of the Constitution of the party or anyone or more of them." The particular ground raised that the finding is vague and not precise, is manifest. It is not possible for any person to relate the Articles of the Constitution which are stated, to the five charges specified in the preceding section because of the qualification that the breach is of anyone or more of them. Even assuming that this is merely an erratic expression and that the petitioner could have come to the necessary conclusion with reference to the charge sheet which cited the particular Articles of the Constitution in respect of each charge, the petitioner contends that those provisions of the Constitution would not apply to him. The first charge in P17 is as follows:

"That on or about the 25th day of January 2006 whilst being a member of the United National Party and a member of Parliament of the United National Party for the Kandy District, you have accepted, the office namely, Minister of Policy Development and Implementation under the United Peoples Freedom Alliance Government without approval of the Working Committee of the United

National Party and thereby you have violated Article 3.4(d) of the Constitution of the United National Party." Article 3.4(d) which is alleged to have been breached as contained in document P1 (Constitution) is as follows:

" Where the member accepts office in the administration formed by any other political party or political alliance or political association or political group or political body consequent upon an election to Parliament or Provincial Council or Local Authority or in an administration that comes into existence upon the change of political control in Parliament or in a Provincial Council or local authority during its term, without the approval of the Working Committee of the Party."

The petitioner's submission has merit in that what is prohibited is only acceptance of office consequent upon an election to Parliament or Provincial Councilor Local Authority in an administration that comes into existence upon the change of political control in Parliament or in a. Provincial Council or in a local authority during its term without the approval of the Working Committee.

There is no reference to the assumption of office upon a Presidential Election. The petitioner did not accept an office upon an election to Parliament. He continued to serve in the opposition and accepted office after the Presidential election on invitation of the President in the circumstances referred to above. Therefore the conduct of the petitioner cannot possibly come within the ambit of Article 3.4(d) of the Constitution as alleged in the charge sheet.

As regards the other charges 2 to 4 contained in the charge sheet (P17) it is stated in respect of each charge that the violation is read with Article 9.7 of the Constitution. This is a common feature of the charges 2, 3 and 4. The petitioner contends that article 9.7 cannot apply for him since it relates to conduct of "any candidate". Article 9.7 as contained P1 reads as follows:

"Any candidate who fails to act in harmony with the principles, policy programme, constitution, rules, code of conduct and standing orders of the party, shall be deemed to have violated the constitution and shall be subject to disciplinary action including expulsion.

It is clear that the reference here is to a candidate who fails to act in harmony with the principles, policy and the like, of the Party. This is included in Chapter 9, which relates to Presidential, Parliamentary and other elections. On the material alleged in the Charge the impugned conduct of the petitioner does not relate to the conduct as a candidate of the Party. The petitioner was certainly not a candidate at the Pradeshiya Sabha election to which reference is made in respect of the charges. Charge 5 is a consequential charge and cannot stand on its own. In the circumstances the ground of challenge based on the Charge has also been established by the petitioner.

The final ground of challenge relates to procedural impropriety. Mr. Wijesinghe contended that in the long line of decisions of this Court commencing from the decision of Gamini Dissanayake v Kaleel (supra), including the decision in Sarath Amunugama v Karu Jayasuriya(6) at 173, this Court has held that there should be compliance with the principles of natural justice. This premise is conceded by the respondents. The additional ground alleged in this case is that where a person has the right to be heard, the provisions of section 41(2) of the Judicature Art will apply and such person is entitled to be represented by an Attorney-at-law. Section 41(2) of the Judicature Act reads as fallows: "Every person who is a party to any proceeding before any person or tribunal exercising quasi judicial powers and every person who has or claims to have the right to be heard before any such person or tribunal shall unless otherwise expressly provided by law be entitled to be represented by an attorney-at-law."

Mr. Choksy, contended with reference to the long title to the Judicature Act and the provisions of Article 105 of the Constitution that the contents of the sub-section should be restricted only to courts and other institutions of a judicial nature. On the other hand Mr. Wijesinghe submitted that the right of representation in courts and such other institutions exercising judicial power is specifically covered by the provisions of section 41(1) and this sub section (2) cited above refers to the exercise of quasi judicial power. The preceding analysis reveals that the power of expulsion by a political party in respect of a member, who holds seat in Parliament has serious consequences in regard to the right of such member and the exercise of franchise by the voters of the electoral district who cast preferential votes in his favour. This Court has consistently held that the member affected has a right to be heard in compliance with the principles of natural justice. he phrase "quasi judicial" has evolved through decisions of Courts to encompass an act which adversely affect the right of a person, bringing within the scope of its exercise the .duty to act judicially.

Wade and Forsyth in his work on Administrative Law 9th Ed. page 482 states as follows: . .

"The term quasi judicial accordingly came into vogue as an epithet for power which although administrative were required to be exercised as they were judicial i.e. in accordance with natural justice. "

Since the power of expulsion in relation to a member leading to his vacating his seat in Parliament has to be exercised in compliance with the principles of natural justice ,this would in my view come within the ambit of a quasi judicial power. In the circumstances the member would be entitled to be represented by an attorney-at-law at the inquiry which precedes such decision in terms of section 41(2) of the Judicature Act NO.2 of1978 cited above.

The petitioner has specifically raised the question of jurisdiction of the disciplinary panel and sought legal representation. This request is in any event reasonable considering that the petitioner was objecting to the jurisdiction of the panel. The request for legal representation has been refused by the 3rd respondent being the General Secretary by document P10. The 4th, 5th and 6th respondents being members of the Inquiry Panel have sought to justify the decision on the basis of the guidelines for the conduct of the disciplinary inquiries marked 4R1 dated 8.8.91 issued by the then General Secretary Mr. B. Sirisena Cooray. In paragraph 11 of this guideline it is stated "the member is not entitled to be represented by lawyers." These guidelines appear to have been issued well before the several decisions by this Court which require the compliance with the principles of natural justice. In terms of section 41(2) the right to representation by an attorney-at-law can be denied only if here is express provision by law to the contrary. The guidelines issued by the then General Secretary cannot be considered an express provision of law by any stretch of imagination. ;

In the circumstances the petitioner is entitled to succeed on this ground as well.

Since the petitioner has established the three grounds of challenges to the decision it is unnecessary to examine the further aspect of the reasonableness of the expulsion in the light of the antecedent conduct of the petitioner referred to in at the commencement of this judgment.

Accordingly, I allow this application and grant the petitioner the relief prayed in prayers (c), (d), (e) and (f) of the prayer to the Petition.

The application is allowed with costs.

JAYASINGHE, J. **I** agree.

DISSANAYAKE, J. **I** agree.

Application allowed.

Piyasena v. Associated Newspapers Of Ceylon Ltd. And Others - SLR - 113, Vol 3 of 2006 [2006] LKSC 10; (2006) 3 Sri LR 113 (23 November 2006)

PIYASENA
VS
ASSOCIATED NEWSPAPERS OF CEYLON LTD AND OTHERS

SUPREME COURT.
DR SHIRANI BANDARANAYAKE, J.
UDALAGAMA, J.
SOMAWANSA, J.
FR 390/2005.
JULY 27,2006.
SEPTEMBER 4, 28, 2006
OCTOBER 25,2006.

Fundamental rights-Articles 3,4,12(1) -Article 126- Constitution,-Acts of The Associated Newspapers of Ceylon Ltd ANCL Special Provisions Law 28 of 1973 - Section 17 - Amenable to fundamental rights jurisdiction? Narrow view-Broader view Test Control- Functions test ?-Rules of Supreme Court - Rule 44 (1) (c)-Non compliance?-Is it fatal?

The petitioner alleged that by the promotion granted to the 7th respondent by the 2nd respondent, Associated Newspaper of Ceylon Ltd., (ANCL), his fundamental right guaranteed in terms of Article 12 was violated.

The respondent contended that, the application should be dismissed in *limine* as (1) ANCL is not amenable to fundamental rights jurisdiction (2) Rule 44(1) (c) of the SC Rules have not been complied with. On the preliminary objections raised :-

HELD:

(1) It is not disputed that ANCL is a creature of statute, as its status was changed by ANCL Special Provisions Law No. 28 of 1973,provision has been made in the law that not less than 75% of the total number of all the shares of the company be vested in the Public Trustee on behalf of the government. Unlike the other corporations, in terms of Section 17 of the law, the Minister is empowered to make regulations for the purpose of giving full force and effect to the principles and provisions of the law.

(2) It is evident that ANCLis an instrumentality or an agency of the State subject to direct control by the government.

Held further:

(3) It is apparent that in terms of Rule 44(1) (c) what is necessary is to tender only the documents and affidavits which are available to the petitioner. There is no compulsion in terms of Rule 44 (1) (c) to make an effort to tender documents which are not in the possession of the petitioner.

(4) It is not possible to restrict the applicability of fundamental rights through mere technicalities.

(5) In terms of the Rule 44 1 (4) once a petitioner has pleaded a document in his petition he would be entitled to submit it, 'as is available to him' and with, the permission of Court or have Court to call for such document.

Per Dr Shirani Bandaranayake. J

"It is also important to note that it was the responsibility of the 2nd respondent to have disclosed relevant and material facts if they were to deny the averments of the petitioner; if the respondents were to deny the position taken up by the. petitioner, the onus was on the respondents to produce such material facts, and disclose that to this Court".

APPLICATION under Article 126 of the Constitution.- on a Preliminary Objection taken.

Cases referred to -

1. Thadchanamurthi VS. Attorney General - 1978-79-80- 1 Sri LR 154

2.VelmuruguVS. Attorney General 1981 - 1 Sri LR 406

3.Irend vs. United Kingdom - Decision of European CCJUT of Human Rights January 18, 1978.

4..Marriadas vs. Attorney General and another - FRO - Vol 2 397

5.Wijetungavs. Insurance Corporation- 1982 1 Sri LR 1

6..GunawardanevS.Perera- 19831 Sri LR 305

7.Perera vs. University Grants Commission- 1978-79-801 Sri LR 128 .

8.Peter Leo Fernando vs. Attorney General and others - 1985 1 Sri LR 341

9.RajaratneVS.Air Lanka - 1987 1 Sri LR 128

10.Leo Samson vs. Air Lanka 2001 1 Sri LR 94

11. Jayakody vs. Sri Lanka Insurance and Robinson Hotel Company Ltd., - 2001 1 Sri LR 365

12.Som Prakash Rekhi vs. Union of India - AIR 1981 SC 212

13.Sukhdev Singh vs. Bhagatram- AIR1975 - SC 133/

14.Ramana Dayaram Shelty vs. The International Air port Authority of India -AIR 1979 SC 1628

15.Ajay Hasia vs. Khalid Kujid - 1981 AIR SC 487

16.Romesh Thappar vs State of Madras- AIR 1950SC 124

17.Prem Chanr Gag vs Excise Commissioner UP- Air1963- SC996

18.B. V.M. Fernando and others vs. Associated Newspapers of Ceylon Ltd.-SC FR 274/200**4.**

Cur adv. vull.

J. C. Weliamuna for Petitioner
Aravinda Athurupana for 2,3,4,5,7, 8th respondents.

November 23, 2006.

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, an Assistant Manager Security Services (Operations) of the Associated Newspapers of Ceylon Ltd., viz., the 2nd respondent (hereinafter referred to as ANCL) alleged that by the promotion granted to the 7th respondent as Manager Operations at ANCL, his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated for which this Court granted leave to proceed.

When this matter was taken up for hearing, learned Counsel for the 2nd to 5th, 7th and 8th respondents (hereinafter referred to as the learned Counsel for the 2nd respondent), took up a preliminary objection stating that ANCL is not amenable to fundamental rights jurisdiction, as ANCL, which is a limited liability Company or its officers is/are not instrumentalities of the State and that the petitioner has not filed any material to show that ANCL falls within the meaning of executive or administrative action in terms of Article 126 of the Constitution.

Accordingly learned Counsel for the 2nd respondent submitted that,

i. the petitioner should have annexed the gazette notification referred to in paragraph 3(b) of the petition to indicate that ANCL has been listed as an institution under the Ministry of Information and Media;

ii. as ANCL is a Company, the petitioner should have filed form 48 and share certificates to indicate that the State has the majority of the shares in ANCL , and

iii. for the reasons referred to in i and ii above, learned Counsel for the 2nd respondent contended that there was noncompliance with Rule 44(1) (c) of the Supreme Court Rules of 1990.

In the circumstances, it was decided to take up the preliminary objection for consideration and both learned Counsel were so heard.

On a consideration of the preliminary objection raised by the learned Counsel for the 2nd respondent, it is apparent that his objection is based mainly on two grounds; namely

A. the impugned ac Us by the 2nd to 8th respondents do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court; and

B. the petitioner has not complied with the Rule 44(1)c of the Supreme Court Rules of 1990, as he "had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Having stated the objections of the learned Counsel for the 2nd respondent, let me now turn to examine the said objections.

A. Whether the impugned act/s by the 2nd to 8th respondents constitute executive or administrative action

Although Article 126 of the Constitution refers to executive or administrative action, with reference to fundamental rights, the Constitution does not provide any definition to this concept. It would therefore be necessary to analyze the case law in order to consider the definition in this respect. The case law, it is to be 1J0ted,clearly indicates a gradual evolution towards broadening the concept, since the early decisions after 1978.

In Thadchanamurthi vs. Attorney Genera J(1) a very narrow view was taken while considering an infringement of fundamental rights by executive or administrative action, where it was stated that torture by police officers were unlawful and ultra vires of the duties of the police officers and therefore it would not amount to state action.. It was also stated that the State would be liable for the wrongs of its subordinate officials only when an 'administrative practice' had been adopted. A few years later in Velmurugu v Attorney Genera(2) in the majority view it was held that if liability is to be imputed to the State it must be on the basis of an administrative practice and not on the basis of an authorization, direct or implied,

or that those acts were done for the benefit of the State. However, in the minority decision, Sharvananda, J. (as he then was) had taken a broader view in giving a meaning to the phrase 'executive or administrative action 'to encompass all actions by State officials. Referring to several judgments of other jurisdictions and especially the decision in Ireland vs. United Kingdom (3) Sharvananda, J. (as he then was) stated that,

"There is no justification for equating 'executive or administrative action' in Article 126 to 'administrative practice' or to acts resulting from administrative practice. Practice' denotes 'habitual or systematic performances' and contemplates a series of similar actions. No known 'canon or statutory interpretation warrants such a narrow or limited construction of the phrase 'executive or administrative action', which, ordinarily understood, embraces in its sweep all acts of the administration, especially when what is at stake is the subject's Constitutional remedy. In my view, all that is required of a petitioner under Article 126 is that he should satisfy this Court that the act of infringement complained of by him is the action of a State official or repository of State power. Any violation of fundamental rights by a public authority, whether it be an isolated individual action or consequent to administrative practice, furnishes, in my view, sufficient basis for an application under Article 126."

This view expressed in 1981 was reiterated by Sharvananda , J., as he then was) in *Mariadas vs. Attorney General and Another*[4] *and in Wijetunga vs. Insurance Corporation.*[5] The interpretation thus propagated by Sharvananda, J. (as he then was) was again referred to in Gunawardena vs. Perera. [6]"

In Perera vs. University Grants Commission'" Sharvananda, J. (as he then was), again referred to the phrase 'executive or administrative action' within the framework of Articles 17 and 126 of the Constitution and stated that,

"The expression 'executive or administration action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions.

" A Divisional Bench of this Court in Peter Leo Fernando vs. Attorney General and Others(8) referred to the interpretation given by Sharvananda. J. (as he then was) to the phrase 'executive or administrative action' in Velmurugu vs. Attorney General and Others supra), Perera vs. University Grants Commission (supra) and in Wijetunga vs. Insurance Corporation and Another (supra) and quoted with approval the principle, which had emerged through the aforementioned decisions in giving a meaning to the concept of executive or administrative action'. Colin-Thome', J. in his judgment, thus stated that the test to be applied in deciding, whether the action question is executive or administrative, is to examine the nature of the functions and the degree of control that has been exercised.

  ; In Rajaratne vs. Air Lanka Ltd.,[9] the question, which arose was as ; whether the actions of Air Lanka Ltd., would come within the meaning executive or administrative action.' Atukorale, J. after an exhaustive examination of

Sir Lankan and Indian cases, took the view that the expression executive or administrative action in terms of Article 17 and 126 of the Constitution should be given a broad construction and Air Lanka Ltd., was a Company formed by the government, owned by the government and controlled by the government and these functions render Air Lanka an agent or organ of the government, which is thereby amenable to the fundamental rights guaranteed in terms of articles 17 and 126 of the Constitution.

  ; The Divisional Bench decision in Leo Samson vs. Air Lanka(10) and the decision in Jayakody vs. Sri Lanka Insurance and Robinson Hotel Company Ltd.,(11) on the other hand had used different parameters in deciding whether government control is exercised over a respondent Company. Acc0rdingly in **Leo Samsons case** (supra), the Court had applied the deep and pervasive control test' whereas in **Jayakody** supra) the Court after examining the structure of the respondent Hotels Company had held that although it was carrying on 'commercial functions' it would still be a State agency.

Having said that, let me now turn to examine the position of the application under review.

The petitioner in his petition had stated that the 2nd respondent is . in terms of the provisions of Section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973 (hereinafter referred to as the Law), a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. In such circumstances could it be 'possible to hold that the actions of the 2nd respondent come within the purview of 'executive or administrative action' in terms of Article 17 and 126 of the Constitution? . .

It is not disputed that the 2nd respondent falls within the category of a Company. The chief contention of the learned Counsel for the 2nd respondent was that, since the decision of **Leo Samson** (supra), the necessary requirement in proof of' executive or administrative action' would be the 'deep and pervasive' test. Learned Counsel further contended that neither L**eo Samson's** case (supra) nor **Jayakody's case** (supra) has whittled down the requirement of deep and pervasive state control'.

In Leo Samson's case (supra) one of the petitioners had alleged that the termination of his services by the Chief Executive Officer of Sri Lanka Airlines Ltd. was violative of Article 12(1) of the Constitution. The other petitioner had alleged, inter alia, that his being posted as . Manager, Kuwait is violative of Article 12(1) of the Constitution.

A preliminary objection was raised on behalf of Sri Lankan Airlines that consequent to the Shareholders Agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka, the impugned acts do not constitute executive or administrative action'. This Court held that the 'executive or administrative action' would include executive or. administrative action of the State or its agents or instrumentalities. In deciding so

Ismail. J. had stated that, it was clear from the provisions of the memorandum and Articles of Association and the Shareholders Agreement that the management, power, control and authority over the business of the Company were vested in the Investor with certain management decisions, being vested exclusively in it.

It is thus clear that the Court had based its decision on a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement and accordingly had held that the Government had lost the 'deep and pervasive' control exercised earlier by it over the Company.

The decision in **Jayakody** (supra), had considered the rationale of **Leo Samson** (supra) and answered in the negative the question as to whether the judgment in the latter would affect the decision taken in Jayakody vs. Sri Lanka Insurance and Robinson Hotel Co. Ltd. (supra). The Court in **Jayakody's case** (supra) took the view that the 2nd respondent in that case is a State agency and therefore its action are executive or administrative in character. Therefore in **Jayakody** (supra) the Court had taken the view that the test to decide whether an act comes within the purview of executive or administrative action would be to consider whether the party in question is a State agency and to consider whether the State has the effective ownership of such establishment and if so whether such an establishment would come under the category of State Agency.

Therefore it is apparent that whilst **Leo Samson** (supra) had considered the kind of control, which is necessary to come within the framework of executive or administrative action, in **Jayakody** (supra) the Court had examined the character of the establishment in order to decide whether there could be executive or administrative action carried out by such an institution. Accordingly it is apparent that the decision in **Jayakody** (supra) could be clearly distinguished from the decision in **Leo Samson's case** (supra).

Considering the circumstances and the questions that has arisen in the. present application, it is apparent that they are quite similar to the questions, which had been considered in **Jayakody vs. Sri Lanka**

Insurance and Robinson Hotel Co. Ltd. (supra). Moreover on such a comparison, and for the reasons aforementioned, it is also apparent that the present application could thus be distinguished from that of the decision of **Leo Samson** (supra).

The question before this Court therefore is to examine whether ANCL, is a State Agency.

Learned Counsel for the 2nd respondent strenuously contended that ANCL is not an entity controlled by the State, but that it is a Company and its decisions cannot be questioned in terms of Article 126 of the Constitution.

It is however an accepted fact that fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining

the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision. In fact this position has been considered by Krishna Iyer, J. in Sam Prakash Rekhi VS.Union of India(12)upholding the views of Mathew, J. in his land mark decision in **Sukhdev Singh** vs. Bhahgatram(13)which was adopted by Bhagwati, J. in Ramana Dayaram Shetty vs. The International Air Port Authority of India.(14)

In Ramana Shetty's case (supra), Bhagwati, J. considering the doctrine of agency propounded by Mathew,J. in Sukhev Singh (supra) states that,

"Where a Corporation is wholly controlled by government not only in its policy making, but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government "

Upholding the views expressed by Mathew, J. in **Sukhdev Singh** (supra) Bhagwati, J. in the Judgment of a Divisional Bench in Ajay Hasia v Khalid Mujib(15)clearly stated that,

"The Government in many of its commercial ventures and public enterprises is resorting more and more frequently to

this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases, **the true owner is the State, the real operator is the State and the effective controllorate is the State and accountability for its actions to the community and the Parliament is of the State.**" (emphasis added)

In **Ajay Hasia** (supra) the society in question was registered under Societies Registration Act for the purpose of establishing an Engineering College, which was sponsored, supervised and financially supported by the Government. The Indian Supreme Court held that such a society should be an instrumentality or an agency of the State.

It is therefore evident that careful attention should be given to several factors, which are relevant in considering whether a Company or a Corporation is an agency or an instrumentality of the Government. Having this in mind let me now turn to examine the status of the 2nd respondent.

It is not disputed that ANCL is a creature of a statute as its status changed by the Associated Newspapers of Ceylon Ltd. (Special provisions) Law, No. 28 of 1973 (as amended). The preamble to this Law clearly states that it is,

"A Law to change the status of the company carrying on business under the name of the Associated Newspapers of Ceylon Limited, to provide for the

redistribution of the shares of such company, and for the reconstitution of the body responsible for the management and administration of the business and affairs of such company "

Provision has been made in this law that not less than 75% of the number of all the shares of the Company be vested in the Public Trustee on behalf of the Government (Section 2(b) of the Law). Moreover, unlike the other Companies, in terms of Section 17 of the the Minister is empowered to make regulations for the purpose of giving full force and effect to' the principles and provisions of this law. Section 11 of the law provides the Minister to revoke or amend the Memorandum and Articles of Association of the Company by regulation published in the Gazette.

It is pertinent to note the provisions made in terms 'Of section 16(1) of the Law read with section 9 to 1?of the Public Corporations (Financial Control) Act, where the accounts and property of ANCL are to be audited by the Auditor General.

Considering the aforementioned factors, it is thus clear that ANCL is prima facie a statutory body with government control.

Learned Counsel for the petitioner in fact submitted that as averred in paragraph 3(b) of the affidavit of the petition, ANCL is an institution, which functions under the direct purview of the Ministry of Information and Media. The petitioner had thus averred that,

" Moreover, by Order of Her Excellency the President, published in the Government Gazette (Extraordinary) of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

On a consideration of all the aforementioned facts and circumstances, it is evident that ANCL is an instrumentality or an agency of the State, subject to direct control by the government. In such circumstances: there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution. Accordingly could it be said that the impugned acts by ANCL do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court? The answer to this question is clearly in the negative as it is clearly evident from the reasons aforesaid that ANCL is an authority, which falls within the parameters of an instrumentality or agency of the State.

B. Non-compliance with Rule 44(1) (c) of the Supreme Court Rules of 1990.

Learned Counsel for the 2nd respondent strenuously contended that the petitioner had not complied with Rule 44(1) (c) in reference to two matters alleged in paragraph 3(b) of his petition. Paragraph 3(b) of the petition as referred to earlier, deals with the legal status of ANCL, where the petitioner had stated that,

"In terms of the provisions of Section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Act, No. 28 of 1993 (hereinafter ANCL Act), the

2nd respondent Associated Newspapers of Ceylon Limited (hereinafter ANCL) is a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. Further in terms of Section 2(b) of the ANCL Act not less than seventy-five per centum of all the shares of the Company shall vest in the Public Trustee on behalf of the Government. Moreover, by Order of Her Excellency the President, published in the Government Gazette Extraordinary of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

Learned Counsel for the 2nd respondent submitted that the petitioner cannot rely on the Law by itself and submit that 75% of the shares of ANCL are held by the Public Trustee as at the date the petitioner had B filed his petition.

Learned Counsel for the 2nd respondent further contended that if the petitioner had wanted to rely on share holding position, he should' have filed a copy of the Annual Return of ANCL. He also submitted that if the petitioner has not annexed to the petition any such document to indicate that at least 75% of the total shares of ANCL, being vested in the Public Trustee, as at the time of the petition, that would amount to non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

Rule 44 of the Supreme Court Rules of 1990 is contained in Part IV, which deals with the applications under Article 126. Rule 44(1)(c) of the aforesaid Rules is in the following terms:

"tender in support **such petition, such affidavits and documents as are available to him**. "(emphasis added).

It is thus apparent that in terms of Rule 44(1)(c), what is necessary is to tender to Court only the documents and affidavits, which are available to the petitioner. In such circumstances could it be possible for this Court to consider that in terms of Rule 44(1)(c), the petitioner is under an obligation to tender all the relevant documents?

Rule 44(1) (c) clearly specifies that the petitioner has to tender to Court in support of his application, the petition, affidavit and other documents as are available to him. Thus Rule 44(1)c is emphatic on the point of the types of documents that should be tendered to Court. What it states is that, the petitioner should tender only the documents, which **are available** to him. In other words, there is **no compulsion** in terms of Rule 44(1)(c) to make an effort to tender documents, which are not in the possession of the petitioner. What is necessary in terms of Rule 44(1)(c) is to tender all relevant documents to support the petitioner's application, that are available to him at the time of filing the application. The petitioner, should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

The basis of this position could be clearly understood by examining the nature of the fundamental rights jurisprudence vis a vis, the civil and criminal litigation

process.

Article 126 of the Constitution clearly states that the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution. Article 4(d) emphasizes on the exercise of sovereignty through the fundamental rights jurisdiction and states as follows:

"the fundamental rights, which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; "

It is therefore to be noted that in terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that the fundamental rights guaranteed by the Constitution cannot be 'abridged, restricted or denied' and it is evident that it would be the duty of this Court to ensure that such rights are not abridged, restricted or denied to the People'

These rights, which are fundamental in nature, are inalienable as Article 3 of the Constitution clearly states that,

"In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Soverejgnty includes the powers of government, fundamental rights and the franchise'."

Fundamental rights are conferred on the people, which are inalienable. Therefore such rights are to be enjoyed by them. The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the people. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society. Unlike an ordinary legal right, which Is protected and enforced by the ordinary law, the fundamental rights are guaranteed and protected ,by the Constitution and they are available only against executive or administrative action. Referring to such fundamental rights, Patanjali Sastri, J., (as he then was) in Romesh Thappar v State of Madrc!s([16])commented that,

"This Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

A decade later, in 1963, Gajendragadkar, J., in Prem Chand Garg v Excise Commissioner, UP (17) emphasized the important position held by the fundamental rights jurisdiction in a democratic system in the following words:

"The fundamental right to move this Court can, therefore, be appropriately described as the. cornerstone of the democratic edifice raised by the Constitution."

In such circumstances it is quite clear that it is not possible to restrict the applicability of fundamental rights through mere technicalities.

Having said that let me now turn to examine the contention of the learned Counsel for the 2nd respondent in his preliminary objection on the ground of non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990,

The main submission of the learned Counsel for the 2nd respondent that,

(a) the petitioner had not filed form 63 of the Companies Act; and

(b) the petitioner had not filed the Gazette Notification to support the submissions referred to in paragraph 3(b) of the petition.

It is not disputed that the petitioner in his petition dated 28.09.2005 referred to the leg~1status of the 2nd respondent in paragraph 3(b) of the petition, which paragraph was re-produced earlier. That paragraph clearly stated the number of shares that was vested with the Public Trustee and referred to the Gazette Extraordinary of 28.04.2004, where ANCL was listed as an institution under the purview of the Minister of Information and Media.

The Company Secretary of ANCL in her affidavit dated 04.01.2006, denied the averments in paragraph 3(b) and had averred that,

" I deny the averments in paragraph 3(b) of the said petition except that the provisions of the Associated Newspapers of Ceylon Limited (Special Provisions) Act, No. 28 of 1973 are applicable to the 2nd respondent."

Paragraph 3(b) of the petition, as referred to earlier, speaks of the Law and its provisions, which states that not less than seventy-five per centum of its shares being vested in the Public Trustee.

It is thus evident that ANCL had not denied this position and therefore is apparent that the reference to the Law had been sufficient to justify the proposition propounded by the petitioner.

Considering the fundamental rights jurisdiction exercised by this Court in terms of Rule 44(1)(c) of the Supreme Court Rules of 1990, it has been the practice of this Court to have a liberal approach in entertaining documents. There have been many instances, where parties have moved Court to call for necessary documents. Needless to say that, documents are necessary and vital for the purpose of ascertaining whether there has been a violation of any fundamental rights as the said jurisdiction is exercised and facts are ascertained through affidavits and documents. It has also to be borne in mind that in terms of Article 126(2) of the Constitution that in order to exercise the fundamental rights jurisdiction, an

aggrieved person should apply to this Court by way of petition **within one month of the** alleged infringement. Thus in order to advance the fundamental rights jurisdiction and also to ensure that such jurisdiction is not 'abridged, restricted or denied' to the People, it would be necessary to give a liberal and a purposive construction to Rule 44(1)(c) of the Supreme Court Rules of 1990.

Considering all the aforementioned factors, it is evident that in terms of Rule 44(1)(c), once a petitioner **has pleaded a document** in his petition he would be entitled to submit it '**as is available to him**' and with 1H"epermission of Court or move Court to call for such document.

It is also important to note that, it was the responsibility of the 2nd respondent to have disclosed relevant and material facts if they were to deny the averments of the petitioner. If the respondents were to deny the position taken by the petitioner, the onus was on the respondents to produce such material facts and disclose that to this Court. It is however not disputed that the respondents have not produced any material either to deny the contention of the petitioner or to substantiate their position. In such circumstances it would not be correct for the learned Counsel for the 2nd respondent to state that the petitioner had not complied with Rule 44(1)(c) as he has not filed Form 63 of the Companies Act.

learned Counsel for the 2nd respondent also contended that the petitioner should have filed the Gazette Extraordinary of 28.04.2004 along with the petition.

As referred to earlier, the question of the aforesaid Gazette not being filed by the petitioner came up at the stage of hearing, when preliminary objections were raised by the learned Counsel for the 2nd respondent. learned Counsel for the petitioner submitted that, at the time of filing the petition, a copy of the said Gazette was not available and stated that a copy would be submitted along with his

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written submissions. In fact the learned Counsel for the petitioner had filed a copy of the said Gazette, marked X, along with his written submissions.

In these circumstances, the objection by the learned Counsel for the 2nd respondent on the ground of non-compliance of Rule 44(1)(c) of the Supreme Court Rules of 1990 cannot be sustained.

It would be worthy to note before I part with this judgment the submission of the learned Counsel for the petitioner where he stated that, there were several cases filed against ANCl and that this Court had considered those on their merits and none had held that the actions of ANCl are not executive or administrative action in terms of Article 126 of the Constitution. He cited the recent decision by this Court in B. V M. Fernando and Others v. Associated Newspapers of Ceylon Limited(18)where the Court had considered ANCl as an agent of the
State.

On a consideration of all the material placed before this Court I hold that the 2nd respondent, namely the Associated Newspapers of Ceylon Ltd., is a State agency and that its actions were therefore executive or administrative in character and that the petitioner had complied with Rule 44(1)(c) of the Supreme Court Rules of 1990.

I accordingly overrule the preliminary objection, with costs in a sum of Rs.10,000/- payable ANCI (2nd respondent) to the petitioner. This amount to be paid within one month from today.

Since this matter cannot be concluded before this Bench, this will be listed before any Bench for hearing on the merits, on a date next term to be fixed by the Registrar of the Supreme Court.

UDALAGAMA, J. - I agree.

SOMAWANSA, J. - I agree.

Preliminary objections overruled . Main matter to be listed for argument.

Malraj Piyasena v. Attorney-General And Others - SLR - 117, Vol 2 of 2007 [2006] LKSC 13; (2007) 2 Sri LR 117 (23 November 2006)

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MALRAJ PIYASENA
V
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
UDALAGAMA, J. AND
SOMAWANSA, J.
S.C. (F.R.) APPLICATION NO. 390/2005
27TH JULY 2006

Fundamental Rights - Infringement of Article 126 of the Constitution - Is the Associated Newspapers of Ceylon Ltd. (ANCL), a Limited Liability Company amenable to fundamental rights jurisdiction - Whether the impugned acts of 7th and 8th respondents constitute executive or administrative action - Supreme Court Rules 44(1) C of the Supreme Court Rules (1990).

At the hearing two preliminary objections were raised, namely-

(a) the petitioner cannot invoke the fundamental rights jurisdiction of the Supreme Court, as the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action/actions.

(b) the petitioner has not complied with the Rule 44(1)(C) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Held:

(1) Fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision.

(2) ANCL is an instrumentality or an agency of the State, subject to direct control by the Government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution.

(3) In terms of Rule 44(1)(C), what is necessary is to tender to Court only the documents and affidavits which are available to the petitioner.

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There is no compulsion in terms of Rule 44(1)(C) to make, an effort to tender documents, which are not in the possession of the petitioner. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

(4) In terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that fundamental rights guaranteed by the Constitution cannot be 'abridged', 'restricted' or 'denied' and it is evident that it
would be the duty of the Supreme Court to ensure that such rights are not abridged, restricted or denied to the People.It is not possible to restrict the applicability of fundamental rights through mere technicalities.

per Dr. Shirani Bandaranayake, J:

"The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the people. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society."

Cases referred to:

(1) Thadchanamurthi v Attorney-General FRD(1) 129.

(2) Velmurugu v Attorney-General (1981) 1 SLR 406.

(3) Ireland v United Kingdom January 18, 1978 Decisions of the European Court of Human Rights.

(4) Mariadas v Attorney-General and another FRO Vol. 2, 397.

(5) Wijetunga v Insurance Corporation (1982) 1 SLR 1.

(6) Gunawardena v Perera (1983) 1 SLR 305.

(7) Perera v University Grants Commission FRO (1) 103.

(8) Peter Leo Fernando v Attorney-General and others (1985) 2 SLR 341.

(9) Rajaratne v Air Lanka Ltd. (1987) SLR 128.

(10) Leo Samson v Air Lanka (2001) 1SLR 94.

(11) Jayakodyv Sri Lanka Insurance and Robinson Hotel Company Ltd. (2002) 1 SLR 365.

(12) Som Prakash Rekhiv Union of India AIR (1981) S.C. 212.

(13) Sukdev Singh v Bhagatram AIR (1975) S.C. 1331.

(14) Ramana Dayaram Shetty v The International Air Port Authority of India AIR (1979) S.C. 1628.

(15) Ajay Hasia v Khalid Mujib (1981) AIR S.C. 487.

(16) Romesh Thappar v State of Madras AIR (1950) SC124.

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(17) Prem Chand Garg v Excise Commissioner, u.P. AIR (1963) S.C. 996.

(18) B. v.M. Fernando and others v Associated Newspapers of Ceylon Ltd. S.C. (FR) 274/2004.

APPLICATION for infringement of Fundamental Rights.

J.C. Weliamuna for petitioner.

Aravinda Athurupana for 2nd, 3rd, 4th, 5th, 7th and 8th respondents.

Cur.adv. vult.

November 23, 2006

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, an Assistant Manager Security Services (Operations) of the Associated Newspapers of Ceylon Ltd., viz., the 2nd respondent (hereinafter referred to as ANCL) alleged that by the promotion granted to the 7th respondent as manager Operations at ANCL, his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated for which this Court granted leave to proceed.

When this matter was taken up for hearing, learned Counsel for the 2nd to 5th, 7th and 8th respondents (hereinafter referred to as the learned Counsel for the 2nd respondent), took up a preliminary objection stating that ANCL is not amenable to fundamental rights jurisdiction, as ANCL, which is a limited liability Company or its officers is/are not instrumentalities of the State and that the petitioner has not filed

any material to show that ANCL falls within the meaning of executive or administrative action in terms of Article 126 of the Constitution.

Accordingly learned Counsel for the 2nd respondent submitted that -

i. the petitioner should have annexed the gazette notification referred to in paragraph 3(b) of the petition to indicate that ANCL has been listed as an institution under the Ministry of Information and Media;

ii. as ANCL is a Company, the petitioner should have filed Form 48 and share certificates to indicate that the State has the majority of the shares in ANCL; and

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iii. for the reasons referred to in i and ii above, learned Counsel for the 2nd respondent contended that there was non-compliance with Rule 44(1) (c) of the Supreme Court Rules of 1990.

In the circumstances, it was decided to take up the preliminary objection for consideration and both learned Counsel were so heard.

On a consideration of the preliminary objection raised by the learned Counsel for the 2nd respondent, it is apparent that his objection is based mainly on two grounds; namely

A. the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court; and

B. the petitioner has not complied with the Rule 44(1)(c) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Having stated the objections of the learned Counsel for the 2nd respondent, let me now turn to examine the said objections.

A. Whether the impugned act/s by the 2nd to 8th respondents constitute executive or administrative action

Although Article 126 of the Constitution refers to executive or administrative action, with reference to fundamental rights, the Constitution does not provide any definition to this concept. It would therefore be necessary to analyze the case law in order to consider the definition in this respect. The case law, it is to be noted, clearly indicates a gradual evolution towards broadening the concept, since the early decisions after 1978.

In *Thadchanamurthiv Attorney-General* (1) at 129 a very narrow view was taken while considering an infringement of fundamental rights by executive or administrative action, where it was stated that torture inflicted by police officers were unlawful and ultra vires of the duties of the police officers and therefore it would not amount to state action. It was also stated that the State would be liable for

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SC Attorney-General and Others (Dr.Shirani Bandaranavake, J.) the wrongs of its subordinate officials only when an 'administrative practice' had been adopted. A few years later in Velmurugu v Attorney-Generat2) at 406 in the majority view it was held that if liability is to be imputed to the State it must be on the basis of an administrative practice and not on the basis of an authorization, direct or implied, or that those acts were done for the benefit of the State. However, in the minority decision, Sharvananda, J. (as he then was) had taken a broader view in giving a meaning to the phrase 'executive or administrative action' to encompass all actions by State officials. Referring to several judgments of other jurisdictions and especially the decision in Ireland v United Kingdom(3) Sharvananda, J. (as he then was) stated that,

"There is no justification for equating 'executive or administrative action' in Article 126 to 'administrative practice' or to acts resulting from administrative practice. 'Practice' denotes 'habitual or systematic performances' and contemplates a series of similar actions. No known or limited constitution of the phrase 'executive or administrative action', which, ordinarily understood, embraces in its sweep all acts of the administration, especially when what is at stake is the subject's Constitutional remedy. In my view, all that is required of a petitioner under Article 126 is that he should satisfy this Court that the act of infringement complained of by him is the action of a State official or repository of State power. Any violation of fundamental rights by public authority, whether it be an isolated individual action or consequent to administrative practice, furnishes, in my view, sufficient basis for an application under Article 126."

This view expressed in 1981 was reiterated by Sharvananda, J., (as he then was) in Mariadas v Attorney-General and another..4) and in Wijetunga v Insurance Corporation(5) at 397. The interpretation thus propagated by Sharvananda, J. (as he then was) was again referred to in Gunawardena v Perera (6) at 305. In Perera v University Grants Commission (7) at 103 Sharvananda, J. (as he then was), again referred to the phrase 'executive or administrative action' within the framework of Articles

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17 and 126 of the Constitution and stated that,

"The expression 'executive or administration action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions."

A Divisional Bench of this Court in Peter Leo Fernando v Attorney-General and others[8] at 341 referred to the interpretation given by Sharvananda, J. (as he then was) to the phrase 'executive or administrative action' in Velmurugu v Attorney-General and others (supra), Perera v University Grants Commission (supra) and in Wijetunga v Insurance Corporation and another (supra) and quoted with approval the principle, which had emerged through the aforementioned decisions in giving a meaning to the concept of 'executive or administrative action'. Colin-Thome',J. in his judgment, thus stated that the test to be applied in deciding, whether the action in question is executive or administrative, is to examine the nature of the function and the degree of control that has been exercised.

In Rajaratne v Air Lanka Ltd.[9]at 128 the question, which arose was as to whether the actions of Air Lanka Ltd., would come within the meaning of 'executive or administrative action'. Atukorale, J. after an exhaustive examination of Sri Lanka and Indian cases, took the view that the expression executive or administrative action in terms of Articles 17 and 126 of the Constitution should be given a broad construction and Air Lanka Ltd., was a Company formed by the government, owned by the government and controlled by the government and these functions render Air Lanka an agent or organ of the government, which is thereby amenable to the fundamental rights guaranteed in terms of Articles 17 and 126 of the Constitution.

The Divisional Bench decision in Leo Samson v Air Lanka[10]at 94 and the decision in Jayakody v Sri Lanka Insurance and Robinson Hotel Company Ltd.[11] at 365 on the other hand had used different parameters in deciding whether government control is exercised over a respondent Company. Accordingly in Leo Samson's case (supra), the Court had applied the 'deep and pervasive control test' whereas in Jayakody (supra) the Court after examining the structure of the respondent Hotels Company had

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held that although it was carrying on 'commercial functions' it would still be a State agency.

Having said that, let me now turn to examine the position of the application under review.

The petitioner in his petition had stated that the 2nd respondent is in terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No 28 of 1973 (hereinafter referred to as the Law), a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. In such circumstances could it be possible to hold that the action of the 2nd respondent comes within the purview of 'executive or administrative' in terms of Articles 17 and 126 of the Constitution?

It is not disputed that the 2nd respondent falls within the category of a Company. The chief contention of the learned Counsel for the 2nd respondent was that, since the decision of Leo Samson (supra), the necessary requirement in proof of

'executive or administrative action' would be the 'deep and pervasive' test. Learned Counsel further contended that 'neither Leo Samson's case (supra) nor Jayakody's case (supra) has whittled down the requirement of deep and pervasive state control'.

In Leo Samson's case (supra) one of the petitioners had alleged that the termination of his services by the Chief Executive Officer of Sri Lankan Airlines Ltd was violation of Article 12(1) of the Constitution. The other petitioner had alleged, inter alia, that his being posted as Manager, Kuwait is violative of Article 12(1) of the Constitution.

A preliminary objection was raised on behalf of Sri Lankan Airlines that consequent to the Shareholders Agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka, the impugned acts do not constitute 'executive or administrative action'. This Court held that the 'executive or administrative action' would include executive or administrative action of the State or its agents or instrumentalities. In deciding so Ismail, J. had stated that, it was clear from the provisions of the Memorandum and Articles of Association and the Shareholders Agreement that the management

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power, control and authority over the business of the Company were vested in the Investor with certain management decisions, being vested exclusively in it.

It is thus clear that the Court had based its decision on a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement and accordingly had held that the Government had lost the 'deep and pervasive' control exercised earlier by it over the Company.

The decision in Jayakody (supra), had considered the rationale of Leo Samson (supra) and answered in the negative the question as to whether the judgment in the latter would affect the decision taken in Jayakody v Sri Lanka Insurance and Robinson Hotel Go. Ltd. (supra). The Court in Jayakody's case (supra) took the view that the 2nd respondent in that case is a State agency and therefore its actions are executive or administrative in character. Therefore in Jayakody (supra) the Court had taken the view that the test to decide whether an act comes within the purview of executive or administrative action would be to consider whether the party in question is a State agency and to consider whether the State has the effective ownership of such establishment and if so whether such an establishment would come under the category of State Agency.

Therefore it is apparent that whilst Leo Samson (supra) had considered the kind of control, which is necessary to come within the framework of executive or administrative action, in Jayakody (supra) the Court had examined the character of the establishment in order to decide whether there could be executive or administrative action carried out by such an institution. Accordingly it is apparent

that the decision in Jayakody (supra) could be clearly distinguished from the decision in Leo Samson's case (supra).

Considering the circumstances and the questions that has arisen in the present application, it is apparent that they are quite similar to the questions, which had been considered in Jayakody v Sri Lanka Insurance and Robinson Hotel Go. Ltd. (supra). Moreover on such a comparison, and for the reasons aforementioned, it is also apparent that the present application could thus be distinguished from that of the decision of Leo Samson (supra).

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The question before this Court therefore is to examine whether ANCL, is a State Agency.

Learned Counsel for the 2nd respondent strenuously contended that ANCL is not an entity controlled by the State, but that it is a Company and its decisions cannot be questioned in terms of Article 126 of the Constitution.

It is however an accepted fact that fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision. In fact this position has been considered by Krishna Iyer,J. in Som Prakash Rekha v Union of India(12) upholding the views of Mathew, J. in his land mark decision in Sukhdev Singh v Bhagatram(13) which was adopted by Bhagwati, J. in Ramana Dayaram Shetty v The International Air Port Authority of India(14).

In Ramana Shetty's case (supra), Bhagwati, J. considering the doctrine of agency propounded by Mathew, J. in Sukhdev Singh (supra) stated that, "Where a Corporation is wholly controlled by government not only in its policy making, but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government ..." Upholding the views expressed by Mathew, J. in Sukhdev Singh (supra) Bhagwati, J. in the judgement of a Divisional Bench in Ajay Hasia v Khalid MujiJ:f...15) at 487 clearly stated that,

"The Government in many of its commercial ventures and public enterprises is resorting more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases, the true owner is the State, the real operator is the State and the effective controllorate is the Stateand

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accountability for its actions to the community and the Parliament is of the State. " I (emphasis added).

In Ajay Hasia (supra) the society in question was registered under the Societies Registration Act for the purpose of establishing an Engineering College, which was sponsored, supervised and financially supported by the Government. The Indian Supreme Court held that such a society should be an instrumentality or an agency of the State.

It is therefore evident that careful attention should be given to several factors, which are relevant in considering whether a Company or a Corporation is an agency or an instrumentality of the Government. Having this in mind let me now turn to examine the status of the 2nd respondent.

It is not disputed that ANCL is a creature of a statute as its status was changed by the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973 (as amended). The preamble to this Law clearly states that it is, "A Law to change the status of the company carrying on business under the name of the Associated Newspapers of Ceylon Limited, to provide for the redistribution of the shares of such company, and for the reconstitution of the body responsible for the management and administration of the business and affairs of such company "

Provision has been made in this Law that not less than 75% of the total number of all the shares of the Company to be vested in the Public Trustee on behalf of the Government (section 2(b) of the Law). Moreover, unlike the other Companies, in terms of section 17 of the Law, the Minister is empowered to make regulations for the purpose of giving full force and effect to the principles and provisions of this Law. Section 11 of the Law provides the Minister to revoke or amend the Memorandum and Articles of Association of the Company by regulation published in the Gazette.

It is pertinent to note the provisions made in terms of section 16(1) of the Law read with sections 9 to 12 of the Public Corporations (Financial Control) Act, where the accounts and property of ANCL are to be audited by the Auditor-General.

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Considering the aforementioned factors, it is thus clear that ANCL is prima facie a statutory body with government control.

Learned Counsel for the petitioner in fact submitted that as averred in paragraph 3(b) of the affidavit of the petition, ANCL is an institution, which functions under the direct purview of the Ministry of Information and Media. The petitioner had thus averred that,

" Moreover, by Order of Her Excellency the President, published in the Government Gazette (Extraordinary) of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

On a consideration of all the aforementioned facts and circumstances, it is evident that ANCL is an instrumentality or an agency of the State, subject to direct

control by the government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution. Accordingly could it be said that the impugned acts by ANCL do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court? The answer to this question is clearly in the negative as it is clearly evident from the reasons aforesaid that ANCL is an authority, which falls within the parameters of an instrumentality or agency of the State.

B. Non-compliance with Rule 44(1)c of the Supreme Court Rules of 1990.

Learned Counsel for the 2nd respondent strenuously contended that the petitioner had not complied with Rule 44(1)c in reference to two matters alleged in paragraph 3(b) of his petition. Paragraph 3(b) of the petition as referred to earlier, deals with the legal status of ANCL, where the petitioner had stated that, "In terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Act, No. 28 of 1993 (hereinafter ANCL Act), the 2nd respondent Associated Newspapers of Ceylon Limited (hereinafter ANCL) is a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. Further

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in terms of section 2(b) of the ANCL Act not less than seventy-five per centum of all the shares of the Company shall vest in the Public Trustee on behalf of the Government. Moreover, by Order of Her Excellency the President, published in the Government Gazette Extraordinary of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

Learned Counsel for the 2nd respondent submitted that the petitioner cannot rely on the Law by itself and submit that 75% of the shares of ANCL are held by the Public Trustee as at the date the petitioner had filed his petition.

Learned Counsel for the 2nd respondent further contended that if the petitioner had wanted to rely on share holding position, he should have filed a copy of the Annual Return of ANCL. He also
submitted that if the petitioner has not annexed to the petition any such document to indicate that at least 75% of the total shares of ANCL, being vested in the Public Trustee, as at the time of the petition, that would amount to non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

Rule 44 of the Supreme Court Rules of 1990 is contained in Part IV, which deals with the applications under Article 126. Rule 44(1)(c) of the aforesaid Rules is in the following terms:

"tender in support **such petition, such affidavits and documents as are available to him;" (emphasis added)**.

It is thus apparent that in terms of Rule 44(1)(c), what is necessary is to tender to Court only the documents and affidavits, which are available to the petitioner. In such circumstances could it be possible for this Court to consider that in terms of Rule 44(1)(c), the petitioner is under an obligation to tender all the relevant documents?

Rule 44(1)(c) clearly specifies that the petitioner has to tender to Court in support of his application, the petition, affidavit and other documents as are available to him. Thus Rule 44(1)(c) is emphatic on the point of the types of documents that should be tendered to Court. What it states is that, the petitioner should tender only the documents, which are available to him. In other words, there is no

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compulsion in terms of Rule 44(1)(c) to make an effort to tender documents, which are not in the possession of the petitioner. What is necessary in terms of Rule 44(1)(c) is to tender all relevant documents to support the petitioner's application, that are available to him at the time of filing the application. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

The basis of this position could be clearly understood by examining the nature of the fundamental rights jurisprudence vis a vis, the civil and criminal litigation process. Article 126 of the Constitution clearly states that the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution. Article 4(d) emphasizes on the exercise of sovereignty through the fundamental rights jurisdiction and states as follows:

"the fundamental rights, which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; "

It is therefore to be noted that in terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that the fundamental rights guaranteed by the Constitution cannot be 'abridged, restricted or denied' and it is evident that it would be the duty of this Court to ensure that such rights are not abridged, restricted or denied to the People. These rights, which are fundamental in nature, are inalienable as Article 3 of the Constitution clearly states that,

"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise,"

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Fundamental rights are conferred on the People, which are inalienable. Therefore such rights are to be enjoyed by them. The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the People. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society. Unlike an ordinary legal right, which is protected and enforced by the ordinary law, the fundamental rights are guaranteed and protected by the Constitution and they are available only against executive or administrative action. Referring to such fundamental rights, Patanjali Sastri, J.; (as he then was) in Romesh Thapper v State of Madras-16)at 124 commented that,

"This Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

A decade later, in 1963, Gajendragadkar, J.; Prem Chand Garg v Excise Commissioner, U.P'(17)emphasized the important position held by the fundamental rights jurisdiction in a democratic system in the following words:

"The fundamental right to move this Court can, therefore, be appropriately described as the cornerstone of the democratic edifice raised by the Constitution." In such circumstances it is quite clear that it is not possible to restrict the applicability of fundamental rights through mere technicalities.Having said that let me now turn to examine the contention of the learned Counsel for the 2nd respondent in his preliminary objection on the ground of non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

The main submission of the learned Counsel for the 2nd respondent is that,

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(a) the petitioner had not filed Form 63 of the Companies Act; and

(b) the petitioner had not filed the Gazette Notification to support the submissions referred to in paragraph 3(b) of the petition. It is not disputed that the petitioner in his petition dated 28.09.2005 referred to the legal status of the 2nd respondent in paragraph 3(b) of the petition, which paragraph was re-produced earlier. That paragraph clearly stated the number of shares that was vested with the Public Trustee and referred to the Gazette Extraordinary of 28.04.2004, where ANCL was listed as an institution under the purview of the Minister of Information and Media.

The Company Secretary of ANCL in her affidavit dated 04.01.2006, denied the averments in paragraph 3(b) and had averred that,

"I deny the averments in paragraph 3(b) of the said petition except that the provisions of the Associated Newspapers of Ceylon Limited (Special Provisions) Act, No. 28 of 1973 are applicable to the 2nd respondent."

Paragraph 3(b) of the petition, as referred to earlier, speaks of the Law and its provisions, which states that not less than seventy five per centum of its shares being vested in the Public Trustee.

It is thus evident that ANCL had not denied this position and therefore it is apparent that the reference to the Law had been sufficient to justify the proposition propounded by the petitioner.

Considering the fundamental rights jurisdiction exercised by this Court in terms of Rule 44(1)(c) of the Supreme Court Rules of 1990, it has been the practice of this Court to have a liberal approach in entertaining documents. There have been many instances, where parties have moved Court to call for necessary documents. Needless to say that, documents are necessary and vital for the purpose of ascertaining whether there has been a violation of any fundamental rights as the said jurisdiction is exercised and facts are ascertained through affidavits and

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documents. It has also to be borne in mind that in terms of Article 126(2) of the Constitution that in order to exercise the fundamental rights jurisdiction, an aggrieved person should apply to this Court by way of petition within one month of the alleged infringement. Thus in order to advance the fundamental rights jurisdiction and also to ensure that such jurisdiction is not 'abridged, restricted or denied' to the People, it would be necessary to give a liberal and a purposive construction to Rule 44(1)(c) of the Supreme Court Rules of 1990.

Considering all the aforementioned factors, it is evident that in terms of Rule 44(1)(c), once a petitioner has pleaded a document in his petition he would be entitled to submit it 'as is available to him' and with the permission of Court or move Court to call for such document.

It is also important to note that, it was the responsibility of the 2nd respondent to have disclosed relevant and material facts if they were to deny the averments of the petitioner. If the respondents were to deny the position taken by the petitioner, the onus was on the respondents to produce such material facts and disclose that to this Court. It is however not disputed that the respondents have not produced any material either to deny the contention of the petitioner or to substantiate their position. In such circumstances it would not be correct for the learned Counsel for the 2nd respondent to state that the petitioner had not complied with Rule 44(1)c as he has not filed Form 63 of the Companies Act. Learned Counsel for the 2nd respondent also contended that the petitioner should have filed the Gazette Extraordinary of 28.04.2004 along with the petition.

As referred to earlier, the question of the aforesaid Gazette notification not being filed by the petitioner came up at the stage of hearing, when preliminary objections were raised by the learned Counsel for the 2nd respondent. Learned Counsel for the petitioner submitted that, at the time of filing the petition, a copy of the said Gazette was not available and stated that a copy would be submitted along with his written submissions. In fact the learned Counsel for the petitioner had filed a copy of the said Gazette, marked X, along with his written submissions.

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In these circumstances, the objection by the learned Counsel for the 2nd respondent on the ground of non-compliance of Rule 44(1)(c) of the Supreme Court Rules of 1990 cannot be sustained.

It would be worthy to note before I part with this judgment the submission of the learned Counsel for the petitioner where he stated that, there were several cases filed against ANCL and that this Court had considered those on their merits and none had held that the actions of ANCL are not executive or administrative action in terms of Article 126 of the Constitution. He cited the recent decision by this Court in B. v.M. Fernando and others v Associated Newspapers of Ceylon Limitecl18), where the Court had considered ANCL as an agent of the State.

On a consideration of all the material placed before this Court I hold that the 2nd respondent, namely the Associated Newspapers of Ceylon Ltd., is a State agency and that its actions were therefore executive or administrative in character and that the petitioner had complied with Rule 44(1)(c) of the Supreme Court Rules of 1990.

I according overrule the preliminary objection, with costs in a sum of Rs.10,000/- payable by ANCL (2nd respondent) to the petitioner. This amount to be paid within one month from today.

Since this matter cannot be concluded before this Bench, this will be listed before any Bench for hearing on the merits, on a date next term to be fixed by the Registrar of the Supreme Court.

UDALAGAMA, J. - I agree.

SOMAWANSA, J. - I agree.

Preliminary objection overruled.

Matter set down for Argument.

Ceylease Financial Services Ltd. v. Sriyalatha And Another - SLR - 169, Vol 2 of 2006 [2006] LKSC 5; (2006) 2 Sri LR 169 (11 December 2006)

CEYLEASE FINANCIAL SERVICES LTD.

VS.

SRIYALATHA AND ANOTHER

SUPREME COURT.
SHIRANI BANDARANAYAkE, J.
AMARATUNGA, J.
MARSOOF. J.
HC COLOMBO 45/2002(1)
SC HC CA 16/2004.
SC CHC (APPEAL) No. 48/2004.
MARCH 15, 2006.

Stamp Duty Act, sections 24, 31, 33(1), 69 -Guarantee and indemnity -Do they fall within the meaning of a "Bond"?-Deficiency of stamp duty - Could it be rectified? - When? -Liability to pay stamp duty on whom?

The appellant instituted action against the respondents seeking to recover a certain sum of money based on 3 guarantees and indemnity documents. At the trial when the evidence of the plaintiff's witness was given the plaintiff appellant sought to mark the guarantee and indemnity. This was objected to by the defendent-respondent on the ground that the said guarantee and indemnity have not been property stamped. The High Court after inquiry into the objection upheld the objections of the defendant-respondent.

It was contended by the plaintiff appellant that the guarantee and indemnity sought to be marked was not a Bond.

HELD:

(1) In considering the document in question what is necessary would be to look to the substance of it in order to identify whether that would come within the meaning of a Bond?

(2) Guarantee and indemnity given by the defendants - respondents is security for the facility granted in terms of the lease agreement they had entered into. They had

entered into an agreement to pay a fixed sum of money at a definite time and thus the said document falls into the meaning of a Bond.

(3) It is apparent that a bond which is an instrument under seal whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date could include a guarantee bond and or indemnity bond.

HELD FURTHER:

(4) The appellant was entitled to rectify the deficiency of the stamp duty with the payment of penalty.

(5) Though sufficient time and an opportunity was given to the appellant to rectify the deficiency of stamp duty on the guarantee and indemnity had not taken any steps in that regard.

(6) Where an instrument has to be admitted in evidence and if it is not duly stamped the deficiency has to be cured prior to the instrument being marked in evidence.

(7) The person who draws, makes or executes the relevant instrument pertaining to a lease agreement is the leasing company and therefore under and otherwise there is an agreement to the contrary the liability of paying the stamp duty would be with the leasing company.

per Shirani Bandaranayake, J. :

" It is also to be noted that regulations are made in terms of section 69 of the Stamp Duty Act and the rule of this court is to give effect to the said provisions as it is the bounden duty of any court and the function of every Judge to impart justice within the given parameters."

APPEAL from a judgment of the Commercial High Court of Colombo.

Cases referred to :

1. Yousoof Mohammed and Another vs. Indian Overseas Bank 1999 3 Sri LR 278

2. Wickremasinghe and Other vs. Goodwill Marine Academy (Pvt.) Ltd. 2001 2 Sri LR 284

Nihal Fernando, PC with Ms. Ruchira Anthony for plaintiff-appellant Kushan de Alwis with Prasanna de Silva for 1st and 2nd defendant respondents Harsha Fernando, Senior State Counsel for Attorney General as amicus Curiae

cur. adv. vult

December 11,2006.

SHIRANI BANDARANAYAKE, J.

This is an appeal from the order of the High Court of the Western Province, sitting in Colombo in the exercise of its Civil Jurisdiction (the Commercial High Court) (hereinafter referred to as the High Court) dated 03.08.2004.By that order the learned Judge of the High Court upheld the preliminary objection raised by the defendants-respondents (hereinafter referred to as the respondents) and held that the Guarantee and Indemnity in question cannot be marked in evidence. Being aggrieved by that order the petitioner- appellant (hereinafter referred to as the appellant) appealed to this Court, where leave to appeal was granted on the following questions:

A. Has the learned Judge of the High Court erred in law and misdirected himself as the Guarantee sought to be marked in evidence does not fall within the words "Bond, pledge and mortgage"?

B. Has the learned Judge of the High Court erred in law and misdirected himself by totally failing to consider that item NO.7 of Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does not deal with Guarantees and/or Indemnities?

C. Has the learned Judge of the High Court erred in law by making an order on P2 annexed to the plaint more particularly as P2 is not yet in evidence and has not yet been sought to be marked?

The facts of this appeal, albeit brief, are as follows:

On 15.03.2002, the appellant instituted action against respondents seeking inter-alia, Judgment and Decree against the respondents in a sum amounting to Rs. 8,914,834 together with interest in a sum of Rs. 6,642,632 from 19.02.2000 until payment in full (XI). The appellant claimed that the aforesaid amounts were due to it from the respondents based on three (3) Guarantee and Indemnity documents relating to three (3) lease agreements annexed with the plaint marked P2, P7 and P12.

The respondents filed Answer, dated 02.08.2002, seeking inter-alia the rejection and/or dismissal of the action of the appellant (X2).

On 02.03.2004, the matter was taken up for trial, and the Evidence-in- Chief of the witness for the appellant commenced. Upon the producing of Guarantee and Indemnity dated 19.12.1996, through the afore-mentioned witness, the respondents objected to the said document being accepted on the basis that the said Guarantee and Indemnity had not been property stamped.

Learned Judge of the High Court had inquired into the objection taken by the respondents, upheld the said objections and disallowed the appellant from producing the said Guarantee and Indemnity as evidence.

Since it was common ground that the questions in issue are of public importance and especially deal with the Leasing Industry in the country was decided to obtain the assistance from the Hon. Attorney General as amicus curiae.

Having set down the facts of this appeal, let me now turn to examine the questions of law.

A. Has the learned Judge of the High Court erred in law and misdirected himself as the Guarantee sought to be marked in evidence does not fall within the words 'bond, pledge and mortgage' ?

Learned President's Counsel for the appellant contended that Guarantee and Indemnity sought to be marked in evidence was not a bond. He referred to the following paragraph of the Guarantee and Indemnity, in support his contention, which reads thus:

" We the undersigned do and each of us both hereby jointly and severally guarantee the punctual payment by the Lessee of all rental, interest and all other sums whatsoever due under the Lease Agreement including any award taken by the Lessor in any arbitration commenced under Article 25 of the Lease Agreement and the due performance of all the Lessee's obligations there under and we and each of us further jointly and severally undertake to indemnify you on demand against all losses, expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by you inconsequence of any failure by the Lessee to perform any of the said Lessee's obligations under the Lease Agreement" (emphasis added).

The contention of the learned president's Counsel for the appellant was that a "bond" represents a debt and therefore the document in question is not a bond. Learned President's Counsel referred to the 6th Edition of Black's Law Dictionary, which had defined the word "bond" in the following words in support of his contention:

"A certificate or evidence of a debt on which the issuing company or government body promises to pay the bondholders a specified amount of interest for a specified length of time, and to repay the loan on the expiration date. In every case a bond represents debt."

He also cited the 14th Edition of Wharton's Law Lexicon, which had defined the word "bond" to read as follows:

"The term 'bond' is also to denote an acknowledgement of indebtedness for a loan obtained by a Government or Company. Bonds contain provisions as to interest until repayment of the principal."

Accordingly, the contention of the learned President's Counsel for the appellant is that for a document to be a bond, it is mandatory that at the time of signing the document the person issuing same owed a specific sum of money or a debt to the person to whom it was issued. Thus the submission for the appellant is that the person issuing the bond should be the debtor himself and not a 3rd party.

On the afore-mentioned basis, learned President's Counsel for the appellant strenuously contended that on a plain reading of P2 and Pl, it is apparent that at the time of signing the document, the respondents were not debtors of the appellant and had not agreed to pay a specific sum.

Learned President's Counsel, further contended that, by P2 and P7 respondents had only-

(a) guaranteed to the appellant that the lessee will duly perform his obligations under the lease agreement, and

(b) agreed to indemnify the appellant for all losses, expenses, charges and damages suffered by the appellant due to the lessee's failure to perform his obligations.

In these circumstances, learned President's Counsel for the appellant contended that by P2 and P7, respondents had promised the appellant that they will pay an unspecified sum of money that may be owed in the future by a debtor or a 3rd party in the event of such debtor failing to perform his obligations.

Accordingly, the contention of the learned President's Counsel for the appellant was that P2 and P7 annexed to the plaint were only Guarantees and/or Indemnities and they are not bonds as determined by the learned Judge of the High Court.

Considering the afore-mentioned contention of the learned President's Counsel for the appellant, the question arises as to whether P2 and P7 were only Guarantees and/or Indemnities.

It is not disputed as submitted by the learned Counsel for the respondents that the appellant had instituted action against the respondents on the basis of the Guarantee and Indemnity bonds given by the respondents as security for the facility granted in terms of the several lease agreements.

It is common ground that the document P2 does not contain the word 'bond'. The question that arises therefore is in such circumstances whether the said document, which is a Guarantee and Indemnity would come within the purview of a bond.

The 8th Edition of Black's Law Dictionary (West Publishing Co. 2004, pg. 187), illustrates the meaning of the word 'bond', quite elaborately and reads as follows:

"Bond, n. 1. An obligation; a promise (A)n obligation or in English a 'bond', is a document written and sealed containing a confession of a debt; in later times 'contract' is the genus; 'obligation' the species .....

2. A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp. an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes that if the Public officer does not does not do so the surety will be liable in a penal sum.

The Dictionary further states that,

" The fact that an instrument is called a 'bond' is not conclusive as to its character, It is necessary to disregard nomenclature and look to the substance of the bond itself. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money, at a definite time, with a stated interest, and it makes no difference whether a bond is designated by that name or by some other, if it possesses the characteristics of a bond. There is no distinction between bonds and certificates of indebtedness which conform to all the characteristics of bonds" (emphasis added).

Thus it is clear that, in considering the document in question what is necessary would be to 'look to the substance' of it, in order to identify whether that would come within the meaning of a 'bond'.

The contention of the learned President's Counsel for the appellant was that, at the time of the execution of P2 or P7 no fixed amount of money was agreed as payable by the respondents.

However, it is to be noted that the Guarantee and Indemnity, which the appellant sought to be marked, refers to the lease agreement and stated that,

"We the under-signed do and each of us doth hereby jointly and severally guarantee the punctual payment by the Lessee of all rental, interest and all other sums whatsoever due under the Lease Agreement "

The schedule to the aforesaid lease agreement dated 19.12.1996, clearly gives a breakdown of the payments under that agreement. It thus stated that,

Item (7) Term of Lease: Thirty Six (36) months from date of Acceptance Receipt

Item(8) Deposit: Nil Prepaid Rent: Nil covering the last Nil months

Item (9) Thirty Six (36) monthly payments of Rs. 75,962+ 5,318(7%IT) on the 1st day of each month .....

Item(10) Rent for renewed Lease: Rs. 2,000

Item (11) Stipulated Loss Value:

1st Year 1,900,000/-
2nd year 1,406,000/-
3rd year 779,000/-
4th year -

Item(12) Stipulated Loss Value for Renewed Lease: Rs. 2,000/

Item(13) Overdue Interest: (36% per annum) (emphasis added)"

As referred to earlier, a 'bond' could be defined as an instrument, which would make provision for a person to be obliged to pay a fixed sum of money to another at a definite time. A guarantee and/or indemnity also deal with a fixed some of money that has to be paid by the guarantor at a definite time. with regard to a guarantee and/or indemnity, the fixed sum of money payable by the guarantor could be ascertained on a perusal of the schedule to a lease agreement. Such a schedule would indicate the number of monthly payments and the relevant other payments, which would due at a fixed period of time. Accordingly the schedule would specifically set out a definite and a certain sum that the guarantor intended to guarantee by a Guarantee and Indemnity. The figures depicted in Item 9 of the schedule to the lease agreement dated 19.12.1996, thus reflects the fixed amount that has to be paid at the given time

It is thus apparent that by the Guarantee and Indemnity given by the respondents as security for the facility granted to the appellant in terms of the lease agreement, they had entered into an agreement to pay a fixed sum of money at a definite time and thus the said document clearly falls with the meaning of a 'bond'.

In such circumstances, it is evident that the guarantee sought to be marked in evidence clearly falls with the words " bond, pledge and mortgage."

In the light of the aforesaid examination, let me now turn to consider the position regarding the provisions in the two (2) Gazette notifications.

B. Has the learned Judge of the High Court erred in law and misdirected himself by totally failing to consider that item No.7 of Gazette ExtraordinaryNo.224/3dated 20.12.1982as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does not deal with guarantees and/or indemnities?

Learned President's Counsel for the appellant submitted at the hearing that item NO.7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by

Gazette Extraordinary No. 948/15 dated 06.11.1996 applied only in respect of a bond for a 'definite and certain sum of money' and as the Guarantee and Indemnity sought to be produced and marked, does not refer to such a definite and certain sum of money, the provisions of aforesaid Item NO.7 of the Gazette Extraordinary would not apply to the said Guarantee and Indemnity.

Item NO.7 of Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 reads as follows:

"7(a) Bond, pledge, bill of sale or mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act (Chapter365) -

(i) Where such bond, pledge, bill of sale or mortgage is for a sum of money not exceeding Rs. 25,000 - For every Rs. 1,000 or part thereof

(ii) In any other case -

For every Rs. 1,000 or part thereof

(b) Bond or mortgage where by any sum of money is hypothecated as security for the due performance of any act or acts or for fulfilling any obligation under any contract or otherwise or indemnifying any person in respect of any damage, loss or expenses, other than a bond referred to in paragraph (c)-

For every Rs. 1,000 or part thereof

(c) Bond entered into by an exporter with the Director General of Customs as security under a contract in relation to the Manufacture-in -Bond Scheme."

As referred to earlier, in terms of the Guarantee and Indemnity in question, the respondents had duly stated that they would guarantee the payment of all rentals, interest and other sums due under the lease agreement in the event of any failure by the Lessee to perform any obligation under the lease agreement.

It is to be noted, as correctly referred to by the learned Senior State Counsel and the learned Counsel for the respondents that there are various types of bonds, which have been defined in Black's Law Dictionary (supra), This includes an 'Guaranty Bond' as well as an 'Indemnity Bond'. According to the definition given in Black's Law Dictionary (supra) a 'Guaranty Bond' is :

" A bond combining the features of a fidelity and a surety bond securing both payment and performance."

Where an Indemnity Bond would mean:

" A bond to reimburse the holder for any actual or claimed loss caused by the issuer's or some other person's conduct."

Item No.7 of the Gazette Extraordinary, which was referred to earlier deals with 'bond, pledge, bill of sale or mortgage'. It is apparent that a bond, which is an instrument under seal, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date (Halsbury's Laws of England Vol, 12, Pg.556-557, para 1385) could include a Guarantee Bond and/or an Indemnity bond. As stated earlier it would be necessary to disregard the nomenclature and will have to look into the substance of the bond itself, to find out its identity. Thus considering all the facts and circumstances, it is apparent that, on an examination of the nomenclature of the Guarantee and indemnity in question, it is undoubtedly in law a bond, which would come within Item No.7 of the GazetteExtraordinaryNo.224/3dated20.12.1982asamended by Gazette Extraordinary No. 948/15 dated 06.11.1996.

Learned President's Counsel for the appellant took up the position that, Item No.7 clearly refers to any 'definite and certain sum of money' and that the Guarantee and Indemnity in question is not for such a definite and certain sum of money.

The details specified in the relevant Guarantee and Indemnity were referred to earlier, and on a perusal of the contents of that document it is evident that the installment payable and the term of the lease are specifically set out in that document and accordingly, there is a definite and certain amount payable by the lessee to the appellant that has been guaranteed by the respondents. As correctly contended by the learned Counsel for the respondents, no reasonable person would enter into an agreement with the intention of defaulting thereon. Therefore the definite and certain sum that the respondents had guaranteed by the Guarantee and Indemnity was the amount that was stated at the time of entering into the lease agreement. Thus the appellant was to receive a sum of Rs. 2,926,080/- (Rs. 75,962/- + Rs.5,318/- per month over a period of 36 months). This would be the definite and certain sum, which had been agreed upon and guaranteed by the respondents on which the stamp duty has to be calculated.

The default interest, which had got accrued will not come within the definition of 'definite and certain sum'. In fact section 17of the Stamp Duty Act, No. 43 of 1982 (as amended) (hereinafter referred to as the Stamp Duty Act), which deals with the instruments reserving interest had considered this situation, as it has clearly stipulated in that section that the consideration is only on the rental and has disregarded the overdue interest. Section 17 thus stated that,

" Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with stamp duty higher than that with which it would have been chargeable had no mention of interest been made there in."

Thus it is evident that Item No.7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1996 does deal with guarantees and/or indemnities.

C. Has the learned Judge of the High Court erred in law by making an order on P2 annexed to the plaint more particularly as P2 is not yet in evidence and has not yet been sought to be marked?

Learned President's Counsel for the appellant contended that the order made by the learned Judge of the High Court is in respect of P2 annexed to the plaint and that was not the document, which was sought by the appellant to be marked in evidence and objected to by the respondents. His contention was that, the document, which the appellant sought to mark in evidence was the Guarantee and Indemnity relating to Lease AgreementNo.20100389DT,whichwasannexedto the plaint and marked as P7. In the circumstances, learned President's Counsel for the appellant submitted that the order of the learned Judge of the High Court relates only to P2 annexed to the plaint and not to the document P7andtherefore the order of the High Court should be set aside.

It is not disputed that the appellant entered into three (3) lease agreements with the lessee. The three (3) lease agreements, according to the appellant, were marked as P1, P6 and P11.

The three Guarantees and Indemnities were annexed to the aforementioned lease agreements and accordingly P2 was the Guarantee and Indemnity annexed to P1, whereas P7 and P12 were the Guarantees and Indemnities, which were annexed to the two lease agreements marked as P6 and P11, respectively. In all three documents, which were identical, the respondents had entered their names and had signed as the guarantors.

Learned President's Counsel for the appellant contended that the order of the learned Judge of the High Court should be set aside as that order relates to a document, which was never sought by the appellant to be marked as evidence and which was never produced before Court.

I find it difficult to accept this position, since the order of the learned Judge of the High Court clearly relates to all three documents, viz. P2, P7 and P12 and it is obvious that the learned Judge of the High Court had given due consideration to the aforesaid documents before examining the legal position on the preliminary objection taken by the learned Counsel for the respondents. Considering the aforesaid three (3) documents the learned Judge of the High Court had thus stated that,

  ;

In these circumstances it is evident that the contention of the learned President's Counsel for the appellant is not tenable.

Learned President's Counsel for the appellant during the course of the hearing took up the position, relying on section 31 and 33 of the Stamp Duty Act, that the appellant is entitled to rectify the deficiency of stamp duty with a subsequent payment and that he should be allowed to pay the deficit without rejecting the Guarantee and Indemnity in issue.

Section 33(1) of the Stamp Duty Act, deals with the admissibility of a document and/or an instrument and states as follows:

" No instrument chargeable with stamp duty shall be received or admitted in evidence by any person having by law or consent of parties authority to receive evidence or registered or authenticated or acted upon by any person or by any officer in a public office or corporation or bank or approved credit agency unless such instrument is duly stamped."

The contention of the learned President's Counsel for the appellant is that, even if the document in question is not duly stamped at the time of execution, it could be stamped at a later stage and be admitted in evidence in Court and such admission cannot be questioned, as there is no time period that has been stipulated for the purpose of paying the stamp duty and the penalty for a document, which is insufficiently stamped.

Learned Counsel for the respondent conceded that the appellant was entitled to rectify the deficiency of the stamp duty with the payment of a penalty. However, his position was that the said payment of the penalty should be done prior to the production of the document in evidence.

Based on the submissions of the learned President's Counsel for the appellant, two questions have emerged in terms of the provisions of the Stamp Duty Act. The questions thus would be,

(a) Whether the deficiency in stamping would be fatal to the admissibility of the document in issue; and (b) Whether such defect could be regarded as curable? With regard to these two (2) questions, learned Senior State Counsel drew our attention to the two (2) decisions of the Court of Appeal by Edussuriya, J.

In the case of Yousoof Mohamed and Another v IndianOverseasBanW1) the Court had to consider whether the annexures A1 to AS, which were with the plaint should be rejected, as they were not stamped.

After considering the provisions applicable, the Court of Appeal held that,

(a) there is no provision which directs the rejection of a plaint, which is not duly stamped or a dismissal of an action on that basis;
(b) where a plaint is insufficiently stamped due to any annexures, which have been filed as part and parcel of the plaint, not being duly stamped, the Court cannot reject or refuse to entertain the plaint or dismiss the action but must necessarily call for the deficiency in stamps.

Having said that, the Court also was of the view that if there was a failure to supply the deficiency in stamps within a time fixed by Court, the plaint may rejected. Accordingly it was stated that,

" However, where a plaintiff fails to supply the deficiency in stamps within a time fixed by Court, the plaint may be rejected (emphasis added)"

This position was again considered in Wickremasinghe and Others v the Goodwill Marine Academy (pvt.) Ltd.,(2)(2001) where the plaintiff respondent in that matter sought to mark in evidence the bond X2, and objection was taken on the basis that the bond X2 was not duly stamped in accordance with the provisions of the Stamp Duty Act. Considering the applicable provisions of the Stamp Duty Act, the Court held that under the proviso to section 33(1) of the said Act, an unstamped bond may be admitted in evidence upon payment of the proper duty or the amount required to make up the same and a penalty not exceeding three times the proper duty, However, the Court considering the status of the bond in question clearly stated that,

"This had not been done at the time the document was sought to be marked in evidence when the objection was taken. Hence the objection must necessarily be upheld."

On an examination of the rationale of these two decisions, it is apparent that the Court has considered the applicability of section 33 of the Stamp Duty Act as imperative, but is curable, if attended to in terms of the provisions of the said Act. However, it is also to be borne in mind that the Court had taken the view that an attempt to cure the defect should be done prior to the marking of the document (Wickremasinghe and Others v The Goodwill Marine Academy (pvt.) Ltd. (supra).

In the light of the aforementioned, let me now consider the circumstances of the present appeal.

It is not disputed that, when this matter was before the High Court, the learned Counsel for the respondent had objected to the admissibility of the Guarantee and Indemnity, as it has not been prepared in terms of the provisions of the Stamp Duty Act. When this matter came up in the High Court on 02.03.2004, the appellant had moved for a date to make submissions and it had been fixed for 25.03.2004.Onthatdaythe appellant had moved for further time and it was fixed for 03.05.2004, on which day again the appellant had moved for further time. On 18.05.2004 appellant moved for time to file written submissions in respect of the objections taken by the respondent.

The steps taken by the appellant in the High Court as stated by the learned Judge of the High Court in his order further indicates that, when the respondent raised the preliminary objection that the appellant had not paid the required stamp duty in terms of the Stamp Duty Act, the learned Counsel for the appellant had moved for time for the payment of the said amount. Thereafter the case had been called on three occasions for that purpose, but at the end of that period learned

Counsel for the appellant had submitted that they have affixed sufficient amount of stamps and that there is no necessity to pay any further dues as stamp duty. Accordingly the appellant on 18.05.2004had moved court for an order on the objections raised by the respondent. Referring to this position learned Judge of the High Court had clearly stated in his judgment as follows:

It is thus quite clear that, although sufficient time and an opportunity was given to the appellant to rectify the deficiency of stamp duty on the Guarantee and Indemnity, he had not taken any steps in that regard.

In such circumstances the question that needs consideration is whether the deficiency of stamps is a curable defect, which can be rectified upon the payment of the outstanding stamp duty and the requisite penalty as provided for under the provisions of the Stamp Duty Act?

In terms of the proviso to section 33(1) of the Stamp Duty Act, an instrument, which is not duly stamped may be admitted in evidence upon payment of the proper duty with which it is chargeable on the amount required to make up the same and a penalty not exceeding three times the proper duty. The Stamp Duty Act, therefore had made clear provision to cure the deficiency of an instrument, which is not duly stamped, in order for such an instrument to be admitted in evidence. Therefore it is apparent that, if there is a deficiency of stamps in an instrument, that should be regarded as a curable defect that could be rectified upon the payment of the outstanding stamp duty and the required penalty in terms of the provisions of the Stamp Duty Act. In fact, referring to the provisions in the Stamp Ordinance, Lord Goddard, in the Privy Council decision in (Karunapejjalage Bilindi v Wellawa Attadassi Thero) (1945) 47 N.L.A. 7) stated that,

" , it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.&quot ;

I am in complete agreement with the view expressed by the Privy Council, as an objection of purely a technical nature should not be upheld to prevent the course of justice. However, it is also necessary to be borne in mind that, a Court should not allow a process that would pave the way to unwarranted delay, which also would result in thwarting the course of justice.

Acc0rdingly, although it is not specified in the Stamp Duty Act, it would be necessary to consider whether there is a time frame in permitting the payment of the proper duty and the penalty, when an instrument is not duly stamped. Section 33 of the Stamp duty Act, which is referred to earlier, clearly specifies that no instrument chargeable with stamp duty be admitted in evidence, unless such instrument is duly stamped. It is thus evident that, stamp duty should be paid prior to the admission of the relevant instrument. In the circumstances, where an instrument has to be admitted in evidence and if it is not duly stamped, the deficiency has to be cured prior to the instrument being marked in evidence.

In the present case, as stated earlier, the learned Judge of the High Court had granted time for the appellant to cure the deficiency in stamp duty, but the appellant had not taken any steps in this regard.

Learned President's Counsel for the appellant submitted that the Stamp Duty Division of the Department of Inland Revenue had been closed during the relevant period and therefore he was unable to obtain an order from the relevant authority, However, it is apparent that as stated earlier, learned Judge of the High Court after considering the submissions on behalf of the appellant had granted time more than on three (3) occasions for the appellant to pay the proper stamp duty and it is abundantly clear that the appellant had taken no steps to cure the deficit of the stamp duty.

In such circumstances, when ample time and opportunity had been granted to the appellant, quite rightly by the learned Judge of the High court, it would not be possible for this Court to grant further time at this juncture for the appellant to pay the deficit in stamp duty.

Although the Court should be mindful of not permitting mere technicalities to hinder the process of justice, it must also be taken into consideration that unwarranted delay would also necessarily result in thwarting the course of justice. Although it is necessary to grant time in remedying the deficit in stamp duty, that should be done, prior to the relevant instrument/document being marked in evidence and more importantly within the time fixed by the Court.

In the circumstances it is evident that the appellant has failed and neglected to rectify the deficiency in stamp duty paid on the Guarantee and Indemnity and therefore the learned Judge of the High Court was correct in holding that he cannot be allowed to produce and mark the said Guarantee and Indemnity.

There is one other matter I wish to refer to before I part with this Judgment.

Learned President's Counsel for the appellant submitted that if this court holds that the Guarantee and Indemnity is a document subject to stamp duty under item 7 of the Gazette Extraordinary No. 224/3 dated 20.12.1982 as amended by Gazette Extraordinary No. 948/15 dated 06.11.1986, the stamp duty would be a large sum of money the lessee would have to bear thereby burdening the lessee with such stamp duty in addition to the lease rental and taxes, which he is already obliged to pay for the main lease agreement. He further submitted that the guarantors will not accept to be liable to pay a large sum of money as stamp duty.

The person liable to pay stamp duty is clearly stated in the Stamp Duty Act. Section 24 refers to the person liable to pay stamp duty and refers to various categories where as section 24(f) states that,

"(24) Except where there is an agreement to the contrary, stamp duty shall be payable- (f) in the case of any other instrument, by the person drawing, making or executing such instrument."

The person, who draws, makes or executes the relevant instruments pertaining to a lease agreement undoubtedly is the Leasing Company and therefore unless and otherwise there is an agreement to the contrary, the liability of paying the stamp duty would be with the Leasing Companies or the relevant Financial Institutions.

The purpose and the intent of the Stamp Duty Act, is to facilitate the collection of revenue. Therefore when provision is made for the imposition of stamp duty on instruments and documents, it is necessary to adhere to the said provisions although it may seem to be a burden on certain parties. It is also to be noted that, Regulations are made in terms of Section 69 of the Stamp Duty Act and the role of this Court is to give effect to the said provisions as it is the bounden duty of any Court and the function of every Judge to impart justice within the given parameters.

For the reasons aforementioned, I answer the three (3) questions on which leave to appeal was granted in the negative. This appeal is accordingly dismissed and the order of the High Court dated 03.08.2004 is affirmed.

I make no order as to costs.

GAMINI AMARATUNGA, J. -I agree.

SALEEM MARSOOF,J. -I agree.

Appeal dismissed.