SRI LANKA SUPREME COURT **Judgement Delivered (2007)**

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Ashik v. Bandula And Others (Noise Pollution Case) - SLR - 191, Vol 1 of 2007 [2007] LKSC 4; (2007) 1 Sri LR 191 (9 March 2007)

ASHIK
v
BANDULA AND OTHERS
(Noise Pollution Case)

SUPREME COURT
SARATH N. SilVA, C.J.
TIIAKAWARDANE, J.
SOMAWANSA,J.
SC FR 38/2005
NOVEMBER 9, 2007

Constitution - Art 3 - Art 126 - 126(4) - Art 12(1) - Non issue of a loudspeaker permit - Police Ordinance Section 80 - Imposing of restrictions - Breach of fundamental rights? National Environment Act 47 of 1980- Sections 23P - 23R - Amended by Act 56 of 1988- Penal Code - Section 26 - Sound Pollution - Standards - Directions by the Supreme Court. - Public Nuisance.

The petitioners complained that, non issuing of loudspeaker permits under S80 Police Ordinance to .the trustees of the Jumma Mosque Weligama and imposing restrictions on such use is in violation of their fundamental rights.

Held:

Per Sarath N. Silva C.J.

"A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity."

(1) People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by S23P of the National Environmental Act 47 of 1980 (amended) to safeguard the public from harmful effects of noise pollution - No guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Art 12 (1) have been issued.

The Supreme Court having considered the matters before it, issued specific directions in terms of Art 126(4) of the Constitution.

APPLICATION under Art 126(1) of the Constitution.

Cases referred to:

1. Marshall v Gunaratne Unnanse - 1 NLR 179
2. Church of God (full Gospel) in India v K.K.R.M.C. Welfare Association - 1AR 2000 - SC - 2773.
3. In Re Noise Pollution - AIR 205 - SC 3136

Ikram Mohamed PC for the petitioners.
Ms. Indika Oemuni de Silva - 2nd, 3rd, 4th respondents.
Ms. B.J. Tilakaratne, Deputy Solicitor General for Central Environmental Authority.
Uditha Egalahewa for 7th respondent.

March 9, 2007
SARATH N. SilVA, C.J.

The proceedings in this case commenced with an application by the Trustees of the Kapuwatte Mohideen Jumma Mosque of Weligama impleading the action of the 2nd respondent (ASP) in not issuing a loudspeaker permit under section 81 of the Police Ordinance to the extent permitted in previous years and in imposing restrictions on such use, as being in breach of their fundamental rights.

When the matter was supported on 25.2.2007 for leave to proceed the Court noted that the application raises fundamental issues with regard to sound pollution and the standards that should be enforced by the Central Environmental Authority, and the guarantee of the equal protection of the law (Article 12(1)) in this regard.

Accordingly notice was issued on the Central Environmental Authority which was later added as the 6th respondent. The Environmental Foundation Limited being a nongovernmental organization that as consistently engaged in public interest litigation to preserve and protect the environmental was permitted to intervene in the case in view of the general concern that emerges in this case requiring adequate legal safeguards to protect the People from exposure to harmful effects of sound pollution.

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Mr. Senaka Weeraratne, Attorney-at-Law, sought to intervene representing the interests of persons affected by noise pollution. He was added as the 8th respondent.

In his affidavit dated 29.6.2007, he contradicted the claim of the petitioners for unrestricted use of loudspeakers in the call to prayer from the Mosque. He also contended inter alia that such unrestricted use makes:-

"Captive listeners of people of other religious faiths and violates the fundamental rights of the general public, such as the right to silence and the right to quiet enjoyment of property"

As a matter of personal experience, he contended in paragraph 4 of is affidavit that he is an aggrieved party as a result of similar conduct of a place of worship situated on the Marine Drive between Jaya Road and Nimal Road in a residential area in Colombo where

"the high pitched sound of a call to prayer is amplified five times a day beginning in the early hours of the morning, that is at 5.00 a.m. and ending at 8.15 p.m. and repeated daily and which conduct is causing unnecessary hardship and much disturbance, to residents in the neighbourhood the majority of whom belong to other religious faiths and which locality comprise in addition to residential dwellings, schools e.g. Holy Family Convent, private Accountancy Studies Institutions, Buddhist temples, Kovils, Churches "

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole.

The second respondent whose action has been impleaded in this case filed an affidavit supported with several other affidavits and documents. It appears that the particular dispute with regard to the action of the 2nd respondent, the ASP, being himself a Muslim, arose as a result of loudspeakers permits granted to three mosques situated in close proximity in the village of Kapuwatte in Weligama.

The dispute is between the Kapuwatte Mohideen Jumma Mosque and Jiffery Thakkiya Mosque on the one hand and the Jamiul Rahman Jumma Mosque on the other.

In paragraph 5 of the affidavit the 2nd respondent has stated that to the best of his knowledge from about April 2004 residents in the area where the three Mosques are located have complained of noise pollution due to the excessive use of the loudspeakers by the three mosques.

That, subsequently a dispute had arisen between the persons associated with the Mohideen Jumma Mosque and Jamiul Rahman Mosque with regard to the use of loudspeakers which resulted in the parties lodging complaints against each other at the Weligama Police Station. The Police conducted investigations into the

incidents and being apprehensive of an imminent breach of peace filed a "B" Report bearing No. 2154/04 in the Magistrate Court of Matara citing persons associated with the said Mosques as parties. It appears that the proceedings are continuing. The allegation now appears to be that the 2nd respondent has given more favourable treatment to the Jamiul Rahman Mosque.

The 2nd respondent has produced marked "2R4A" to "2R4G" photocopies of some of the complaints and affidavits of persons, all of whom are Muslims that specifically state that noise pollution resulting from excessive noise emitted from loudspeakers of the Mosque, has caused severe health problems. Two of the deponents have coronary ailments and have produced medical evidence in support. The ASP has stated that it was in these circumstances that he reduced the use of loud speakers in the call for prayer to 3 minutes since in his view as a Muslim that period is adequate. The petitioners have not sought to contradict the material adduced by the 2nd respondent.

It is seen that complaint emerge from Muslims themselves as to the harmful effects of excessive emission of noise from loudspeakers in Mosques. Thus Mr. Weeraratne does not stand alone as a victim of such excessive noise.

Although there is no contest in the case as to the harmful effects of noise pollution the case has gone on for more than 2 years to enable suitable regulations to be made to be implemented by the Central Environmental Authority effectively.

Section 23P to section 23R of the National Environmental Act No. 47 of 1980 as amended provides for restrictions on noise pollution. The scheme of section 23P and 23R is that it would be an offence to emit noise in excess of the volume intensity and quality of the standards or limitations that are prescribed which thus becomes a prerequisite for the effectiveness of these provisions. Deputy Solicitor General submitted that the standards and limitations that have now been prescribed in relation to industrial noise cannot be used in respect of community noise (Vide. proceedings 28.3.05).

In the circumstances the parties agreed for adjournments to facilitate the formulation of Regulations.

Draft regulations have been tendered from time to time to Court.

The Environmental Foundation limited made a comprehensive written submission that the initial draft regulations would be unworkable and ineffective and that in contrast the existing legal regime as contained in; section 80 of the Police Ordinance regarding the grant of permits for the use of loudspeakers, amplifiers and the like; section 261 of the Penal Code with regard to the offence of public nuisance; the provisions of the Code of Criminal Procedure with regard to the abatement of any nuisance and the National Environmental (Noise Control) Regulations No.1. of 1996; are adequate and that suitable directions could be issued by this Court in terms of Article 126(4) of the Constitution to assure the people equal protection of the applicable legal regime.

The Court noted that it is desirable to grant further time to formulate suitable Regulations and the added parties were

permitted to make representations to the relevant authority to improve the draft. Several postponements have been granted but there appears to be indecision, disputes, vacillation and on the whole a lack of collective will to take positive action. Deputy Solicitor General now submit that she has received instructions to move to add the Ministry of Religious Affairs as a party. This, in our view puts the matter back to square one. It has to be firmly borne in mind that Sri Lanka is a secular State. It terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions. of race religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this case, there could be no exceptions to accommodate perceived religious propensities of one group or another. No religion advocates a practice that would cause harm to another or worse still a would cause pollution of the environment, a health hazard or a public nuisance being an annoyance to the public.

We have had in this country probably the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute a public nuisance. I would refer to the Judgment of this Court handed down in the year 1895 in the case reported in Marshall v Gunaratne Unnanse(1).In that case the principal trustee of a Buddhist Vihare in Colombo was charged for creating noise in the night and disturbing the inhabitants of the neighbourhood. The report to Court was under the then applicable section 90 of the Police Ordinance. Considering the particular circumstances of the case Bonsor C.J., upholding the conviction stated as follows (at page 180):

" the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony. No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under section 90 of The Police Ordinance, 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance. "

It is to be noted that in terms of section 261 of the Penal Code a person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes inter alia any annoyance to the public or to the people in general who dwell or occupy any property in the vicinity. Section further states as follows:

"A public nuisance is not excused on the ground that it causes some convenience or advantage."

The proposition of Bonser, C.J., which could be cited as a classic statement of a secular approach in dealing with a public nuisance is referable to the final sentence

of section 261 cited by me above. A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity".

Subsequent jurisprudential developments in other countries follows a similar trend of reasoning.

In the case of Church of God (full gospel) in India v K.K.R.M.C. Welfare Association{2) at 2773 the Supreme Court of India posed the selfsame question as follows:

" Whether a particular community or sect of that community can claim rights to add to noise pollution on the ground of religion?"

Shah, J. in his Judgment at 2774 stated as follows in answer to that question

"Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours . Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick people afflicted with psychic disturbances as well as children upto 6 years of age are considered to be very sensitive to noise. Their rights are also required to be honoured. "

It transpired in the course of the submissions that at times there is rivalry between respective religious groups. In this case the rivalry appears to be between different places of worship of one religious group. It is commonly known that when there is call to prayer in the early hours of the morning at about 5.00 a.m. on the other hand amplifiers and loudspeakers blare forth recorded chanting of "pirith". The proceedings in this case evoked much response of persons who are buffeted by the countervailing forces of such amplified noise.

  ; It may be appropriate here to state albeit briefly some matters with regard to the chanting of "pirith" which dates back to the time of the Buddha. The chanting of "pirith" takes place only upon an invitation addressed three times to the Maha Sangha. Chanting ; follows with compassion to the devotees who address the threefold invitation.

Much respected Piyadassi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17) that benefit could be derived only, "by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings."

  ; Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antethesis of the Buddha's teaching.

  ; I would finally refer to the important case in India. In Re. Noise Pollution(3)at 3136, especially because in that case the Supreme Court of India issued several directions in order to safeguard the people from the harmful effects of noise pollution. The motion of the

intervenient 6th respondent is that similar directions be issued pertinent to our legal context in terms of Article 126(4) of the Constitution.

The Chief Justice of India commences his judgment delving into the etymology of the term "Noise" itself and has noted that it is derived from the Latin "Nausea" defined as unwanted sound. He has cited a leading authority which describes unwanted sound as "a potential hazard to health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears and has continued to state that

"noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust, to noise by ignoring it, the ear, in fact, never closes and the body still responds - sometimes with extreme tension, as to a strange sound in the night."

Further, "that noise is a type of atmospheric pollution. It is shadowy public enemy whose menace has increased in the modern are of industrialization and technological advancement." (at 3141 and 3142).

The Supreme Court of India has firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The Chief Justice observed -

"Nobody can claim the fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers. While one has a right to speech, and others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression." (at 3141)

In an exhaustive survey, the Supreme Court of India has dealt with the developments in many other jurisdictions where comprehensive provisions have

been made to safeguard people from the harmful effect of the public nuisance of noise pollution and finally the Court issued several directions (at 3164-3165) including

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a direction that "no one shall beat a drum or tom tom or blow trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00p.m. and 6 a.m.) except in public emergencies".

There is no dispute in this case that People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

Accordingly, we consider it to be just and equitable in the circumstances of the case to make the following directions in terms of Article 126(4) of the Constitution:

(i) That the emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity be considered a public nuisance in terms of section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance;

(ii) That all permits issued by the Police under section 80(1) of the Police Ordinance shall cease to be effective forthwith;

(iii) That no permits shall be issued in terms of section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10 p.m. (night) to 6 a.m. (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit shall be forthwith reported to the nearest Magistrate Court;

(iv) That in respect of the hours from 6.00 a.m. to 10.00 p.m. permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises.

(v) Where a permit is issued in terms of section 80(1) as provided in direction (iii) and (iv) sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with;

(vi) That the Police will make special arrangements to entertain any complaint of a member of the public against any person guilty of an offence of public nuisance as provided in section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in section 80 of the Police Ordinance contrary to any of these directions and take immediate steps to investigate the matter and warn such person against a continuance of such conduct. If the conduct is continued after that warning to seize and detain the equipment as provided in section 80(4) of the Police Ordinance and to report the matter to the Registrar of this Court.

Copies of this Judgment to be sent to the Secretary, Ministry of Defence and the Inspector General of Police for immediate action to be taken in regard to - Directions stated above.

The Inspector General of Police to submit a report to Court as to the action taken on the judgment. Mention case on 10.12.2007.

TILAKAWARDENA, J. - I agree.
SOMAWANSA, J. - I agree

Direction issued under Article 126(4).

Ed. Note - The Supreme Court made order that till the Regulation is made the directions that have been issued and the circulars issued by the

Haputhantirige And Others v. Attorney General - SLR - 101, Vol 1 of 2007 [2007] LKSC 2; (2007) 1 Sri LR 101 (29 March 2007)

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HAPUTHANTIRIGE AND OTHERS
V
ATTORNEY GENERAL

SUPREME COURT.
SARATH N. SilVA, C.J
DISSANAYAKE,.J.
SOMAWANSA,.J.
SC FR 10,11,12, 13/07
MARCH 14, 15, 2007

Fundamental rights-Constitution Art 12(1), Art 29, Art 126 (4) - 13th Amendment - Grade 1 admissions to National Schools - Circular arbitrary unequal and capricious - National Policy -Affirmed by Cabinet of Ministers?- Classification - 'Royster formulation '- National Education Commission Act 19 of 1991 - S2- Education Ordinance.

The petitioners in all the applications allege infringement in respect of the refusal to admit the several children named in the petition to Grade 1 of the respective National Schools. The allegations are related to unequal, arbitrary and capricious application of the Circular. The scheme of the Circular is to state the National Policy for admission of student to schools. The circular also states that the National Policy has been affirmed by the Cabinet of Ministers.

Held:

Quarere

"It is stated in paragraph 1.0 that the National Policy has been approved by the Cabinet of Ministers and reference is made to a letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers, however it is noted that the Circular itself is dated two days prior - this by itself renders it doubtful whether in fact the Cabinet of Ministers considered a National Policy on school admission as claimed in the Circular.

1) The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Art 12(1) sets out the positive element of the right that all persons are equal before the law, and guarantees "the equal protection of the law" and the bar

against discrimination on grounds of race, religion, language, caste, sex political opinion or place of birth - the safeguards that assume equality before the law.

2) Taken in the context of the Republican principle of equality and the fundamental guarantee thereof the phrase the law in Art 12 has to be interpreted in a wider connotation than the term law and within law in Article 170 to encompass any binding process of legislation.

3) The guarantee of the right of equality in Art 12 should extend to any binding process of legislation laid down by the executive or the administrative which affects in its application.

4) The law in its primary sense is contained in the Education Ordinance, but the Ordinance has not been amended and the elaborate system of regulations has fallen into disuse, and there is no law that is operative as regards National Schools or for that matter in regard to any School. Education, being the foremost responsibility of the Government has been operating for a long time in a legal vaccum.

5) The impugned Circular does not have of the general characteristics that, pertain to policy, it has a classification of 7 categories, from a functional perspective it is the binding process of legislation laid down by the executive as regards the matter of admission to government schools.

Per S.N. Silva, C.J.

"Both from the perspective of the application of the equal protection of the law guaranteed by Art 12 (1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admissions of students to schools should be that it assures to all students equal access to education".

6) The classification in the impugned Circular is not based on the suitability and the need of particular child to resume education in a National School or any other State School. It is based on wholly extraneous considerations and the suitability and the need of the particular student to receive education in the school is not ascertained in the process nor is there any method and criteria specified to ascertain such matters. The system of weighted marking contained in the Circular consequently defeats the objective of providing equal access to education.

7) The impugned Circular is inconsistent with the fundamental right to equality before the law and equal protection of the law guaranteed by Art 12(1), in so far it relates to the admission of students to Grade 1 of national/other school to which the Circular has been made applicable.

8) Section 2 of the National Education Commission Act 19 of 1991 empowers the President to declare from time to time the National Educational Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy has to be formulated on the recommendation and advice of the Commission.

APPLICATION under Art 126 of the Constitution.

Cases referred to :-

1. Gulf Colarado and Santa Railway Co. v Ethis - (1897) 165 US 150 165
2. Royster Guano C v Commonwealth of Virginia- 1920 - 253 US 412 at 415
3. Brown v Board of Education Topika- 347 US 483

Wijedasa Rajapakse PC with Rasika Dissanayake and Gamini Hettiarachchi for petitioners

Nuwan Peiris for 19th and 30th respondents

Sanjay Rajaratnam DSG for 2 - 8th and 10th - 12 respondents

Cur.adv. vult.

March 29, 2007
SARATH N SilVA, C.J.

The petitioners in all the application have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. The infringements they allege are in respect of the refusal to admit the several children named in the petitions to Grade 1 of the respective National School.

Admission to Grade I in Government school have resulted in a large number of applications being filed each year in this Court alleging infringement of the fundamental rights guaranteed by Article 12(1) and also in the Court of Appeal for writs of certiorari and mandamus. These matters have been generally dealt with as being urgent since the children on whose behalf the jurisdiction of the Court have been invoked are denied schooling and require relief without delay. With the intervention of Court administrative relief has been granted in many of the cases by admitting the children to the particular school concerned or to an alternative school.

The allegations have related to unequal, arbitrary and capricious application of the relevant circulars resulting in less

suited children securing admission to the detriment of the children who have been thereby compelled to invoke the jurisdiction of Courts. Quite apart from the thrust and parry of allegations and counter allegations, the underlying cause of this pervasive malady is the ever increasing demand for admission to leading schools in Colombo and other principal cities, administratively designated as National Schools within the purview of the Central Government as distinct from other schools within the purview of Provincial Councils and, the limited and number of places in such schools. Plainly, it is a situation of demand out stripping by far the availability of places. The response of the authorities to this classic situation of a gross mismatch in supply and demand has been to narrow down, through an intricate system of criteria contained in circulars (that would be examined hereafter), the area that would feed a particular school described in the Sinhala Circular as "The feeder area" of the leading school have become preposterously narrow to be as low as 600 meters for D,S Senanayake Vidyalaya located between Bullers Road and Gregory's Road in Colombo 7 and 1000 meters for Ananda College abutting Maradana Road, in Colombo 10. It is probable that none of the children admitted live within this narrow official "feeder area". If the Officials and particularly the principals of the schools stay outside the gates at commencement and close of school hours, they would see that the "feeder" buses and vans, that transport school children are from as far out as Gampaha, Nittambuwa, Negombo and Kalutara. The upshot is the nightmare of school time traffic which disrupts all other activity in the city. The reality of the faulty process that we have to address from a legal perspective was pithily captured in an editorial comment of a leading newspaper early this month as follows:

"That, the education sector is in a total mess becomes manifestly clear, year in year out from the brouhaha over the Grade One admissions. If the objective of education is to produce good citizens, the opposite of that happens in this country. Children are trained to be liars from the very beginning of their schooling. Parents forge bundles of documents to "prove" that they live within the stipulated distance from the schools of their choice and children are trained to memorize and utter blatant lies to cover up that

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crime at the interviews, where they are debriefed by teachers and principals to check whether their parents are lying! In a country where children are trained to lie at a very tender age, it is not surprising that more and more people want to enter politics! How can the Ministry of Education, which cannot deal with at least a child's school admission properly, handle his or her education efficiently thereafter?"

Notwithstanding virulent criticism, the authorities have continued in the same way allowing matters to be resolved in Court. Recourse to Court has increased over the years to reach a remarkably high figure this year. Often, when leave to proceed is granted the authorities agree to the admission of the children concerned rendering it unnecessary to proceed with the matter further. In view of the persistent allegations of infringements it was decided that number of cases be grouped together and heard on two dates by this Bench.

With the assistance of counsel, including counsel of the Attorney General's Department, we have been able to comprehensively examine the relevant provisions of the impugned Circular and the ramifications of applying them....

The lead cases in which pleadings are complete relate to Sujatha Vidyalaya, Matara (S.C.F.R 10- 13 of 2007) Mr. Wijyadasa Rajapakse, President's Counsel who appeared for the petitioners presented submissions on a two fold basis, viz:

(i) That the application of the provisions of the Circular to the relevant facts by the Respondents has been arbitrary and capricious, resulting in infringements of the fundamental rights guaranteed to the Petitioners by Article 12(1) of the Constitution.

(ii) That the classifications and criteria in the Circular applicable to the admission to Grade I are per se unreasonable and cannot be rationally related to the object of providing equal access to education.

President's Counsel strenuously submitted that the object. of free education provided by the State is not to favour particular groups by reserving the best facilities to pre-

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identified categories such as children of past pupils, and brothers and sisters of those already in a particular school. Such reservations do not pertain to the suitability of the child for admission and are in any event inconsistent with the character and purpose of a National School.

The facts relevant to the four applications in first group typify the complaints of alleged violation that are based on a combination of unreasonable and vague criteria and the arbitrary application thereof. The petitioners in the four cases made applications for the admission of their respective children to the Sujatha Vidyalaya, Matara, on the basis of Circular No. 20 of 2006 dated 23.05.2006 issued by the 10th respondent, being the Secretary of Ministry of Education, titled "Admission of Children, to Schools" (P1). The Circular is available only in Sinhala.

The petitioners admittedly reside within close proximity of the Sujatha Vidyalaya and their common complaint is that on the elaborate system of assigning marks which would be considered later, they infact received sufficient marks to secure admission of their children. However, 30 other children, residing further away secured admission depriving the petitioners' children of their due places in view of a decision of the respondents (stemming from a decision of the Acting Director of Education, as contained in document 6R4) to assign 15 marks to each child who was born at the Matara Hospital. As a result the petitioners children fell below the cut off point giving an undue advantage to children who were born in the Matara Hospital.

The case of arbitrary exercise of power in applying the Circular was unanswerable and the respondents agreed as an interim measure to admit the

children to school. However, this would be in addition to the 30 children who secured admission due to the fortuitous circumstance that they were born in the Matara Hospital and not in any other Hospital. That would have ordinarily concluded the case but for the decision to deal with the alleged infringements vis-a.-vis, the Circular in a comprehensive manner.

In this background I would examine the impugned Circular (P1) issued by the Secretary Ministry of education, referred to above. The Circular has several parts including that relevant to

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these applications dealing with the admissions to Grade I. The scheme of the Circular is to state in Part I, the national policy for admission of students to schools. It is stated in paragraph 1.0 that this national policy has been affirmed by the Cabinet of Ministers and reference is made to letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers. However, it is noted that the Circular itself is dated two days prior, that is on 23.05.2006. This by itself renders it doubtful whether infact the Cabinet of Ministers considered a national policy on school admission as claimed in the Circular. Be that as it may, similar Circulars appear to have been issued even in the previous years and the Circular is examined on the premise that it is an act of the executive.

The national policy in respect of the different levels of admission to schools as contained in the Part I, is elaborated in the other parts of Circular and the schemes of marking are contained in the schedules at the end.

Admissions to Government schools are effected mainly at two levels

They are;

i) Admission to grade I being the subject matter of this application; and
ii) Admission to Grade VI based entirely on an island-wide scholarship examination;

The second level of admission at Grade VI rarely result in complaints, since it is based on the marks assigned at an examination conducted by the Department of Examinations. Thus, a merit based scheme is less prone to allegations of abuse provided it is properly structured to ensure transparency. The main submission of the President's Counsel is that the scheme for Grade I as contained in the Circular is totally devoid of a merit criteria in the sense of the suitability of a child for admission to particular school and is based on extraneous criteria such as ownership/occupation of property: the record of the parent as a past pupil (when both parent have been past pupils marks being attributed in respect of the parent having the better record); and the record of any brother or sister of the applicant child, already in that school. The extent to which the suitability of the child is excluded from the process is seen from the fact that no marks whatsoever are attributable on that account.

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Counsel submitted that the resources of the State being public funds are spent largely on National School and that it is essential that the facilities in such schools being limited, the suitability of the child should be the principal criteria with a "feeder area" being realistically fixed with reference to Divisional Secretaries areas. That, the assignment of quotas to past pupils and brothers and sisters is an unreasonable classification which negates equal access to education being be the objective of the law.

In the light of these submissions being far reaching in their ambit, I would at first examine the specific classification that are made in Circular P1 in respect of admission to Grade I. The circular classifies seven categories specifying a percentage of admission for each as follows:

1) Householders children	40%
2) Children of the past-pupils of the school	25%
3) Brothers and sisters of the children receiving education in the school	15%
4) Children of the public officers who have received transfers and taken residence in the area in which the school is located and the children of	6%
5) Children of persons who are not householders	7%
6) Children of persons who are directly involved in institutions connected	5%
7) Children of persons who have returned from abroad	2%

In addition to the foregoing, clause 1:1 (d) provides that the initial selection should be of 34 student per class and 5 places be reserved for children of members of the Armed Forces and the Police who are engaged in service in operational areas. One place is reserved for the children of persons who get transferred after the initial admissions on the basis of exigencies of state service. Thus a total of 40 student is specified for each class.

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Clause 5:1 specifies the qualifications for admission from the householders category for 40% of the vacancies. It is stated that children permanently resident close to the school would qualify on the basis of residence of their parents or their grand parents where the parents are living in the same house.

5:1 (b) provides that residence should be for six years or more and to gain priority following criteria is set out. They are

i) ownership of the place of residence;
ii) evidence of permanent residence and the period;
iii) distance to the school from the place of residence;

5:1(c) states that evidence of ownership would be:

i) Title deed;
ii) Householders list;
iii) Permit granted by the National Housing Authority;
iv) Title deed of the grand parents if the residence is the grand parents house
v) A certificate issued by the head of the Institution as regards residence in official quarters;
vi) Any other applicable document

Schedule II contains a scheme of marking in reference to particular documents.

A maximum of 50 marks will be assigned as follows:

i) a document confirming the ownership	25
ii) birth certificate of the child (the relevant address to be included)	15
iii) certificate of the Grama Sevaka confirmed by the Divisional Secretary	5
iv) electricity, water, telephone and the like	3
v) any other documents	2

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Clause 2 of the schedule assigns further total of 150 marks for the period of residence in the particular place. If the residence is over 6 years 150 marks, if it is 5-6 years 90 marks and 4-5 years 30 marks.

Clause 3 gives the marks on the basis of distance from the school. The distance is calculated from the office of the primary section of the school. If it is calculated from the office of the primary section of the school. If it is within 500 meters - 60 marks, and the number of marks get reduced proportionately as it goes further and where the distance is more than 3000 meters only 5 marks will be given.

President's Counsel made serious criticism of this entire scheme. He submitted that the document as to residence being the most important on which the marks as to distance and so on are also calculated, is specified as a title deed. He submitted that the persons before whom the documents are produced are not qualified, in any way to decide on the validity or otherwise of a title deed. The validity of a deed and the title conveyed thereby is a vexed question in civil litigation. It appears that the only matter looked into is the fact of registration. Under our law, registration does not attribute title to land is at best a claim to priority, which has to be considered in the light of the other registered documents. We have to yet move into a system of title registration.

Counsel accordingly submitted that this has left open an avenue for fabrication of deeds, especially in urban areas. He further contended that in any event one could

have ownership of property that is not reflected in a title deed. In a situation where property is inherited from a parent who has died and the testamentary proceedings are not concluded there would be no registered document. Similarly, an instance of co-ownership or of prescriptive possession cannot be proved by a title deed as required in Clause I (i) of the schedule. Such a person would fall outside the entire scheme of marking. Thus the scheme favours the person who secures a title deed by hook or crook and may well exclude the genuine owner. The editorial comment of "bundles" of forged documents stems from these requirements in the scheme of marking.

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It was revealed that several criminal prosecutions have been instituted against applicant parents; a sad ending to an endeavour to secure the admission of a child to a school of choice.

The extent of the prevarication of documents that take place is reflected in Supreme Court case NO.1 01/2005 which relates to an application for admission to Ananda College. The parent had obtained a lease for premises bearing No. 142 Temple Road, Colombo 10. These premises are said to be located 50 meters away from Ananda College. The document P8 produced in that case is the electoral list in respect of the said premises. The name of the applicant parent who is a member of the Armed Forces appears as chief householder. The second name is that of the mother. The third is an entirely different name of a medical officer. The fourth is a lecturer of a University who appears to be the wife of the third person. The fifth and sixth are persons bearing different names who have no occupation. The sixth is described as a Coordinating officer. The eighth is described as being self employed. There is yet another, making a total of nine. The modus operandi appears to be that each year the particular applicant shifts to the top position and present chief occupant who has made use of that position drops down. Ironically, the owner who has purported to give the lease is also included as one of the occupants. Hence, there is no change in the actual possession of the premises.

Being located 50 meters away from Ananda College the place is of high demand. Quite apart from fraudulent school admissions this situation presents a serious danger to the exercise of the franchise and the electoral process.

The next basis of assigning marks to a householder is on the birth certificate of the child concerned. This requirement is misconceived since the child is not given an address in the birth certificate. The particulars given of the mother and father in the birth certificate are places of their birth. It appears that the authorities have had in mind, the address of the informant specified in the reverse of the birth certificate who could be any person furnishing the information to the Registrar of Birth. In respect of birth at the Matara Hospital, in place of name of the informant the rubber stamp of the DMO had been placed. In these circumstances the authorities

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decided to assign the full 15 marks to children born in the Matara Hospital. It is inexplicable that the acting Director herself who is supposed to be in charge of subject has given instructions on such a nonsensical basis. No person with an iota of common sense would give such an instruction. In view of this atrocious mistake 30 children secured admission.

President's Counsel then took on category of past pupils. He submitted that in terms of schedule 03 of the Circular marks are given on the basis of the period spent by the parents in the school; the examinations passed, performance including participation in musical band and so on. The significant point raised by Counsel in that where a parent had gained admission to the school pursuant to the year 5 scholarship examination only 2 marks are assigned. A clear instance of discrimination in respect of parents, long stayers preferred as against scholars. Whereas when parent had entered at grade I and continued 13 marks are assigned. Counsel submitted that it is irrational to assign marks on the basis of the period the parent has spent in school and his achievements both as a student and in extra curricular activities.

There is indeed merit in the submission of Counsel and when one peruses the scheme it appears as if though the scheme is designed to ascertain the suitability of the parent for re-admission to the school and not that of the child whose suitability is totally ignored. Similarly, in the other category of brothers and sisters marks are assigned in respect of achievements of the brother and sister already in school. In respect of both categories residence is also a criteria which has to be decided as in relation to householders. That scheme as revealed in the preceding analysis is totally flawed.

As regards the category of "transfers" Counsel submitted that Members of Parliament and Provincial Councillors are given maximum of 20 marks although they are not in a transferable service. It has to be noted that upon election they should remain to serve their electorates and not move to urban centers and be removed from the area where their attention is most needed. If the elected members remain in their particular areas those schools will develop and the demand for leading school would gradually diminish. The scheme is totally misguided in respect of elected representatives.

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President's Counsel submitted that reserving of 2% of the vacancies for persons who return from abroad results in an incongruity where places may have to be kept vacant for such persons denying facilities to children who have had continued residence within the country. These vacancies are later filled in a surreptitious way. It appears that there is no end to the list. The maximum of 40 for a class is exceeded by far and at times a whole new class is established to accommodate those who are favoured.

Since the challenge to the validity of the Circular has far reaching implications, I have to examine the grounds urged from the ambit of the fundamental right to equality guaranteed by Article 12(1) of the Constitution.

The Preamble of the Constitution states the "immutable republican principles" on which it is based as being "Representative Democracy" and the assurance to all people "Freedom, Equality, Justice, Fundamental Human Rights and the independence of the judiciary". These principles partake of Democracy and Socialism being the components of the name of the Republic.

The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Article 12 of the Constitution. Sub Article (I) sets out the positive element of the right, that "all persons are equal before the law". The other provision in Sub Article (1) which guarantees "the equal protection of law" and the bar against discrimination on grounds of race, religion, language, caste, sex, political opinion or place of birth contained in Sub-Article (2), are the safeguards that assure equality before the law. Taken in the context of the republican principle of equality and the functional guarantee thereof, the phrase "the law" as appearing in Article 12 has to be interpreted in a wider connotation than the terms "law" and "written law" defined in Article 170 of the Constitution, to encompass any binding process of regulation. Since the jurisdiction of this Court in terms of Article 126 and the right as contained in Article 17 to invoke such jurisdiction is in relation to executive or administrative action, the guarantee of the right to equality in Article 12 should extend to any binding process of regulation laid down by the executive or the administration which affects persons in its application.

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It is necessary at this point to ascertain "the law", including any binding process of regulation, from the perspective of which the alleged infringement has to be judged.

The law in its primary sense of an Ordinance or Enactment of the legislature relating to Education, is contained in the Education Ordinance originally proclaimed in 1939, prior to the granting of independence. A perusal of the provisions of the Ordinance reveals that these provisions have fallen into disuse. A similar observation has to be made as regards the exhaustive regulations that have been made under the Ordinance. They are contained in nearly 200 pages in the Volume of Subsidiary Legislation.

I have to digress at this point to state albeit briefly the sequence of events in which the Education Ordinance as amended and the Regulations made thereunder fell into disuse.

The Ordinance established the Department of Education as the Central Authority for Education which functioned under the general direction and control of the Minister. There was a Central Advisory Council to advise the Minister and Local Advisory Committees in different parts of the country at the level of Municipal

Councils, Urban Councils, Town Councils and Village Councils. These Advisory Committees looked into the educational needs of the particular areas. The Government functioned as the regulator of education and standards were laid down and enforced through a system of School Inspectors, Directors and the like. The schools were separately managed by religious and non religious bodies and received assistance from the Government. Hence there were mainly the "Assisted Schools" and a few Private Schools. The education system thus structured including the Central Colleges became a model for the whole Region and the country achieved the much acclaimed high levels of literacy and of academic excellence. There have been drastic changes in the system commencing from 1961 when the management of "Assisted Schools" was taken over by the Government. Thereby, the Government became the manager of virtually all schools and shed its role as the regulator and supervisor. The well. structured law and the comprehensive Regulations became mere pages in the Statute books.

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Then, we come to the 13th Amendment to the Constitution which inter alia, provided for the devolution of power to Provincial Councils. In terms of section 3 of List 1 in the 9th Schedule to the 13th Amendment, "Education and Educational Services" to the extent set out in Appendix III are devolved to Provincial Councils. Section 1 of Appendix III states that the provision of facilities to all State schools, other than specified schools shall be the responsibility of the Provincial Council. It is there provided that specified schools will be "National Schools". The concept of "National Schools" derives solely from its single reference to it in Appendix III. Almost all leading Government schools have been declared as being "National Schools". The Education Ordinance has not been amended to provide for the newly emerged situation and there is no law that is operative as regards National Schools or for that matter, as far as I could discover in regard to any school.

The alarming situation is that Education being the foremost responsibility of Government has been operating for a long period of time in a legal vacuum. Where there is no law it is anarchy that prevails. In this vacuum shorn of the carefully structured regulatory and supervisory system, with Advisory Councils at different levels, self styled experts exercising the freedom of the wild ass have dangerously tampered with the process, to bring about chaos. The resultant tragedy is revealed in a survey carried out by the National Education Commission, according to which reportedly 18% of the Grade VI students are illiterate. It is unnecessary for the purpose of this judgment to delve into the other alarming revelations of this survey.

It appears that the impugned Circular P1 itself is referable to the opening line of List II (Reserve List) in the 13th Amendment which states that "National Policy on all subjects and functions" will come within the Central Government. Hence we have a situation where the law as contained in the Education Ordinance and the elaborate system of regulations having fallen into disuse and the matter of admission to schools being regulated by a Circular purporting to be a statement of National Policy. It is plain to see that the Circular does not have any of the general

characteristics that pertain to policy. It has a classification of 7 categories, a scheme of weighted marking and a related identification of documents that

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could be received in evidence. From a functional perspective it is the binding process of regulation laid down by the executive as regards the matter of admission to Government Schools. On the reasoning stated above it would constitute "the law" within the purview of Article 12(1) of the Constitution in reference to which the alleged infringement of the right to equality has to be judged.

I have now to revert to the right to equality guaranteed by Article 12(1) and the basis on which its content would be applied to judge an alleged infringement. Dr. Wickremaratne (Fundamental Rights in Sri Lanka - 2006 Second Edition at page 286) citing from the renowned exponent of Socialism, Harold Laski (A Grammer of Politics), C.G. Weeramantry and the Judgment of Brewer J., sums up the concept of equality and the manner in which the equal protection of law applies, as follows:

"Equality, as Laski stated, does not mean identity of treatment. 'There can be no ultimate identity of treatment so long as men are different in want and capacity and need'. Men are unequal in strength, talent and other attributes. While some of these are natural, others are referable to the society in which they live. Some are born with advantages. Other factors and combinations of factors may favour some people and place others at a disadvantage. To quote Weeramantry:

"As the myriads of constituent units of a society keep thus shifting their positions relative to each other, absolute equality among (men) even in one characteristic of for a moment of time is patently an impossibility Far greater is the impossibility of preserving general equality for any period, however short. A permanent state of equality is only the remotest dream. "

Equal protection does not mean that all persons are to be treated alike in all circumstances. It means that persons who are similarly circumstanced must be similarly treated. The State is however permitted to make laws that are unequal and to take unequal administrative action when dealing with persons who are placed in different circumstances and situations. Thus the State has the right to classify persons

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and place those who are substantially similar under the same rule of law while applying different rules to persons differently situated. "A classification should not be irrational or arbitrary. It must be reasonable and based on some real and substantial distinction, which bears a reasonable and just relation to the act in respect of which the classification is proposed and can never be made arbitrary and without any such basis. "

The requirement stated by Brewer J., in the case of Gulf Colarado and Santa Railway Co v Ethis(1)cited above, has been subsequently stated as the "Basic standard" to be satisfied in a permissible clarification. The classic formulation of the "basic standard" is that stated in the case of Royster Guano Co. v Commonwealth of Virginia(2)at 415. It reads as follows:

" classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Therefore in applying what has been described as the "Royster formulation" to test the validity of classification we have to first look at the object of the law and then consider whether the classification could be reasonably related to achieve the object. As noted above the law as contained in the Ordinance and Regulations have fallen into disuse. The constitutional scheme for devolution of power in the subject of education has been defeated to a great extent by recourse to a single reference to "National Schools" in Appendix III. We are confronted with a jurisprudential paradox of a Circular purporting to be a statement of National Policy being is the only binding process of regulation as regards admission of students to Government Schools. The Circular has been issued in the exercise of the power reserved to the Government to formulate "National Policy" on all subjects and functions.

There is no provision in the 13th Amendment that defines the ambit of Government action that would come within the broad phrase, 'National Policy'.

Maxwell on The Interpretation of Statutes, under the heading "An Act is to be regarded as a whole" (12th Ed. Page 58) states that

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" one of the safest guides to construction of sweeping general words which are hard to apply in their full literal sense is to examine other words of like import in the same instrument, and see what limitations must be imposed on them "

The relevant principle of interpretation with particular reference to the interpretation of provisions in a Constitution is set out in Bindra's Interpretation of Statutes - 9th Ed. page 1182 as follows:

"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. "

In applying these principles of interpretation I am of the view that the broad phase "National Policy" appearing at the top List II should be interpreted together

with the relevant provisions in Chapter VI of the Constitution which contains the "Directive Principles of State Policy."

The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the 'Directive Principles of State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society." Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert.

As regards education, the policy objective is stated in section 27(2) (h) as follows:

"The state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include -

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.....
(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels. "

This objective as to equal access to education has gained recognition in section 3(2) of the Tertiary and Vocation Education Act No. 20 of 1990.

Equal opportunity in the matter of education was held by the Supreme Court of the United States to be a requirement of the Equal Protection Clause (similar to Article 12) of the Fourteenth Amendment to the Constitution. In Brown v Board of Education Topika(3) - Chief Justice Warren delivering the opinion of the Court stated as follows: (at 493):

"Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms. "

Hence both from the perspective of the application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the

objective of any binding process of regulation applicable to admission of students to schools should be that it assures to all students equal access to education.

On the reasoning stated above the question before this Court narrows down to whether the classifications of students for admission in the impugned Circular P1 and the criteria laid down

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therein can be reasonably related to the objective of providing equal access to education.

The preceeding analysis reveals that the classification in P1 is not based on the suitability and the need of a particular child to receive education in a national school or any other State School. The classification is based on wholly extraneous considerations such as the residence of the parents to be ascertained from the ownership of property; whether the parent is a past pupil and if so for what period and his achievements; whether the child to be admitted has a brother or sister in the school and if so the brother's or sister's achievements or whether the parent has been transferred in the manner that has been referred to above. The suitability and the need of the particular student to receive education in the school is not ascertained in the process, nor is there any method and criteria specified to ascertain such matters.

Similarly, the system of weighted marking referred to above as contained in the Circular completely defeats the objective of providing equal access to education.

For the reasons stated above we hold that the Circular P1 applicable in the matter of admission of students is inconsistent with the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution, in so far as it relates to the admission of students to Grade I of national schools and other schools to which the Circular has been made applicable.

We are mindful of the resultant position, that there would be no binding process of regulation in the matter of admission of students to Grade I. This would not normally be the consequence of a declaration of invalidity of executive or administrative action since fresh action can be taken under the applicable law. In this instance, as noted above law and written law relevant to education have fallen into disuse resulting in a legal vacuum.

Since the jurisdiction of this Court in terms of Article 126(4) of the Constitution empowers the court to make "directives as it may seem just and equitable in the circumstances," we consider it appropriate to indicate a course of action which in our view may alleviate the situation that has come to an impasse.

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The authorities have failed over the decades that elapsed to provide an effective to legal machinery to manage, regulate and supervise education. The Ministry of Education appears to have formulated P1 as the purported National policy outside the framework of the law, which fact by itself would suffice to declare invalid. Section 2 of the National Education Commission Act No. 19 of 1991, empowers the President to declare from time to time the national Education Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy is formulated on the recommendations and advice of the Commission and in terms of section 2(2) includes, inter alia:

" methods and criteria for admission of students"

This in our view is the proper guideline for the formulation of a policy. The Ministry fell into error by laying down classifications, quotas and a system of weighted marking being elements completely antithetic to the guarantee of equality before the law whereas the focus should be on appropriate methods and criteria that would apply in the process of effecting admissions. In the situation that has arisen we are of the view that it is appropriate for immediate action to be taken in terms of the National Education Commission Act for the formulation of a policy setting out methods and criteria for admission of students.

Counsel submitted that leading private schools in Colombo have adopted different methods to be applied in the admission of students. The methods have been in certain instances structured to include interviews with parents and children and a suitable test which should be faced by the children seeking admission. These tests not being written tests are based on the methodology that is adopted in pre-school education. It has now been established by clear scientific evidence that all the elements that go to develop character and personality are in place by the time a child reaches the age of 5 years. Detailed studies have been done in the United Kingdom in this regard under a separate Ministry in charge of the subject of Children. In the circumstances there is a wealth of experience, both in this country and outside on the basis of which a suitable methodology and criteria could be adopted for admission of children particularly to Grade 1.

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The National Education Commission may if it is considered appropriate seek the assistance of child psychologists and competent pre-school educators in formulating the appropriate methods and criteria. The process of interviews and tests to be included have to be transparent and all safeguards should be put in place to minimize allegations of favourism.

The present situation has resulted in a gross abuse of the process of admission of students. In the circumstances it would be necessary to devise a new process in which the participation of authorities who have brought about the tragic situation be excluded and the process to be administered directly under the purview of the President as provided in the National Education Commission Act.

The demand for education in leading schools in Colombo and other urban centers result from the lack of appropriate facilities in the outer areas. In the circumstances the national policy should also encompass a suitable program to develop a minimum of two schools in each Divisional Secretariat Division so that with the passage of time these schools would reach the same standard as that of national schools.

The final matter to be addressed is in relation to the other applications pending before this Court and the Court of Appeal. Further litigation is not warranted in view of the finding of illegality as to the Circular P1 in respect of admission to Grade 1. In the circumstances suitable administrative relief should be granted to the persons affected. Since the availability of places in schools is a variable factor which cannot be addressed in Court, a Committee may be established to ascertain the grievances of the persons who have already invoked the jurisdiction of Court and to grant administrative relief, if it is established that any student concerned is suitable for admission to a particular school. This process would be available only to persons who have already invoked the jurisdiction of Court considering the administrative difficulties that would otherwise arise if the floodgates are opened at this stage for another series of applications for relief in the matter.

Considering the directions that are made in this Judgment, the Registrar of this Court is directed to send a copy of this judgment to the Secretary, to His Excellency the President to facilitate action as stated above.

The national policy on school admission to be formulated may be submitted to Court for the policy to be examined from the perspective of the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution.

S.C.(FR) Applications 10 to 13/2007 are allowed and the petitioners are granted the declaration that their fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by executive and administrative action.

It is further declared that the Circular marked P1 is inconsistent with Article 12(1) of the Constitution and is invalid and of no force or avail in law in respect of admission of students to Grade 1 in the schools to which the Circular is addressed.

No costs.

DISSANAYAKE, J. - I agree.
SOMAWANSA, J. - I agree.

Relief granted.

National Policy on school admission to be formulated and submitted to the Supreme Court

Watte Gedera Wijebanda v. Conservator General Of Forests And Others - SLR - 337, Vol 1 of 2009 [2007] LKSC 15; (2009) 1 Sri LR 337 (5 April 2007)

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WATTE GEDERA WIJEBANDA VS. CONSERVATOR GENERAL OF FORESTS AND OTHERS

SUPREME COURT
SARATH N. SILVA, C. J.
SHIRANEE TILAKAWARDANE, J. AND
SALEEM MARSOOF,
S.C. APPLICATION NO. 118/2004
SEPTEMBER 7TH, 2005,
OCTO MER 10TH AND 24TH, 2005,
JANUARY 9TH,2006,
JUNE 5TH,2006

Fundamental Rights - Constitution - Article 12(1) - Equality before law - Article 27(4) - Directive principles of State policy enjoins the State to protect, preserve and improve the environment - Article 28 - Fundamental duty upon every person to protect nature and conserve its riches - Public Trust doctrine - Present generation holds the natural resources in trust for future generations - National Environment Act No. 47 of 1980 - Section 26(1) as amended by Section 9 of the National Environmental (Amendment) Act No. 56 of 1988 - Permit delegation of the powers and functions of the Central Environmental Authority to any Government Department, Corporation, Statutory Board, Local Authority or any Public Officer - Fauna and Flora Protection Ordinance No.2 of 1937 - Section 2 - Minister has power to declare a specified area of land to be a national reserve.

The Petitioner was granted leave to proceed in respect of an alleged infringement of Article 12(10) of the Constitution.

The petitioner instituted this application for violation of his fundamental rights, after being refused a permit for quarry mining of silica quartz in an environmentally sensitive area. However, he became aware that one, several or all the 1st to 5th respondents had granted a mining permit to the 6th respondent with respect to the same area to carry out quarry mining. The petitioner claims that the respondents have acted in a discriminatory manner depriving and denying the petitioner of his right to equal treatment.

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Held:

(1) The Constitution in Article 27(4) of the directive principles of State policy enjoins the State to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person to protect nature and conserve its riches.

(2) The doctrine of "public trust", recognized that the organs of State are guardians and preservers of the resources of the people.

(3) Under the 'public trust doctrine' as adopted in Sri Lanka, the State is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all the protection and regeneration of our environment and its resources.

Per Shiranee Thilakawardena, J.

"Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability."

(4) Even if environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution.

(5) Although the Directive Principles of State policy in Article 27(4) of the Constitution, are riot specifically enforceable against the State, they provide important guidance and direction to the various organs of State in the enactment of laws and in carrying out the functions of good governance.

(6) Although, the international instruments and constitutional provisions are not legally binding upon governments, they constitute an important part of our environmental protection regime, and the importance and relevance of which must be recognized when reviewing executive action vis-a.-vis the environment.

(7) In terms of Article 3 of the Constitution the sovereignty is in the people, and is inalienable and being a representative democracy, the powers of the people are exercised through persons for the time

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being only, entrusted with certain functions, and as such must at all times be considered by them as a sacred trust, never to be exploited for short term commercial

gain or personal gain even by those holding political power, or exploited for their own personal gain and selfish agendas.

Per Shiranee Tilakawaradena, J .

"The enactment of a law and tolerating its infringement, is at times. worse than not enacting a law at all. The continued infringement of law, over a period of time is facilitated by a high level of laxity, tolerance and even collusion on the part of the administrative authorities concerned with the implementation of the law."

(8) The petitioner's right to equality and equal protection of the law under Article 12(1) of the Constitution has been violated through the arbitrary and capricious acts of
the respondents in issuing a quarry mining permit to the 6th respondent.

(9) The issuance of an environmental licence with a validity, extending beyond that of the mining permit was a clear violation of established procedure and raised mala fides against the relevant authorities who sanctioned such licence.

(10) Where a Statute requires the power to be exercised in a certain form, the neglect of that form renders the exercise of the power et ultra vires.

(11) The Court would not substitute its discretion for that of the expert, but would interfere with its exercise, if it is sought to be exercised in an arbitrary manner or in the matters outside the limits of the discretionary authority conferred by the legislature or on considerations extraneous to those laid down by the legislature.

(12) That the application of the petitioner for conducting mining activities has been rightly refused by the relevant authority.

(13) The 6th respondent's permit was in any event invalid, as he did not have a valid environmental licence under the National Environment Act.

Cases referred to:

(1) *Som Prakash Rekhi us. Union of India,* AIR 1981 S.C. 212

(2) *M. C. Mehta us. Union of India,* AIR 1988 S.C. 1037

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(3) Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh, AIR 1988 S.C. 2187

(4) Damodar Das vs. The Special Officer, Municipal Corporation of Hyderabad, AIR 1987 Ap 171

(5) M. C. Mehta vs. Kamal Nath (1997), S. C. C. 388

(6) Bulankulama vs. Secretary, Ministry of Industrial Development (2000) 3 SLR 243

(7) Danube Case (Hungary vs. Slovakia) (1997) 1CJ Reports 78

(8) A. P. Pollution Control Board vs. Nayada (1992) 2 S. C. C. 718

(9) Vellore Citizens' Welfare Forum vs. Union of India (1995) 5 S. C. C. 647

(10) ICELA vs. Union of India, AIR 1997 S. C. 3519

APPLICATION under Article 12 (1) of the Constitution.
D. P. Kumarasinghe, P. C. with Chandana Prematilaka for Petitioners.
N. Sinnathamby, P. C. with K. M. B. Ahamed for the 6th Respondent
Neville Abeyratne with Samanthi Gamage for the 8th Added Respondent
Sanjay Rajaratnam, D. S. G. for 1st, 2nd, 3rd, 4th, 5th, 7th & 9th Respondents.

Cur. adv. vult.

April 5th 2007

SHIRANEE TILAKAWARDANE, J.

The Petitioner was granted leave to proceed in respect of an alleged infringement of Article 12(1) of the Constitution, on 28.04.2004. The Petitioner pleaded that the acts of one, several or all of the 1st to the 5th Respondents in denying the Petitioner a permit to mine the quarry of silica quartz deposited at Kiriwalhena, in the Gramasevaka Division of Polaththawa, constituted a violation of the Petitioner's right to equality and equal protection of the law guaranteed under Article 12(1) of the Constitution.

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The Petitioner claims that although his application was rejected by the Respondent authorities, based on grounds set out in document P11 (that the quartz deposit is situated less than a mile from the Girithale Minneriya national reserve; that it is situated close to Sigiriya archeological area; that mining activities at the site may cause damage to wild life and water resources; .that watercourses to the ancient Sitiriya Maha Wewa may be altered as a result of the mining and that it is the decision of the Environmental Committee of the Matale District, not to permit quarry mining in the lands surrounding Sigiriya), the 6th Respondent was granted a mining lease with respect to the same land by the Respondent authorities without recourse to the objections contained in P11. It is the Petitioners' contention that by granting a mining license to the 6th Respondent, without applying the same grounds and objections set out in P11, the Respondent authorities have acted in an unreasonable,
arbitrary, capricious and discriminatory manner.

In this regard, it is also the Petitioners' contention that he had a legitimate expectation that the same grounds of objections set out in P11, which deprived the Petitioner of a permit, would be equally applied to the mining application submitted by the 6th Respondent. Therefore in failing to apply the same standards and objections to the concerned applications the Petitioner claims that the Respondents have clearly acted in a discriminatory manner depriving and denying the Petitioner of his right to equal treatment.

Originally there were only 7 Respondents in this case. By order dated, 07.09.2005, this court added A. G. Sirisena,the Chairman of Dambulla Predeshiya Sabha at the relevant time, as the 8th Respondent. Furthermore, in consideration of the environmental impact, which was referred to in document P11, the Chairman of the Central Environmental Authority was added as the 9th Respondent and notice was issued to these added parties.

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In addition, the 9th Respondent was directed to carry out an inspection of the site at which the mining had taken place, and report on the extent of the mining activities that had been carried out to date, and also to submit photographs depicting the said area, and this is annexed to the docket as "Field Inspectors Report".

Several documents have been submitted by the Respondents to support the sanction granted by the Respondent Authorities for the mining activities of the 6th Respondent. It is pertinent that these documents be subjected to the strictest scrutiny, as the validity and legitimacy of these documents appears to have a direct bearing on the merits of this case.

The 6th Respondent submitted a document marked as 6R13,which was presented as a 'true copy' of the mining permit. issued to the 6th Respondent Company by the 4th Respondent. This permit purportedly granted license to the 6th Respondent to "extract quartz in one acre of land" from 06.02.2004 up to 05.02.2005.

A mining permit contains important conditions, which are a prerequisite to the commencement of mining activities. These conditions are displayed on the reverse of the permit. Document 6R13 however does not contain any such conditions on its reverse. Even a superficial comparison of the two documents 8R8, (which is a permit submitted by the 8th Respondent and should be identical in format to the permit 6R13), and mining permit 6R13, clearly shows that the 6th Respondent has suppressed the mandatory conditions, displayed on the reverse of the document, thereby depriving the court of the significance of the 5th condition, which mandates that, "the holder should obtain an Environmental Protection License (EPL) from the Central Environmental Authority, under the National Environmental Act No. 47 of 1980, prior to commencement of mining operations".

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The 6th Respondent purported to rely on document 6R14 as the Environmental Protection License. However, this contention is demonstrably false. Paragraph 9 of the environmental license (6R14) refers to the relevant mining permit as bearing No. IML/C/4441, but the mining permit 6R13 relied on by the 6th Respondent is numbered IML/C/ MD/ 19. Clearly the permit referred to in the environmental license, 6R14, is distinct from and bears no relation to the permit 6R13 relied on by the 6th Respondent. The 6th Respondent could therefore not have legally commenced any mining activities on the said land without an environmental license corresponding to the permit 6R13.

I am unable to place any reliance on the affidavit of the 6th Respondent that document 6R13 was the valid permit for this period, for the following reasons:

1. The Chairman of the Dambulla Pradeshiya Sabha has submitted 8R8, bearing No. IML/C/4441 as the permit issued to the 6th Respondent, which bears a different number.

2. The permit does not correspond with the environmental license 6R14, and does not tally with the permit number for which the environmental license was issued. The
6th Respondent produced 6R 14 as the relevant environmental license to permit 6R13, and license 6R14 does not match or correspond with the number on the face of the permit 6R13.

3. Two distinct permits for the same period could not have been issued for the same mining activity.

Therefore 6R13 produced by the 6th respondent to this court, as the valid license for his mining activities is not a legitimate document and does not legally authorize or permit any such mining activity.

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The 6th respondent has relied on 6R14 as the Environmental Protection License issued in terms of Section 23(8) of the Environmental Protection Act, No. 47 of 1980. This document too cannot be accepted since;

1. This has not been issued to the mining permit 6R13.

2. The validity period of the license has been visibly altered, the altered period is mentioned as between 22.03.2004 and 02.03.2007.

3. The application for the environmental license [marked as 8R3], clearly mentions the period of validity of the mining permit for which the environmental license is sought, as 06.02.2004 to 05. 02.2005.

4. The validity of the environmental license, reflected in page 8 of the document is

02.03.2004 to 02.03.2007.

5. This notably extends for a considerable period beyond that of the mining permit which is valid only up to 05.02.2005. An environmental license cannot be issued beyond the period of the mining permit for which it has been issued. These dates however correspond directly with the altered dates on license 6R14 (also submitted as 8R4).

It is manifest that these inconsistencies are material and affect the veracity and legitimacy of the purported environmental license 6R14, which cannot be accepted as the valid license and has no nexus to the mining permit 6R13 produced by the 6th Respondent.

I also find disturbing evidence of collusion between the 8th and 6th Respondents with respect to the issue of the environmental license 6R14. The issue of an environmental license with a validity period, extending beyond that of the mining permit is in clear violation of established procedure

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and raises suspicions of mala fides against the relevant authorities who sanctioned such a license.

Complicity and collusion on the part of the Chairman, Dambulla Pradeshiya Saba the 8th Respondent in this case, is evidenced also by the environmental license issued by him on 02.03.2004, [marked as 8R4]. It is evident that the Inspection Report on the land [marked as 8R6], which should have preceded the issue of the license, has been finalized and submitted only on 20.03.2004, after the issue of the environmental license, dated 02.03.2004. This discloses that the environmental license was issued even prior to the finalization of the survey inspection report by its officers, in clear violation of standard procedure. Such blatant disregard for established procedure undermines the very purpose of the Inspection Report. It is clear that G. M. S. Herath, the Environmental Officer and Wasantha Kumara, the Revenue Administrator, have not conducted a genuine inspection, a fact clearly bome out by a comparison of 8R6 with the Field Inspectors Report tendered to this Court on 24.11.2005.

In paragraph 1.7 contained in page 3 of annexure 'F' to the Inspection Report, it is clearly stated that, "the committee decided not to permit any quarries which are situated in State Lands around Sigiriya and it was advised to inform the Geological Sections of Wildlife Department & Forest Conservation Department on the above decision hereafter." No valid report could have been made which ignored this clear directive against the grant of mining permits on the concerned land, which was a defined natural forest reserve.

The Field Inspector's Report dated 24.11.2005 tendered on the direction of this court, shows that the area concerned with mining activities had been previously demarcated distinctly as a natural forest. The report states that even the teak

plantation, which existed on this land, had been cut and disposed of in order to facilitate the silica quarrying that had

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been going on in this forest reserve. The stumps of teak trees, which had been felled, were visible with fresh sprouting of sapling leaves on it.

It also appears that another mining permit bearing No. IML/C/MD/1500 has been issued by the 4th Respondent for the period 21.02.2005 - 02.02.2006. This mining permit is annexed to the Field Inspector's Report, of the 9th Respondent as Annexure 'C'. It is curious as to how the 4th Respondent issued another permit for the period 21.02.2005 to 20.02.2006, when the Dambulla Pradeshiya Sabha had issued a trade license to the 6th Respondent only up to 31.12.2005. (Annexure C to the Inspection Report tendered to Court). The 4th Respondent's conduct is inexplicable and it would be prudent if such conduct is investigated. It is also pertinent to examine the actual process by which the mining permit was obtained by the 6th Respondent.

The 6th Respondent has relied on the document marked as 6R7b, which is an application for a permit to quarry quartz. This application has been preferred by the 6th Respondent on 20.12.2000 together with a project report, marked as 6R7c.

The 6th Respondent has admitted that the application 6R7b was submitted in response to an advertisement produced before Court as 6R5. This document 6R5 is clearly a paper advertisement by the Ministry of Forestry & Environment and the Forest Department for "reforestation with private sector participation".

The 6th Respondent's application in response to advertisement 6R5, was forwarded with a covering letter which referred only - to the private sector reforestation program - 2nd phase application for 50 hectares of land in block No. 13 - Pollaththawa (SRL No. 104) Dambulla A. G. A. Division - Matale District. The project report 6R7 c, annexed to the application appears to have been formulated for the

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project of reforestation. The 6th Respondent was granted this project. In terms of the project, several undertakings which relate specifically to the reforestation project have been detailed in paragraphs 82, 83 and 84 of the project report, 6R7C and includes the setting aside of a sum of Rs.1 Million towards 0btainingwater for the purpose of reforestation, planting and maintenance, inter-cropping and crop protection etc. The 6th Respondent had failed to honor any of these undertakings, and this is revealed in the Environmental Inspector's Report dated 24.11.2005.

Delays in implementing the terms of the project are referred to in letter dated 01.04.2003 marked as 6R10a, addressed to Mr. Peter Amarasinghe, Chairman of

the 6th Respondent Company. Evidently a meeting of the 80ard of Investment, Sri Lanka has also been held to discuss these delays on the part of the 6th Respondent.

It is clear that the 6th Respondent had no interest whatsoever in the reforestation activities adverted to in the application 6R7b and project report 6R7c. The real purpose behind this application was to gain access to the land upon which quarry mining could be carried out. Instead of submitting a direct application for quarry mining to the relevant authority, the 6th Respondent has gained access to an expanse of protected land under the guise of reforestation and conservation, when in fact the real purpose was the exploitation of the land for commercial purposes.

There is ample proof of the fraud and misrepresentation carried out by the 6th Respondent. As late as 12.12.2002, the company's involvement with the allotted land was represented as being for the purpose of reforestation alone. No mention was made of mining activities in the letter sent by the 6th Respondent to the Conservator of Forests [marked as 6R9a] in which is stated "the delay in getting these details across to you is regretted. However, owing to the prolonged North

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Eastern rains for the past six to eight weeks and which we are still experiencing in the district, the surveyors were prevented from finalizing their surveys and connected documentation". This communication clearly indicates the representations of the 6th Respondent as to the Company's involvement in reforestation activities upon the said land. By letter dated, 12.12.2002, [marked as 6R9b] the 6th Respondent has also made an application seeking another 10 hectares of land.

Documents marked as 6R10b & 6R10c, also specifically advert only to reforestation. Significantly, in 6R10c, which is an extract of a meeting that has been held on 26.05.2003 it appears that while discussing matters relating to the allocation of land from Polaththawa for reforestation, the 6th Respondent has made a casual reference to the necessity of removing a quartz deposit on the land in furtherance of the reforestation scheme. A decision was made to discuss the feasibility and possibility of quartz extraction on the said land with the Conservator of Forests.

Even at this point there appears to have been an implicit understanding that any mining and extraction of quartz contemplated and discussed at the time was only for the purpose of facilitating the reforestation project undertaken by the 6th Respondent. By his letter dated, 21.01.2004, [marked as 6R11] the Conservator General of Forests has recommended the grant of a permit for quarrying an extent of one acre only, subject to 13 conditions.

Even assuming that the 6th Respondent did possess a valid permit for the mining of silica. quartz, it would still be mandatory for the 6th Respondent to restore the land to its original position; a fact conceded by the learned senior counsel for the

6th Respondent. Instead, having extracted the valued quartz, the 6th Respondent had merely filled the excavation sites with loose sand and rubble available on the land

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and had not carried out any reforestation activities or made any attempt to even at the very minimum, restore the affected land to its original position.

The wrongful conduct of the 6th Respondent and the illegal activities undertaken by the Company could not have taken place without the complicity of certain high-ranking state officials. This must be fully investigated and suitable action be taken against these officials under the direction of the Attorney General.

The 8th Respondent, has acted in complete breach of the duties entrusted to him in issuing the Environmental Protection License 6R14. In the affidavit he has filed 8R3 as the application for an environmental license submitted by the 6th Respondent for the purpose of carrying out mining activities. The 8th Respondent states that he issued the environmental license 6R14 in consequence of this application.

It is apparent that the validity period on 6R14 has been altered and post alteration is mentioned as between 02.03.2004 and 02.03.2007. However it is the submission of the 8th Respondent that the license 6R14 has been issued for the mining permit marked as 8R8, bearing number IML/C/4441. The problem lies in the fact that the validity period of permit 8R8 is given as 06.02.2004 to 05.02.2005. This corresponds also with the dates mentioned in application 8R3 with reference to the mining permit to which the application relates.

No environmental license could be granted by the 8th Respondent, which extends beyond the validity period of the permit to which it pertains. Clearly the 8th Respondent could not have been clairvoyant to know that a further permit for the balance period would be granted on 02.03.2004. This has not been explained by the 8th Respondent.

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Irregularities are also apparent when one considers the relevant time frame attached to the granting of license and the commencement of mining activities. The application for the environmental license 8R3 has been tendered by the 6th Respondent purportedly on 10.02.2004. However the date of commencement of mining activities had been specified as 11.02.2004, which gives the relevant authorities a single working day within which to examine, process and grant the said license. Although eventually the license 6R14 was granted on 02.03.2004, it appears that mining activities were commenced on schedule on 11.02.2004, prior to the issue of the license.

It is clear that even if for arguments sake, the permit 8R8 was considered as the valid permit for this period as produced by the 8th Respondent (the 6th Respondent relied on an entirely different mining permit 6R13 bearing number IML/C/MD/19 for the same period), mining activities conducted under this permit were in contravention of the law and policy governing such permits, as at the time and date of commencement, no environmental license had been procured by the 6th Respondent.

It is now necessary to consider the involvement of the Conservator General of Forests, the 1st Respondent in this case. In his affidavit the 1st Respondent referred to
document lR2 dated 20.12.2000 as "the application". However it is obvious that this was not for a mining permit but an application for cultivation and reforestation as referred to above. The 1st Respondent went on to state that the 6th Respondent by letter dated, 12.12.2002 [marked as lR3] requested" 10 hectares of land in Pollaththwa division to quarry white silica quartz". This letter referred to an Inter Ministerial Advisory Board Meeting held at the Board of Investment of Sri Lanka on 14.10.2002.

The 6th Respondent also refers to this same document [marked as 6R9a] as an application submitted to the 1st

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Respondent on 12.12.2002 for the lease of 10 hectares of land in Pollaththawa, for reforestation of the land with Teak, Halmilla and Khomba etc., after extracting the Silica Quartz. The. application for the 10 hectares of land mentioned in 6R9a/ lR3 is marked as 6R9b.

It is apparent even on a rudimentary reading of the application marked as lR2 (for 50 hectares dated 20.12.2000) and the application marked as 6R9b (for 10 hectares dated 12.12.2002), that they both pertain clearly to a scheme of reforestation and cultivation and not to the commercial exploitation of the concerned land through the mining of silica quartz. The concomitant question that arises is as to why the 6th Respondent was not required to comply with the normal procedure of tendering a straightforward application for mining, in the same format as PI. This lends credence to the allegation by the Petitioner that the 6th Respondent was given favorable and privileged treatment by the 1st Respondent in contravention of set and established procedures for the grant of mining permits.

A further point which militates against the bona fides of the 1st Respondent is the incontrovertible evidence of the project report marked as lR4 which relates solely to the reforestation of 10 hectares of land in Pollathawa. A single sentence in paragraph 3 of the Report refers almost surreptitiously to the fact the "it is intended to plant this land in stages after the extraction of quartz in each block". The application was clearly intended to be for reforestation. This same document annexed by the 6th Respondent as 6R9d was referred to by him as an "amended project report for reforestation" of land submitted on 12.12.2002.

Further the 6th Respondent has stated in paragraph 18 of objections dated 04.06.2004, that while several meetings were held regarding the allocation of land for the reforestation program, it was only at a meeting held on 26.05.2003 in discussions with the 1st Respondent that it was "suggested" by the 6th

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Respondent that there might be a possibility of "negotiating" with the four parties who had signed the agreement for reforestation, to permit extraction of quartz prior to reforestation. If this suggestion came up only at a meeting held on 26th May 2003, the 1atRespondent could not have conceivably considered either 6R9b dated 12.12.2002 or 1R2 dated 20.12.2000 as applications for a mining permit to extract white Silica quartz.

The 1st Respondent has also tendered 1R2 as the application for the reforestation project 1R4. It is to be noted that the application 1R2 was for 50 hectares and dated 20.12.2000. 1R2 was also produced by the 6th Respondent as 6R7b.The project report 1R4 was filed by the 1at Respondent as the project report relating to the application for reforestation 1R2/6R7b relates however only to 10 hectares which was the project report relating to a subsequent application made by the 6th Respondent dated 12.12.2002 marked as 6R9b. The project report relating to the application for reforestation marked as 1R2, which was for 50 hectares has not been
produced by the 1at Respondent, but has been produced by the 6th Respondent as 6R7 c.

It is significant that while the application for reforestation produced by the 1st Respondent as 1R2 was for 50 hectares, the project report annexed by him relates only to the amended project for 10 hectares and therefore clearly did not relate to the application 1R2. The 1st Respondent has erroneously tendered a project for 10 hectares 1R4/ 6R9d. He has not tendered the project report for the 50 hectares, which was however produced by the 6th Respondent and marked as 6R7c.

Accordingly, the 6th Respondent's position contradicts the position taken up by the 1st Respondent. In any event, it is clear that the 6th Respondent has not submitted an application for mining in the form set out in Pl. The question then arises as to how a mining license was ever granted to the

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6th Respondent without a valid application, in the established format, ever being made; especially as the 6th Respondent himself adverts only to an application for reforestation.

In terms of Section 26 (1) of the National Environmental Act No.4 7 of 1980, the Central Environmental Authority could by order delegate any of its powers, duties

and functions under this Act to any Government Department or any Local Authority. Therefore, the powers, duties and functions under the Act, which were conferred on the Central Environmental Authority, could be delegated. Accordingly, it appears that the Dambulla Pradeshiya Sabhawa was delegated with powers and functions under this Act. Thereafter Section 26 (1) of the Principle Enactment has been amended by Section 9 of the National Environmental Amendment " Act No. 56 of 1988, permitting delegation of the powers and functions of the Central Environmental Authority to any Government Department, corporation, Statutory Board, Local Authority or any public officer.

It is also relevant to refer to Section 23(Y) falling within part IV (c) of the National Environmental (Amendment) Act No. 56 of 1988. This section permits the Minister by an order published in the gazette to specify the state agencies, which shall be the "project approving agency". Section 11 of the Amended Act also repeals the powers of the Minister to make regulations (Section 32 (1) of the Parent Act) in respect of all matters, which are stated or required by the Act for which regulations were required. Though such was repealed, the Minister was now empowered with even wider powers to make regulations in respect of all matters which were required by the Act to be prescribed or for which regulations were required by the said Act.

It is important to note that in accordance with Section 23 (Y) of the National Environmental Act No. 56 of 1988 an order was published in the gazette specifying the Central Environ-

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mental Authority and the Geological Surveys Mining Bureau as the Project Approving Agencies [marked as R4]

In terms of Section 9 of the National Environmental Amendment Act No. 56 of 1988, the Chairman of the Predeshiya Sabhawa was vested with the powers to issue an environmental license. The 8th Respondent has admitted that in terms of section 26 of the National Environmental Act No. 47 of 1980 as amended by Acts No. 56 of 1988 and No. 53 of 2000 he has been delegated with the authority to issue licenses under the National Environmental Act to the industries listed in the Gazette Notification No. 1159/22 dated 22.11.2000 marked as 8R2, and in terms of the letter of authority produced by him and marked as 8R 1.

It is also relevant to note at this stage that the 1st Respondent has stated in paragraph 10 of his affidavit that the authority to grant approval to commence excavation
of land is vested in the Forest Department and not the Divisional Secretary.

The next matter that comes up for analysis by this Court is the relevance of the Field Inspector's Report tendered by the Central Environmental Authority on 24.11.2005. A clear finding has been made that the quarry is situated within 75 meters of the Digiriya Polaththawa road. It has also been stated that this area is a

reserved forest and specific finding have been made that the teak forest that once existed has been destroyed to facilitate the illegal mining activities. A finding has also been made that more than 2 acres of land had been mined.

It is pertinent to note that under the Fauna and Flora Protection Ordinance No. 02 of 1937, a Minister may declare a specified area of land to be a national reserve. It is not in

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dispute that the Girithale Minneriya National Reserve has been declared as a national reserve under Section 2 of the Fauna & Flora Protection Ordinance, as it was found in the Gazette marked R7 bearing No. 492/32 dated 12.02.1988. The Field inspectors Report adverted to above states that the mine was located within one mile of the Girithale Minneriya National Reserve. Given the situation of this mine, there should have been an initial environmental examination or environmental
impact assessment conducted prior to the granting of the mining license. Even presently, the Field Inspector does not recommend any mining activity without such examinations.

The findings of the Field Inspection Report are significantly corroborated by the actions of the Forest Officer when she sent P11. It appears that the 2ndRespondent rejected the application of the Petitioner based on the grounds laid out in the report P11, which are in conformity with the findings of the Field Inspection Report submitted to court. Under the circumstances it is inexplicable, arbitrary and capricious that this report P11 and the grounds contained therein have been circumvented in order to accommodate and grant mining rights over the same site, to the 6th Respondent. In this context, a comparison of the document 6R11 produced by the 6th Respondent with the document P11, ex-facie shows the capricious and arbitrary manner in which the recommendations of the forest officer, have been granted.

The 4th Respondent is also implicated in this transaction due to the granting of twin licenses covering the same area of land. As the license 6R13 is a license given for the same period as 8R8 it is apparent that the 4th Respondent has issued two licenses for the same period and thereby given permission for an extent of more than one acre to be mined which was in violation of the explicit conditions given by the Forest Department in the document 8R7, which was for an

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area of one acre only. This action by the 4th Respondent is both capricious and arbitrary.

It appears that several meetings have been held between the 6th Respondent and the Board of Investment of Sri Lanka. I find it unnecessary and undesirable that

the Board of Investment interferes in any manner whatsoever with the functioning of public officers who regulate and implement procedures and mechanisms for environmental protection in Sri Lanka.

The right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution.

The constitution in Article 27(4) of the directive principles of state policy enjoins the state to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person in Sri Lanka to protect nature and conserve its riches.

Further, although the Directive Principles of State Policy are not specifically enforceable against the state, they provide important guidance and direction to the various organs of state in the enactment of laws and in carrying out the functions of good governance. An important parallel can be drawn with the Indian experience, and the significance granted to Directive Principles within that countries' legal scheme governing environmental protection.

The Indian Supreme Court has increasingly cited the directive principles of state policy in a complimentary

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manner to fundamental rights. *[Vide, Som Prakash Rekhi v. Union of India,* [1]*M. C. Mehta v. Union of India,* [2]*Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh,* [3]*In Damodar Das v. The Special Officer, Municipal Corporation of Hyderabad,* [4]the High Court of Andra Pradesh has interpreted Article 48A, the provision dealing with environmental protection, as imposing an obligation on the government including courts to protect the environment. In M. C. Mehta v. Kamal Nath[5] the Indian Supreme Court has recognized the right of the public to expect certain lands and natural areas to retain their natural characteristic.

Correspondingly, courts in Sri Lanka, have long since recognized that the organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This recognition of the doctrine of 'public trust', accords a great responsibility upon the government to preserve and protect the environment and its resources.

The doctrine of public trust was initially developed in ancient Roman jurisprudence and was founded on the principle that certain common property resources such as rivers, forests and air were held by the government in trusteeship for the free and unimpeded use of the general public. This doctrine

emphasizes the obligation of the government to protect and conserve these resources for public use and protect it from exploitation by private individuals for short term monetary or commercial gains. Such resources being an endowment of nature should be available freely to the general public, irrespective of the individual's status or income level in life. This doctrine is an "affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering the right of protection only in the

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rarest of cases, when the abandonment of that trust is consistent with fundamental and larger interest of the purposes of that trust. Contemporary concerns with the state and its role in the protection of the environment have close links with this doctrine of public trust. As part of this responsibility governments make policy decisions related to the environment and its useful utilization, conservation and protection and should always be only in the interest of the general public with a long term view of such being conserved for intergenerational use. For this doctrine is closely linked with the principle of intergenerational equity. Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability.

Under the public trust doctrine as adopted in Sri Lanka, the State is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all and the protection and regeneration of our environment and its resources. Principle 21 of the Stockholm declaration, 1972 and Principle 2 of the Rio De Janeiro Declaration, 1992 recognize the right of each state to exploit its own resources, pursuant, however to its own environmental and development policies. The principle of sustainable development prioritizes human needs and concerns for a healthy and productive life in harmony with nature. Therefore environmental protection as envisaged under the Constitution forms an integral part of such development.

Where government officers act in the manner set out in the facts of the instant case, they act in grave breach of the public trust reposed upon them.

Although the international instruments and constitutional provisions cited above are not legally binding upon

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governments, they constitute an important part of our environmental protection regime. As evidenced by the decision of this court in *Bulankulama v. Secretary, Ministry of Industrial Development*, (6) they constitute a form of soft law, the importance and relevance of which must be recognized when reviewing executive action vis-a.-vis the environment, In this case the Supreme Court adverted to principle 1 of the Rio declaration that "Human beings are the center of concern for

sustainable development. They are entitled to a healthy and productive life in harmony with nature" .

The phrase 'sustainable development' encapsulates the meaning that natural resources must be utilized in a sustainable manner, in keeping with the principle of intergenerational equity. This requires that the State as the guardian of our natural resource base does not compromise the needs of future generations whilst attempting to meet and fulfill the present need for development and commercial prosperity or short term gain.

In terms of Article 3 the sovereignty is in the people, and is inalienable and being a representative democracy, the powers of the people are exercised through persons who are for the time being only, entrusted with certain functions, and such must at all times be considered by them as a sacred trust, never to be exploited for short term commercial gain or for personal gain even by those holding political power, or exploited for their own personal and selfish agendas. To do so would be the highest betrayal of the sacred trust reposed in them not only by the present generations but all generations to come.

This has been succinctly put by Judge C.G. Weeramantry, who in his separate opinion in the *Danube case (Hungary v. Slovakia)* [(7)] referred to the "imperative of balancing the needs of Lie present generation with those of posterity."

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Even national legislation aimed at environmental protection, has developed as a further standard applicable to environmental policy decisions. It involves the anticipation of environmental harm and taking measures to avoid it or to choose the least damaging alternative or activity. The environment must not only be protected in the interest of health, property and economy, but also for its own sake. Precautionary duties are triggered not only by concrete knowledge of danger but also by a justified concern or risk potential. [Vide, *A. P. Pollution Control Board v. Nayudu*].[(8)]

Application of this principle also suggests that where there is an identifiable risk of serious or irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. The burden of proof in such cases is therefore placed firmly on the developer or industrialist who wishes to alter the status quo. [Vide, *Vellore Citizens' Welfare Forum v. Union of India,*[(9)]*.*

The National Environmental Act, which forms the primary legal basis for environmental protection in Sri Lanka, aims at providing an effective mechanism for the protection and efficient management of the environment. Section 17 of the National Environmental Act makes it a mandatory duty for the Central Environmental Authority to "recommend to the Minister the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits there from and to preserve the same for future generations

and the general measures through which such policy may be carried out effectively".

Unfortunately though, neither the enactment of environmental legislation nor the recognition of key principles in this regard have had the desired effect of effectively stemming the tide of environmental degradation. In the face of a conflict between a protective law and personal or commercial interest

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it appears sadly that the law ends up the inevitable loser. A strong regulatory framework with requisite checks and balances is therefore an imperative for the effective and meaningful application of any conservation law.

As recognized by the Indian Supreme Court in *ICELA v Union of India*[10] the enactment of a law and tolerating its infringement, is at times worse than not enacting a law at all. The continued infringement of a law, over a period of time is facilitated by a high level of laxity, tolerance and' even collusion on the part of the administrative authorities concerned with the implementation of the law. Continued tolerance of such violations not only renders the law nugatory but also encourages a level of lawlessness and adoption of means which must not be tolerated in any civilized society.

A law is not only meant for the law-abiding citizen and it is the function of the enforcement officials to ensure that the spirit of the law is enforced and honored by all. Failure to do so will lead to a level of degradation with disastrous impacts on the present and future health of the nation.

This court is deeply disturbed by the apparent act of collusion and dishonesty committed by high-ranking public officials in order to grant this wrongful license to the
6th Respondent. All these institutions appear to have acted in complete disregard of the several Acts, which exist to protect and preserve the environment.

The power of the state and public servants to grant or refuse licenses and take suitable action for the protection and conservation of both the environment and natural resources is derived from its status as a public trustee. In this capacity state officials have a paramount duty to serve as a safeguard against private and commercial exploitation of common property resources, and the degeneration of the environment due to private acts. The principle of inter-generational equity

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and the long-term sustainability of our delicate eco-system and biological diversity vests mainly in the hands of such officials.

In light of the repeated failure of state mechanisms to prevent the degradation of

the environment and natural resources at private hands, it is appropriate that we turn
our attention to emerging principles of public accountability in the field of environmental law. The accountability principle, establishes that public servants should be held directly accountable to the public for their actions and inactions. While the polluter pays principle internalizes the costs of pollution to corporate or individual polluters, the principle of public accountability extends this liability towards corrupt or incompetent regulators for the most egregious instances of mis-regulation.

The principle is borne from a growing recognition that environmental degradation is by and large the product of government corruption and inertia. Each public official assumes a heightened responsibility upon accepting public office, and every public official is universally empowered with the trust of the people. The official thus owes a corresponding duty of care to the people to exercise their powers in public interest. This is particularly important with respect to environmental laws where dereliction of the officer's duty leads to serious environmental harm. The accountability principle recognized the negligent public official as a cause for environmental degradation and thereby holds them liable.

The concept of good governance requires governments to promote accountability, public participation, transparency, and a sound legal framework for equitable development. Of all these elements in my view, government accountability is the comer stone of good governance. While the principle of accountability as detailed above may not as yet have developed to an extent which warrants its application -in the

instant case, it signifies an important step in the direction of full government accountability which cannot be ignored in the future, if the present state of governmental inaction and arbitrariness were to continue into the future.

In light of the circumstances detailed above I conclude that the application of the Petitioner for conducting mining activities has been rightly refused by the relevant authority. I find that the Petitioner's right to equality protected under the Constitution of Sri Lanka has been violated by the arbitrary and capricious acts of the Respondents, which led to the wrongful granting of a mining license to the 6th Respondent under conditions of fraud and collusion. I consequently make the declaration as prayed for by the Petitioner that his rights enshrined in Article 12(1) of the Constitution have been violated.

With respect to the state of the land concerned, there is no doubt that the illegal mining activities conducted on the land have had an appalling impact on the surrounding environment. The primary objective in such a case must be the restoration of the land to its original position. The costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental

quality or increased taxation in order to mitigate the environmentally degrading effects of a project. Therefore I order that no further mining activities be conducted on the land and that the 6th Respondent be compelled to bear all costs related to the restoration of the land back to its original position.

With regard to the obvious negligence, collusion and complicity displayed by the relevant state officials in connection with this transaction, I wish to express my profound distress and dissatisfaction regarding the functioning of these

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regulatory authorities. I direct that immediate action be taken and inquiries be initiated by the Attorney General and the heads of the public institutions concerned, against those involved whose actions or inaction have facilitated the commencement and continuance of illegal mining activities in a protected forest reserve. I also direct the Attorney General to indict, in terms of the provisions of the Penal Code, the Respondents, including the public officials concerned who have filed false documents in this case.

For the reasons set out in my judgment, I declare that an infringement of the fundamental rights of the petitioner guaranteed by Articles 12(1) of the Constitution has been established. The refusal of the permit to the petitioner was however correct and as it should be in terms of the law. It was salutary that as counsel informed court, the petitioner is not pursuing his application for the permit in view of the facts that were disclosed in the case.

I direct that no further mining activities take place on the said land and that suitable and immediate measures, be taken to restore the concerned land back to its original position by the 6th Respondent, and the program of reforestation that was undertaken by the 6th Respondent be strictly adhered to and complied with.

I further order that the State shall pay the Petitioner a sum of Rs.20,000 as costs and the 6th Respondent shall pay the Petitioner a sum of Rs. 50,000 as costs.

S. N. SILVA CJ. - I agree

MARSOOF J. - I agree

Relief refused.

Directives issued.

Senarath And Others v. Chandrika Bandaranayake Kumaratunga And Others - SLR - 59, Vol 1 of 2007 [2007] LKSC 1; (2007) 1 Sri LR 59 (3 May 2007)

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SENARATH AND OTHERS
v
CHANDRIKA BANDARANAYAKE KUMARATUNGA
AND OTHERS

SUPREME COURT
SARATH N. SilVA, C.J.
TIlAKAWARDANE, J.
AMARATUNGA, J.
SC FR 503/2005
March 2, 2007

Fundamental Rights - Art 118, Art 126 (1), Presidents' Entitlement Act 4 of 1986 - S213 - Conferment of wrongful or unlawful benefits - Executive power exercised in trust for the people - Such wrongful act is an infringement of fundamental right? Locus Standi -Sed quis custodiet ipsos cutodies - Nemo debet sua judix.

The petitioners three Attorneys-at-law alleged infringement relating to unlawful unreasonable arbitrary and mala fide executive action of the 1st respondent who was at the material time the President of the country and the other respondents who were the then members of the Cabinet in securing for the 1st respondent -

(a) a free grant of developed land close to the Parliament
(b) Premises in Colombo 7 from which two public authorities have been ejected to be used as her residence after retirement,
(c) staff and other facilities purportedly under the President's Entitlement Act.

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Held:

Per S. N. Silva, C.J.

"Good governance and transparency characterize democracy and the rule of law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be meted upon."

(1) Though it is correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption - the fact that the impugned action mayor may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from the Supreme Court that the conferment of such benefit or advantage is contrary to the fundamental right to equality before the law.

(2) The respective organs of government reposed power as custodians for the time being to be exercised for the people. The petitioner allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the people - "Sed quis ipsos custodies."

(3) The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law.

Per Sarath N. Silva, C.J.

"I am of the view that there is a positive component in the right to equality that where the executive being the custodian of the people's power abuse a provisions of law in the purported grant of entitlements under such laws and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court."

(4) The denial of locus standi in the circumstances as presented in this case where there has been a brazen abuse of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless.

Per Sarath N. Silva, C.J.

"In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a manner where he has a personal interest". 'Nemo debet sua judix is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown into the winds by the 1st respondent in initiating several Cabinet Memorandum

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during her tenure of office and securing for herself purported entitlements that would if all ensure only after she lays down the reigns of office."

APPLICATION under Act 126 of the Constitution.

Cases referred to:

(1) In Re the NineteenthAmendment of the Constitution - 2002 - 3 Sri LR 85.
(2) Visvalingam v Liyanage - 1983 - 1Sri LR 236.
(3) Premachandra v Jayawickrema 1994 - 2 Sri LR - 90.
(4) S.P. Guptha v Union of India and others. 1982 - AIR (SC) 149.

Peter Jayasekera with Thiranagama and K. Senadheera for petitioner.
Nigel Hatch PC with Gaston Jayakody and Ms. K. Geekiyanage for the 1st respondent.

P.A. Ratnayake PC DSG with Ms. Demuni de Silva SSC for respondents.

Cur.adv. vult.

May 3, 2007

SARATH N. SilVA, C.J.

The petitioners being three Attorneys-at-law of this Court have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. They plead that the applications have been filed in addition to their own interest, as a matter of public interest representing the rights of the citizens of this country, to enforce the fundamental right to equality before the law.

The alleged infringement relates to the unlawful unreasonable, arbitrary and mala fide executive action of the 1st respondent who was at the material time the President of the country and of 2nd to 35th respondents who were then members of the Cabinet of Ministers, in securing for the 1st respondent a free grant of a land vested in the Urban Development Authority in extent of 11/2 acres close to the Parliament which had been fully developed at a cost of Rs. 800 million; a premises at No. 27 Independence Avenue, Colombo 7, from which two public authorities viz: the Ranaviru Sevana Authority and the Disaster Management Centre were ejected to be used as her residence after retirement; staff and other facilities; purportedly under the President's Entitlement Act NO.4 of 1986.

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The relevant provisions of the Presidents' Entitlement Act No.
4 of 1986 are as follows:

(2) "There shall be provided to every former President and the widow of a former President, during his or her life time, the use of an appropriate residence free of rent; Provided that where for any reason, an appropriate residence is not provided for the use of such former President or the widow of such former President, there shall be paid to such former President or the widow of such former President, a

monthly allowance equivalent to one third of the monthly pension payable to such former President or the widow of such former President, as the case may be.

3. (1) There shall be paid to -

(a) every former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President; and (b) to the widow of such former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the Minister of the Cabinet of Ministers.

(2) There shall be provided to every former President and the widow of such former President, official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers. "

The petitioners have pleaded that they had no access to information as to the impugned grant of benefits and advantages to the 1st respondent and that their interest in the matter was aroused by a publication in a Sunday newspaper of 4.12.2005,which has been produced marked "P1" , under the heading "All the ex-president's perks". The publication referred to an allocation of ,a land at madiwela to the 1st respondent and of 36 vehicles, security staff, private staff amounting to a total of 248. The other matters referred to in the publication in regard to certain

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withdrawals from President Fund amounting to Rs. 600 million, do not form part of this application. The petitioners state that in view of the specific material contained in the publication they wrote letter dated 8.12.2005 to the Secretary to the Cabinet of Ministers requesting copies of related Cabinet Memoranda and decisions in order to verify their legality. The Secretary replied by letter dated 26.12.2005 (P2B) regretting his inability to comply with the request. Thereupon the petitioners wrote to individual Ministers and some documents that were made available enabled them file the present application. Considering the matters that had been pleaded the petitioners were permitted by Court to file amended papers setting out whatever additional material that was available with them in support of the alleged infringement.

The documents produced by the petitioners relate inter alia, to premises bearing No. 27, Independence Avenue, Colombo 7, which was being extensively repaired at that stage. Since the allocation of the premises as a residence to the 1st respondent had been directly drawn in issue, the Court made an order on the present Secretary to the President to disclose the basis on which the expenses for repairs were being incurred. Pursuant to that order the Secretary to the President produced the relevant documents marked 37R8 to 37R12 under confidential cover. It is pertinent here to note that Counsel for the 1st respondent and later the 1st respondent herself has filed an affidavit stating that the action of the Court in calling for information regarding the repairs is "ultra vires" and the 1st respondent

strenuously objected to any inquiry being made into such expenditure. It appears that the 1st respondent has been ill-advised to use the phrase" ultra vires" in relation to an order made by this Court which is in terms of Article 118 of the Constitution "the highest and final Superior Court of Record in the Republic". On the other hand the Inquiry before this Court is whether the action of the 1st respondent and of the Cabinet of Ministers of which she was the head is ultra vires the provisions of the Presidential Entitlement Act NO.4 of 1986. Good governance and transparency characterize Democracy and the Rule of Law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be insisted upon. The petitioners have pleaded

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and established that they were denied access to information. The extent to which information has been denied is borne out by the fact that the documents were sent even to Court under confidential cover. Hence, the objection of the 1st respondent was over-ruled and the documents were made available to the petitioners.

I would set out the relevant material in reference to the three matters drawn in issue by the petitioners as regards, the land; the residence; staff and other facilities.

The Madiwala Land

The first reference to this land in the documents produced by the parties is contained in the Cabinet Memorandum dated 28.03.05 submitted by the Minister of Urban Development and Water Supply. The Memorandum commences by stating that the 1st respondent as President" has requested a block of land 11/2 acres in extent at Madiwela ... for the purpose of construction of a residence for herself after her retirement as President".

It specifically states that "she wishes this land to be allocated in lieu of the following allowances that a former President is entitled to under the Presidents' Entitlement Act NO.4 of 1986.

* Pension
* The official residence that she would be entitled to;
* Allowance for maintenance of the bungalow, plus allocation for payment of electricity and water bills;

She will thus only take her entitlements of :

* A few vehicles
* Security personnel and related equipments and vehicles for security purposes;
* Office staff. "

Paragraph 2 of the Memorandum seeks to justify the grant of the land by stating that in terms of the Act if the President does not avail herself of a residence, she would be entitled to the payment of 1/3 of the pension as rental allowance. This amounts to approximately Rs. 7,000/- per month. But, as Ministerial type of office residences are in short supply presently, if she avails herself of her entitlement of a residence, a Minister may probably have to

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take a house on rent. The minimum rental of a Ministerial type of residence, at present, in the Colombo 7 area where they are presently situated would be around Rs. 300,000/- to Rs. 400,000/- per month or more. An additional allocation of approximately Rs. 1 million has to be made annually for repairs, maintenance as well as payment of electricity and water bills.

The justification proceeds further to state that the President has suffered by assassination of her husband and injuries suffered in an assassination attempt in 1999 and concludes by stating that "the value of land requested is insignificant" when compared with the entitlements she has given up and also proposes to forego in the future.

In paragraph 3 of the Memorandum Cabinet approval is sought to allocate the land to the 1st respondent on a "free-hold basis for the construction of her residence at her cost". The petitioners contend that the Memorandum is contrary to the provisions of the Act which specifically envisages the payment of a allowance amounting to 1/3 of the pension if a Ministerial type of house is not available. Their main submission is that the Madiwela land was originally intended for the construction of the "Presidential Palace" and a sum of Rs. 800 million has already been spent by the State to develop the land for the purpose of such construction. The Minister, although leave to proceed was granted against him has not sought to contradict this specific averment in the petition. In the circumstances this Court has to act on the basis that the extent of 11/2 acres to be allocated, near the Parliament is a fully developed land in respect of which the State has already spent over Rs. 800 million and that the statement of the Minister that the value of land is "insignificant' is a misrepresentation of facts.

The Memorandum dated 24.8.2005 was considered on the very next day by the Cabinet of Ministers and approval was granted to it by the decision in 36RIB.

It is not clear as to what the Minister meant by a "free-hold" allocation. Such a concept is not known to the law of Sri Lanka. Whatever it may mean it is seen from document 37R2A that the Urban Development Authority in whom the land had been vested,

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on the basis of that decision made a free grant of the land to the 1st respondent by Deed bearing No. 1135 dated 6.9.2005. It is significant that the date in the deed

being a document with several schedules covering six pages is the very next day from date on which the decision of the Cabinet of Ministers was communicated. The land had been surveyed and the date of the Plan is 15.8.2005/ It is thus seen that within a matter of a brief period of this Court making a pronouncement as to the term of office of the President, the land had been surveyed, a Cabinet Memorandum submitted and approved and a deed containing a free grant issued.

The premises at 27 Independence Avenue. Colombo 7.

The first reference to the allocation of No. 27, Independence Avenue, Colombo 7, to the 1st resident is made in the Cabinet Memorandum dated 31.10.2005, submitted by the Minister of Public Security, Law and Order (36R2A).

This Memorandum makes no reference to the fact that a Memorandum had been submitted by the Minister of Urban Development and land at Madiwela was allocated to the 1st respondent in lieu of a pension, residence and so on. The Memorandum of the Minister of Public Security recommends that an entirely New Division be established for the 1st residence as "the Retired Presidential Security Division IV" headed by a Senior Superintendent of Police with 198 personnel, 18 vehicles and 18 motor cycles to be provided for the use of the officers.

Addressing the matter from the perspective of security paragraph 3 of the said Memorandum states:

"Allocate the house No. 27, Independence Avenue, Colombo 7, for this purpose since she needs to reside in a house where adequate security can be provided and to effect repairs thereto in order to ensure security measures. "

The 1st respondent herself has submitted a Note to the Cabinet dated 2.11.2005 titled "Staff of the office of the President on retirement. "(36R3A). It says inter alia, as follows:

"I will be entitled to certain facilities under the provisions of the Presidents' Entitlement Act NO.4 of 1986. Provision of official and personal staff would be one such entitlement. "

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I have already selected premises No. 27, Independence Avenue, Colombo 7, for my office after retirement. Considering the meaningful role that I propose to play in the public affairs of this country on retirement the staff I require to maintain this office is given in the Annexure to this Note.

The annexure sets out a staff as follows:

PARTICULARS OF STAFF	
Designation/Category No. of Positions	**N o O f**

President	1
Secretary to the Former President & Chief of Staff	1
Advisors - Political Affairs & International Affairs	2
Advisor - Social Affairs	1
Additional Secretary	1
Secretaries - Private & Confidential	2
Directors - Foreign Relations & Special Projects	1
Senior Assistant Secretary	2
Assistant Secretaries (SLAS)	3
Assistant Secretaries (Non-SLAS)	3
Co-ordinating Secretaries	3
Programme Officer	1
Manager	1
Stenographer - SinhalaiEnglishffamii	5
Data Entry Operators	3
Clerks	4
Information Officer	1
Cameraman	1
Video Cameraman	1
Garden Specialist	1
Garden Labourers	2
Labourers	2
Messenger	1
Drivers	9
Butlers	5
Cook	1
KKSS	5
Total	**63**

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The matter of the staff would be dealt with under the next heading. As regards the allocation of the premises at No. 27, Independence Avenue, it is seen in paragraph 3 of the Memorandum on security, the Minister has stated that these premises are needed for her to reside, suppressing the fact that the Cabinet has already by a decision taken 2 months before made a free grant of the land at Madiwala in lieu of the entitlement of a residence and a pension. The 1st respondent in her Note to the Cabinet which has been considered by the Cabinet on the same day as the Memorandum of the Minister viz: 3.11.2005, knowing fully

well that she has already got a land free in lieu of a residence has stated that she has "already selected premises No. 27, Independence Avenue, Colombo 7, for the office after retirement, considering the meaningful role that she proposes to play in the public affairs of the country after retirement" and requests the personal staff of 63. There is plainly a contradiction, the Minister calls it a house to reside in and the 1st respondent calls it an office. It has to be noted that there is no entitlement to an office in the President's Entitlements Act, NO.4 of 1986. The reference to an office in the 1st respondent's Note is a patent mis-representation since in the staff of 63 included in the annex there are included 5 Butlers and a Cook. Such persons cannot possibly come within an office staff.

The more significant factor not contained in the Memorandum of the Minister and the Note of the 1st respondent is that No. 27, Independence Avenue, was not an "appropriate residence" in terms of Section 2 of the Act. As revealed in the affidavit of the 37th respondent these premises had been donated on 14.05.1980(37R3) by the then President to the Sri Lanka Foundation. It was used for the Human Rights Centre and at the time material by the Rana Viru Seva Authority and the Disaster Management Centre. Steps had been taken well prior to the Cabinet decision of 3.11.2005 to retake possession of the premises and to shift the Authority and the Centre to rented premises. Letter dated 11.10.2005 (37R4) was sent by the then Chairman of the Sri Lank Foundation to the then Secretary to the President. It states that in reference "to our telephone conversation last week where you requested that the Sri Lanka Foundation voluntarily surrender the above mentioned land to the State as Her Excellency the President

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wishes to use the said premises as her office after relinquishing duties," the Board has unanimously resolved to surrender the land. The surrender was sent for registration but there was an error in the process which had to be rectified with another resolution being passed as recently as 31.10.2006 (vide 37R5, 37R13 and 37R14). Be that as it may, well before even the Cabinet decision with some reference to these premises was made on 3.11.2005 the 1st respondent on her own embarked on the process of effecting repairs. The estimate dated 30.09.2005 (37R12) for a sum of Rs. 43 million reduced to Rs. 35 million appears to have been obtained by her directly. She addressed a minute dated 30.09.2005 to the Secretary that he should obtain the necessary allocation from the Treasury and release it early. The Secretary sent letter dated 7.10.2005 (37R 10) to the Treasury requesting a sum of Rs. 40.25 million to repair the building and a supplementary allocation was made by letter dated 11.11.2005 (37R11). The letter states that the allocation is under -

Head 801 - Department of National Budget.
Programme 07 - Public Resource Management.
Project 02- Budgetary Support Services and Contingent Liabilities.

Whatever these words may mean the process is nothing but a fiscal ruse to incur unauthorized expenditure. It is significant that the Budget Estimates for 2006 for the

former President which has also a column for 2005 does not reflect this figure (Vide: 43R3A). Infact the total expenditure for 2006 is Rs. 37 million and for 2005 Rs. 12 million.

Be that as it may, paragraph 3 of the letter (37R 11) states as follows;

"The granting of this allocation should not be construed as adequate authority for incurring expenditure. All expenditure. should be incurred in accordance with the provisions of the relevant Financial Regulations, Establishment Code and instructions issued from time to time by Government. "

By this time the 1st respondent without any recourse to a tender procedure and in flagrant violation of the guidelines which

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she herself laid down as Minister of Finance, personally selected a contractor and agreed on the price payable. The Submission of President's Counsel for the 1st respondent that a deviation was warranted on grounds of urgency is wholly untenable in view of the paragraph 3 of 37R11. This probably is the reason for the strident objection to the order of the Court in calling for these documents. The documents and the facts set out above clearly establish that the entire sequence of events in regard to premises No. 27, Independence Avenue, is an abuse of authority on the part of the 1st respondent and marked by a serious deception Le. the suppression in both papers to the Cabinet the previous free grant of the Madiwala land in lieu of the entitlement to a pension and a residence.

Allocation of Staff

The specific reference to an allowance and the manner in which it is to be computed, in my view, excludes any other staff being allowed to a former President in terms of Act NO.4 of 1986. The tenor of the Memorandum and the Note submitted by the 1st respondent appears to be that the staff requested is a "facility' to The allocation of staff reveals a two track approach as seen from the papers referred to above. The Minister in charge of the subject of Public Security, Law and Order has submitted the Cabinet Memorandum (36R2A) referred to above recommending the establishment for the 1st respondent an entirely new Presidential Security Division IV with 198 personnel, 18 vehicles and 18 motor cycles. The 1st respondent has submitted a Note to the Cabinet (36R3A) stating her entitlement to an official and personal staff of 63 personnel. Both have been considered on the same day, that is on 3.11.2005 and allowed by the Cabinet of Ministers.

The submission of the petitioners is that in terms of the Presidents' Entitlements Act NO.4 of 1986, a former President does not have an entitlement to an office or to office staff. There is only an entitlement in terms of Section 3(1) to the payment of a monthly allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President.

which a former President is entitled to in terms of Section 3(2) of the Act. This provision entitles a former President to "official transport and on such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."

In my view the phrase 'such other facilities' have to be read ejusdem generis, to mean similar in nature to the provision of official transport. As regards staff the specific provision in section 2 referred above makes reference only to an entitlement of a "monthly secretarial allowance". Therefore the memorandum of the Minister and the Note of the 1st respondent cannot derive any authority from the provisions of Act NO.4 of 1986.

The petitioners made a further submission that in any event the entitlements in Act NO.4 of 1986 are to "every former President and widow of a former President". This is clearly seen in sections 2 and 3. Therefore it was submitted that the entitlement becomes effective only after a President ceases to hold office an acquires the status of former President. The entitlement cannot be granted whilst the person is holding the office of President.

In my view the provisions have been advisedly worded in this manner to avoid a situation as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office.

In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest. "Nemo debet sus judex" is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office and acquire the eligible status of a former President. To add insult to injury the 1st respondent herself has submitted a Note to the Cabinet stating that she intends "to playa meaningful role in the public affairs of the country on retirement" and requires a staff to maintain her office. Whilst there may be of no objection to any

person playing a meaningful role in public affairs the wrongful act submitted by the petitioners is the procurements of land, premises for residence, staff (security and personnel) and vehicles contrary to the provisions of Act NO.4 of 1986, both from the perspective of time and content. The submission of the petitioners is in my view well founded.

I am in agreement with the basic submission that the entitlements in the Act apply only to a former President and that the provisions have been worded in this

manner to ensure that the incumbent President would not have occasion to decide on his entitlements.

The submission of Counsel for the 1st respondent is that even if the grant of the land, premises and staff do not come within the purview of Act No.4 of 1986, the petitioners nevertheless have no locus standi to file this application and that the Court has no jurisdiction to decide on the matter.

The implication of the submission of Counsel appears to be that if there is any conferment of a wrongful or unlawful benefit or advantage, that has to be addressed in appropriate proceedings but it cannot amount to an infringement of a fundamental right guaranteed by Article 12(1)of the Constitution.

It is indeed correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption in terms of section 70 of the Bribery Act, as amended by Act No. 20 of 1994. However, the fact that the impugned action mayor may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from this Court that the conferment of such a benefit or advantage is contrary to the fundamental right to equality before the law. Ordinarily, an infringement of a fundamental right is alleged when the impugned wrongful act on the part of the executive or administration affects the right of the aggrieved person. The petitioners' case is presented on a different basis where they seek to act in the public interest. The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the people and where in the purported exercise of

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such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equally before the law.

In the context of this submission it is relevant to cite from the Determination of a Divisional Bench of seven Judges of this Court in regard to the 19th Amendment to the Constitution(1). The Court there laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective organs of government are reposed power as custodians for the time being to be exercised for the People. At 96 the Court has made the following determination in regard to sovereignty of the People and the exercise of power.

"Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People to include -

(1) the powers of Government.
(2) the fundamental rights; and
(3) the franchise.

Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.

The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament, the executive power "of the People'" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the

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Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People (at page 98). Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People. "

The petitioners allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the People. The basic question therefore arises as posed by Juvenal in the 1st century A.D. who wrote the famous latin phase in a slightly different context which has been frequently cited thereafter. "Sed quis custodiet ipsos Custodes?" meaning, "but who is to guard the guards themselves?". The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, in my view the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law. It has been affirmatively stated in several judgments of this Court that the Rule of Law is the basis of our Constitution (Vide: Visvalingam v Liyanage(2) and Premachandra v Jayawickrema(3). The phrase "Rule of Law" itself gained recognition as a premise of English Constitutional Law.

A.V. Dicey in his Famous work "The Law of the Constitution" at page 202 states as follows:

"That 'rule of law' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a

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breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience of law which governs other citizens or from the jurisdiction of the ordinary tribunals; The 'rule of law', lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts... "

The rule of law thus gains its efficacy by being enforced by the Courts.

In S.P. Guptha v Union of India and otherS(4)at 149, nine Judges of the Supreme Court of India ruled in favour of a public interest suit filed by certain lawyers as a writ petition. In his judgment Bhagawathi, J., who was later the Chief Justice of India made the following observations with regard to the impact of the principle of rule of the law at 197.

"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers".

In considering the provisions of our Constitution as analyzed in the Determination in the 19th Amendment (supra) and the observations cited above of Dicey and the Supreme Court of India, I am of the view that there is a positive component in the right to

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equality. That, where the executive being the custodian of the People's power abuse a provision of law in the purported grant of entitlements under such law and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court. The denial of a locus standi in the circumstances as presented in this case where there has been a brazen abuse of power of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless. The facts that have been clearly established in this case prove that the 1st respondent and the Cabinet of Ministers of which she was the head, secured for the 1st respondent benefits and advantages in the purported exercise of executive power in breach of the provisions of the President's Entitlement Act NO.4 of 1986. Since executive power is exercised in trust for the People, such wrongful action is an infringement of the fundamental right to equality before the law guaranteed by Article 12(1) of the Constitution.

For these reasons I allow the application and grant to the petitioners the declaration prayed for that their fundamental right guaranteed by Article 12(1) of the Constitution has been infringed by executive action in the purported grant of benefits and advantages to the 1st respondent contrary to the provisions of the Presidents' Entitlements Act NO.4 of 1986.

As regards consequential relief it is seen that the 1st respondent has after this application was filed returned the land in question by a notarial instrument. Nevertheless a formal declaration is made that the decision to grant the land referred to in the Petition to the 1st respondent is contrary to law and of no force or avail in law.

Similarly declarations are made that the decisions which by implication give a right to the 1st respondent to the use and occupation of premises No. 27, Independence Avenue, Colombo 7, are of no force or avail in law.

I grant further declaration that the decisions that have been made from time to time by the Cabinet of Ministers and produced in Court with regard to the staff, both security and personal of no force or effect in law.

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The 1st respondent would now be entitled to the benefits as stated in sections 2 and 3 of the Presidents' Entitlements Act NO.4 of 1986. The entitlement would be to an appropriate residence free of rent and where an appropriate residence it is not available the 1st respondent would be entitled to a monthly allowance of 1/3rd of the monthly pension that payable. Premises No. 27 Independence venue, Colombo 7, which has not been used as a residence cannot be considered as an appropriate residence for the purpose of section 2 of the Act.

The 1st respondent would also be entitled to a monthly secretarial allowance to be computed in the manner stated in section 3(1)(a) of the said Act and for official transport and facilities relating to such transport as permitted in terms of section 3(2)a of the said Act.

It has to be noted that the President's Entitlement Act NO.4 of 1986 is a unique piece of legislation which grants entitlements only to former Presidents and their widows. Intrinsically it is an exception to the concept of equality before the law, since no other holder of public office is granted such benefits. It appears that there is no similar legal provision in any other country.

The provisions of this Act being an exception in itself to equality before the law, have to be strictly interpreted and applied. In the circumstances the submission of Counsel for the 1st respondent the allocation made in the Appropriation Act for 2006 for salaries of the staff for the 1st respondent creates an entitlement to a staff is misconceived. An allocation in the Appropriation Act predicates that the money allocated should be expended according to law.

The application is allowed. The 1st respondent will pay a sum of Rs. 100,000/- as costs to the petitioners and the State will pay a further sum of Rs. 100,000/- as costs.

THILAKAWARDENA, J. - I agree.

AMARATUNGA, J. - I agree.

Relief granted.

Kumarasinghe v. Dinadasa And Others - SLR - 203, Vol 2 of 2007 [2007] LKSC 14; (2007) 2 Sri LR 203 (18 May 2007)

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KUMARASINGHE
v
DINADASA AND OTHERS

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE, J. AND
MARSOOF, (PC) J.
S.C. (APPEAL) NO. 56/2002
FEBRUARY 07TH, 2006

Registration of Documents Ordinance, No. 23 of 1927 - Fraud and collusion within the meaning of section 7(2), Evidence Ordinance - Presumption under section 144 considered.

The defendants claimed title to the same land on deeds emanating from a common owner on the basis of prior registration. The plaintiff disputed the claim of the defendants on the ground that the said claim frustrates for the reason of fraud or collusion in obtaining the said deeds or securing prior registration thereof by the defendants. The main question considered by the Supreme Court was whether the benefit of registration that has accrued to the defendants-appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance.

Held:

(1) The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion. Whether the plaintiff had established fraud or collusion is entirely a matter for the District Judge to decide on the evidence unfolded in Court. At the end of the case for the plaintiff, if the defendants choose to keep quiet then they do so at great risk.

(2) If fraud had to be proved on a balance of probability the failure on the part of the defendants to give evidence could be held against them. A Civil Court when considering a charge of fraud requires a higher degree of probability than that it would require in establishing negligence.

Per Nihal Jayasinghe, J:

"Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence point to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants."

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Per Nihal Jayasinghe, J:

"In the teeth of damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to crossexamination."

Cur.adv. vult.

Cases referred to:

1. Lairis Appu v Kumarihamy 64 NLR 97.

2. Arumugam v Arumugam 53 NLR 490.

3. Ferdinando v Ferdinando 23 NLR 123.

4. Homelv Neuberger Products Ltd. 1957 1QB 247.

5. Bater v Bater 1956 3 AER 458.

6. Ceylon Exports Ltd. v Abeysundera 35 NLR 417.

APPEAL from the judgment of the Court of Appeal.

L.C. Seneviratne, P.C. with Lal C. Kumarasinghe for defendant-respondent appellant.

Gamini Marapana, P.C. with Navin Marapana for the plaintiff-appellant respondent.

May 18, 2007

NIHAL JAYASINGHE, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) instituted action for a declaration of title to the land described in the first schedule to the plaint and for an enjoining order, interim injunction and the permanent injunction restraining the defendant-respondent-appellants (hereinafter referred to as defendants) from entering the said land, disputing the title and possession of the plaintiff and alienating the said land.

The defendants claimed title to the same land on deeds emanating from a common owner which they maintained were duly registered and claimed title to the said property as against the plaintiff on the basis of prior registration. The defendants further claimed damages from the plaintiff for unlawful possession of the said land and for restoration of possession. The plaintiff disputed the claim of the defendant based on prior registration by contending that the said claim is defeated on account of fraud or collusion in obtaining the subsequent instrument or securing prior registration thereof. The plaintiff relied on section 7(2) of the Registration of

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Documents Ordinance. The matters that arose for determination therefore were whether -

(1) the defendants were entitled to the benefits of prior registration of their deeds over that of the plaintiff; and (2) the said claim of prior registration has been defeated on account of fraud or collusion in obtaining the said instruments or securing prior registration thereof.

The learned Additional District Judge held against the plaintiff on both grounds aforesaid and dismissed the plaintiffs' action. The plaintiffs appealed to the Court of Appeal and the Court of Appeal by its judgment dated 22.03.2002 allowed the appeal and directed that judgment be entered in favour of the plaintiff-appellant as prayed for in the plaint with costs. It is against this order that this appeal has been referred to this Court.

The main issue which has to be determined by this Court is whether the plaintiff can obtain relief under section 7(2) of the Registration of Documents Ordinance.

It is admitted between parties that one Podisingho Weerasinghe was at one time the owner of the land in suit on Deed No. 2143 (P2) of 10.04.1991 attested by Pinto Moragoda, Notary Public. It is also admitted between parties that the said Weerasinghe by Deed of Transfer No. 70636(P3) of 14.05.1991 attested by Jayasekera Abeyruwan transferred the said land to the plaintiff for a consideration of Rupees One Million. It is also admitted that the said Weerasinghe thereafter on 11.07.1991 and 10.08.1991 purported to convey the same land to the 1st to 4th defendantsappellants on Deeds Nos. 13499, 13571 respectively.

The said 1st to 4th defendants on 20.08.1991 by Deed No. 624 sold the said land to one Chandrapala who on 08.11.1991 by Deed No. 704 sold the same land to the 1st to 4th defendant-appellants and the 6th appellant. It is also admitted that as at the date of execution of Deed No. 70636 in favour of the plaintiff the deed on which the said Podisingho got title i.e. Deed 2143 (P2) had not yet been registered and that in view of the delay in registering the said deed the registration of the plaintiff's Deed No. 70636 (P3) was also held up.

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As Deed No. 2143 (P2) was yet to be registered the notary who executed deed No. 70636 (P3) the said Jayasekera Abeyruwan, Notary Public specifically appended that the said Deed No. 70636 (P3) should be registered in the same folio as Deed No. 2143(P2). It has to be stated here that Deed No. 2143 (P2) dated 10.04.1991 had been tendered for registration on 12.02.1991 and registered on 25.06.1991 in folio B682/57. That Deed No. 70636 (P3) dated 14.05.1991 was tendered for registration on 23.05.1991 and registered on 27.08.1991 in folio B 683/073 with no cross reference to folio B 682/57. Deed No. 13499 on 11.07.1991 has been registered in folio 682/201 cross referenced to folio B 682/57 and Deed No. 15371 dated 10.08.1991 registered in folio 682/203 cross referenced to folio B 682/57. That Deed No. 13571 dated 10.08.1991 registered in folio B 682/203 cross referenced to folio B 682/57. Deed No. 624 dated 20.08.1991 registered on 06.11.1991 in folio B 682/57. It appears that at the time Deed NO.70636 (P3) was registered Deed No. 2143 (P2) has already been registered to folio B 682/57 and despite specific instructions contained in Deed No. 70636 (P3) by the Notary Abeyruwan, it was not registered in the same folio as Deed No. 2143 (P2). However, all subsequent deeds drawn up by the original owner in favour of the defendant appellants have been registered in the correct folio. Thus, as set out before, the question to be determined by this Court is whether the benefit of registration that has ensured to the defendant appellants can be negated by the application of section 7(2) of the Registration of Documents Ordinance. That there was fraud or collusion in the delay and/or improper registration of Deed No. 70636 (P3).

The plaintiff in order to seek benefit under section 7(2) has either to establish fraud or collusion. In Lairis Appu v Kumarihamy(1), it was held by Lord Devlin that for the purpose of section 7 of the Registration of Documents Ordinance there must be "actual fraud in the sense of dishonesty", and that mere notice of prior registration is not enough. It was also held that "the words 'in obtaining such subsequent instrument' in section 7 of the Registration of Documents Ordinance do not exclude the case of a collusion between the transfer or and the transferee." In Arumugam v Arumugam(2) the vendor having sold his share in the property had

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placed the vendee in possession. Thereafter the vendor having discovered that the Deed of Sale has been registered in the wrong folio sold it to another who promptly had his deed registered in the correct folio. His Lordship held that there was collusion. Court followed a dictum of Betram CJ., in Ferdinando v Ferdinando(3) where it was stated that there was collusion within the meaning of the Registration of Documents Ordinance where the evidence establishes the joining of two parties in a common trick. Gratiaen, J. stated further that

"human ingenuity is such that the categories of fraud and collusion are far too varied to permit any comprehensive definition which would fit evety possible case which might a rise for adjudication between competing instruments affecting

land under the Registration of Documents Ordinance. The provisions of section 7(2) are by no means confined to transactions where some fiduciaty relationship exists or where the subsequent purchaser to whom fraud or collusion is imputed is proved to have taken an active part in the earlier sale over which he claims priority. If any person knowing that his proposed vendor had effectively parted with his interest in a property in favour of someone who has entered into possession of the property as its lawful owner, nevertheless, and in the hope of taking advantage of some recently detected flaw in the registration of earlier deed purports to purchase from that vendor certain right in the property which have already been disposed of, he is guilty of 'collusion' within the meaning of section 7(2) of the Ordinance. The law does not grant benefit of such prior registration to transactions of this kind."

Mr. Marapana, President's Counsel in support of his submission that the defendants are guilty of both fraud and collusion argued that the notary who attested the Deed No. 70636 (P3) had clearly indicated therein that it should be registered in the same folio as the Deed No. 2143 (P2) and that the officials of the Land Registry and Podisingho Weerasinghe were aware of. He submitted further that according to the Deputy District Registrar of Land, Kurunegala Deed No. 2143 (P2) had been tendered for registration on 12.04.1991 but that due to a fault that the relevant 'Paththuwa' had

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not been set out it was to be sent by the registered post to the said Weerasinghe on 20.06.1991 and mysteriously the said Weerasinghe had come to the Land Registry the very next day and had personally taken delivery of the deed which was supposed to be sent to him under registered cover, filed an appeal in the Registrar of Lands in Colombo and obtained an order in his favour and got the deed registered on 25.06.1991 in folio 682/57.

Mr. Marapana, President's Counsel adverting to the evidence of the District Deputy Registrar that when a deed is sent for registration and subsequently returned due to some flaw in it all the details regarding the said deed are entered in the folio maintained for it. It is only the relevant details about the transfer are left blank until such time the flaw is corrected and the deed sent back for registration. Mr. Marapana urged very strenuously that at the time the Deed No. 70636 (P3) was registered Le. on 27.08.1991 in folio B 683/173 the details of the Deed P2 were already entered in the relevant folio, and there is no reason why the officials of the Land Registry could not have followed the lawful instructions on Deed No. 70636 (P3) and entered it in the same folio in which the details of P2 already were. But what the officials of the Land Registry chose to do was to register Deed No. 70636 (P3) in a different folio totally disregarding the notary's detailed instructions. There was no explanation forthcoming from the witnesses of the Land Registry as to why the express instructions given by the Notary Abeyruwan were not followed.

It is relevant at this point to advert to the evidence of one Dayananda who gave evidence before the learned District Judge. He had stated that the defendants had said to him that this land in question has already been sold to a gentleman in

Minuwangoda and that they could resell the said land before the registration is effected by the purchaser from Minuwangoda. That he does not want to get involved in transactions and that he only required the money that he had advanced to Weerasinghe. Dayananda had stated in his evidence that the defendants discussed among themselves that they should get the property written in their names, in order to recover the monies they had advanced to Weerasinghe, despite the knowledge they had that the property had already been sold to the plaintiff. The learned President's Counsel went on to

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submit that the conduct of the defendants cannot be considered mere notice and that there was a concerted effort on the part of the defendants to get another deed in their favour before plaintiff's deed was registered. Learned President's Counsel submitted that the conduct of the defendants and the said Podisingho clearly established beyond doubt that they acted not only fraudulently but also in collusion and has support of reasoning in both Lairis Appu v Kumarihamy and that of Arumugam v Arumugam. Mr. Marapana invited attention of Court to the fact that none of the defendants gave evidence to controvert the evidence of Dayananda or to explain their conduct.

Mr. L.C. Seneviratne, President's Counsel for the appellant submitted that it was unnecessary for the defendants to have given evidence for the reason that fraud had to be proved beyond reasonable doubt and since that has not been proven to that degree the defendants were not obliged to give evidence to contradict Dayananda's testimony.

It is my considered view that whether the plaintiff had established fraud or collusion is entirely a matter for the learned District Judge to decide on the evidence unfolded in the Court and it is not for the defendants to make that decision. At the end of the case for the plaintiff if the defendants chose to keep quiet then they do so at great risk. If as contended by Mr. Seneviratne, President's Counsel the plaintiff fell short of establishing his case then the learned District Judge who is adjudicating the issues is quite likely to hold against the plaintiff. The learned President's Counsel for the appellant conceded that if fraud had to be proved on a balance of probabilities the failure on the part of the defendants to give evidence could be held against them. The standard of proof regarding allegation of crime in civil proceedings was considered in the case of Hornel v Neuberger Products Ltd,(4)The plaintiff in that case claimed damages for breach of warranty or alternatively for fraud. The matter for determination before Court was whether a director of the defendant company had made a fraudulent misrepresentation to the effect that the machine which was the subject matter of the sale was a reconditioned machine. If the Director did so represent, there was fraudulent misrepresentation because he knew that the machine had not been reconditioned.

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The Court dismissing the claim for damages for breach of warranty on the ground that the parties did not intend the Director's statement to have contractual effect, nevertheless held that it was satisfied on a balance of probabilities but not beyond reasonable doubt that the statement was in fact made and accordingly awarded damages for fraud. On appeal it was held by the Court of Appeal that on an allegation of a crime in civil proceedings the standard of proof was on a balance of probabilities. In the case of Baterv Bate,(5)where Lord Denning observed that in civil cases the case must be proved by preponderance of probabilities but there may be degrees of probabilities within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of criminal nature. Even though mere notice of prior registration is considered insufficient to establish fraud as held in Ceylon Exports Ltd. v Abeysundera(6) the slightest element of moral blame in addition to notice would constitute fraud. Section 7(2) has two elements, fraud or collusion. If fraud has to be established on a balance of probabilities and quite naturally standard of proof in respect of collusion shall be the same standard of proof. The conduct of Podisingho in retrieving the Deed No. 2143 from the Land Registry suggests a strong motive to commit a fraud. It is most unusual that Podisingho the owner of the land having sold the property to the defendants and having obtained the full consideration would seek to regularize a defect in the deed and waste his time to travel all the way to Colombo to obtain an order for the registration of the deed. The element of collusion can be gathered from the conduct of both Weerasinghe and the defendants. It is in evidence that the defendants along with Weerasinghe visited the Land Registry in Kurunegala many times. That they considered various options of obtaining the monies that had been advanced to the said Weerasinghe. Obtaining a conveyance of the land in their favour and reselling it to recover their money, whilst being aware that the land has already been sold to a buyer from Minuwangoda was an option that was also considered. There was an element of urgency in obtaining the defendants deeds registered before the original

buyer could effect his registration. On the facts disclosed the irresistible inference would be that Weerasinghe along with the defendants were guilty of collusion. Even though it is unnecessary to establish collusion beyond reasonable doubt all the items of evidence points to the fact that the registration of the deed of the plaintiff in the wrong folio was as a result of a collusive arrangement between Podisingho and the defendants. The defendants when they sought to have the subsequent instrument registered were aware that the plaintiff has been placed in possession by the said Weerasinghe. In the teeth of this damning evidence it was inconceivable that the defendants could have given evidence and subjected themselves to cross examination. The Court was entitled to draw the presumption under section 114 of the Evidence Ordinance.

Mr. Seneviratne the learned President's Counsel also submitted that the defendants were aware that the instruments No. 70636 (P3) has not been

registered and sought to take advantage which the defendant could rightfully do. There can be no dispute on that. But the circumstances here are entirely different. The defendants having advanced money to Weerasinghe in order to recover the said sum sought to contrive a scheme which was both fraudulent and collusive. I see no reason to interfere with the judgment of the Court of Appeal. Appeal is accordingly dismissed with costs.

TILAKAWARDANE, J. I agree.

MARSOOF, (PC) J. I agree.

Appeal dismissed.

Janashakthi Insurance Co. Ltd. v. Umbichy Ltd - SLR - 39, Vol 2 of 2007 [2007] LKSC 7; (2007) 2 Sri LR 39 (23 May 2007)

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JANASHAKTHI INSURANCE CO. LTD.
v
UMBICHY LTD.

SUPREME COURT
S.N. SILVA, C.J.
JAYASINGHE, J.
SHIRANEE TILAKAWARDANE. J.
SC 26/99
HC CIVIL 187/96 (1)
DC COLOMBO 13405/MR
JUNE 19, 2006
OCTOBER 25, 2006
DECEMBER 15, 2006
JANUARY 26, 2007

Evidence Ordinance, Section 35, Evidence (Sp. Pro.) Act 14of 1995- Marine Insurance - Breach of warranty of seaworthiness - Burden of Proof - on whom? -Admissibility of documents - Documents maintained in the ordinary course of business - Setting up of a different case in appeal- Permitted?

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The defendant-appellant successor to the original insurer appealed against the judgment of the Commercial High Court which awarded to the insured, the plaintiff-respondent on two causes of action for breach of contract to pay the sums insured on contracts of Marine Insurance, pertaining to the carriage of consignment of cargo.

In appeal it was contended by the appellant that the High Court erred in its application of the presumption, since there was no proof that the vessel had set sail for Colombo and there was no proof of unauthorized deviation from the normal route which discharged the insurer of liability and the plaintiff has failed to prove that it complied with the Institution classification clause and as such the claim is not maintainable and certain documents - telexes - have not been proved and as such were inadmissible.

Held:

(1) The evidence on record reveals that the vessel left the Port of Mersin and called at the port in Limersol due to engine trouble and from there sailed to Thessaloki and the documents or record indicate clearly that the shipment is to Colombo from Mersin via the Steam M.V. Elliot - which established that the voyage contemplated was in fact the voyage insured.

(2) Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. The burden of proof of breaches of conditions was on the insurer in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless his policy otherwise provided, on the insurer.

Per Shiranee Tilakawardane, J.

"I do not believe there to be any doubt regarding the fundamental position of Insurance Law that burden of proof related to an alleged breach of warranty lies on the insurer alleging it - I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the "Institute Classification clause" lies with the plaintiff-respondent".

(3) The law of evidence provides that the documents maintained by the party in the ordinary course of business can be produced by such party as evidence. Section 35 (a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents: The Director of plaintiff-respondent company has certified in Court that the documents were maintained in the ordinary course of business. There is no impediment to the admissibility of this evidence in the light of the provisions contained in the Evidence Ordinance.

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Per Shiranee Tilakawardane, J.

"The defendant-appellant is prohibited from setting up a different case from that set up at the trial, he cannot take up a case in appeal which differs from that of the trial."

APPEAL from a judgment of the Commercial High Court.

Cases referred to:

(1) Royster Guano Co. v Globe &Rutgers 19230 AMC11 (St. NY)
(2) The AI Jubail iv 1982 Lloyds Rep. 637 (Singapore)
(3) Stebbing v Liverpool&London &Globe 1917 2 KB42323
(4) MarshallvEmperorLife(1865)LR 10B 235
(5) Parkerv Potts- 181523 Dow223
(6) Francov Natush (18236) Tyr&Gv. 401

(7) Pickup v Thames and Mersey Marine Insurance (1878) 23 OBD 594 CA
(8) Bond Air Services Ire v Hill 1955 2 OB 417
(9) Barett v London General Insurance Co. Ltd. (1935) 1KB238.

Faiz Musthapha PC with Dinal Phillipsfor defendant-appellants.
K. Kanag-IswaranPC with K.M. Basheer Ahamed for plaintiff-respondent.

Cur.adv. vult

May 23, 2007
SHIRANEE TILAKAWARDANE, J.

This is an appeal by the successor to the original insurer, the defendant-appellant, against the judgment of the Commercial High Court dated 22nd April 1999, awarding the insured, the plaintiff-respondent, damages on two causes of action for breach of contract to pay the sums insured on two contracts of marine insurance, pertaining to the carriage of consignments of cargo from Turkey to Sri Lanka.

The High Court awarded the insured an amount aggregating to Rs. 27,323,372.00 with legal interest thereon from 1st September 1987 to the date of decree and thereafter on the aggregate amount of the decree till payment in full and taxed costs.

The plaintiff-respondent instituted action against the defendant-appellant on 24th May 1993 for the loss of cargo consisting of 2000 metric tons of red split lentils valued at Rs. 25,668,380/- and 200 metric tons of chickpeas valued at Rs. 1,654,992/- consigned to the

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plaintiff-respondent on M.V. 'Elitor' which sailed from the port of Mersin in Turkey on or about 24th May 1987.

The cargo comprising 2000 metric tons of red split lentils valued at Rs. 25,668,380/- had been insured on 2nd April 1987 by the policy marked as P1, against total loss of the entire consignment by total loss of the carrying vessels and the 200 metric tons of chickpeas valued at Rs, 1,654,992/- was insured on 12th May 1987 by the policy marked as P2 against loss by any risk, except those excepted under the said policy by Institute Cargo Clause A. .

The said policies of insurance were issued by National Insurance Corporation. The defendant-appellant is the successor to the business of the said Corporation and all its assets and liabilities.

The plaintiff-respondent's version is that after sailing from the Port of Mersin on 24th May 1987, the vessel M.V. 'Elitor' developed engine trouble and called at its home port in Limersol, and sailed there from on or about 20th June 1987 and sank

with all its cargo on or about 8th July 1987. The entire consignment of the plaintiff-respondent was lost.

The plaintiff-respondent notified the defendant-appellant of its claims on the said policies in August 1987. However these claims were not met by either the defendant-appellant or its predecessor.

The plaintiff-respondent states however, that others who had consigned cargo on board the same vessel were paid by the National Insurance Corporation admitting its liability. A cause of action having arisen to sue the defendant-appellant for monies due under the above policies, the plaintiff-respondent has instituted this action.

At the trial the defendant repudiated liability on several grounds, including that the vessel never left the port on its voyage to Colombo, the ship was not seaworthy for the voyage to Colombo, the ship secretly discharged the cargo of red split lentils and chickpeas in Lebanon, the plaintiff failed to inform the defendant immediately of the sinking of the ship, and the plaintiff has not suffered any loss or damage since the equivalent of the consignment said to have been lost was supplied to the plaintiff by Betas Beton.

S. Ashokan, a director with the plaintiff company gave evidence that the vessel, 'Elitor' did not arrive at the port of Colombo and that ordinarily the ship would have arrived within two to three weeks. Due

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to the non-arrival of the ship, the plaintiff made inquiries through Lloyds and from local agents and the owners. Telexes received from Lloyds of London, marked as P3 and P4 were produced by the witness. Referring to the originals of these documents the witness stated that these documents were taken over by the CID as part of an
ongoing investigation. The witness certified that documents P3 and P4 are copies of the originals and were taken and maintained in the ordinary course of business.

The plaintiff-respondent made its claims to the defendant-appellant through its letters P8 dated 24th August 1987, and P11 dated 18th August 1987. The plaintiff-respondent also produced documents P9(a) and P10(a) which are Clean Shipped on Board Bills of Lading stating that the consignments described therein have been shipped at the Port of Loading in Mersin, Turkey. Documents P10(b) and P10(c) are certificates issued by the shipping agent in Turkey certifying that the shipment has been effected in the vessel 'Elitor' and that the vessel'Elitor' is an ocean going seaworthy vessel.

The documents submitted along with claims P8 and P11 establish that the consignment of red split lentils and chickpeas were shipped on board the vessel 'Elitor' from the Port of Mersin, Turkey. These documents have not been contested by the defendant-appellant. As remarked upon by the learned Judge, although the

Defendant has taken several positions against the plaintiff's claim, the defendant has neither called any witnesses not elicited even under cross examination the veracity of the position taken by them.

The learned High Court Judge having examined and analysed the evidence in view of relevant legal positions, concluded that "the plaintiff has established its claim on the basis that the ship M. V. Elitor on board of which the plaintiff-respondent's consignment of goods covered by P1 and P2 were legally presumed to be lost and resulted in the actual total 1055of goods to the plaintiff which is covered by P1 and P2 with the liability of the defendant, having to pay the value the two contracts have covered. "

Aggrieved by this decision of the High Court, the defendant-appellant has raised this appeal on the following grounds;

Firstly, that the High Court has erred in its application of the presumption, since there was no proof that the vessel has set sail for

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Colombo and there was proof of unauthorized deviation from the normal route which discharged the insurer of liability.

Secondly, that the plaintiff-respondent has failed to prove that it complied with the institute Classification Clause, and as such the claim is not maintainable.

Thirdly, that the documents P3 and P4 which are copies of telexes said to have been received from Lloyds have not been proved and as such, were inadmissible.

Considering the first ground of appeal, it is the defendant-appellant's contention that the presumption has been incorrectly applied in the instant case as for the presumption to operate it is necessary to establish that the vessel sailed on the voyage insured. The defendant-appellant submits that in the instant case, there is no evidence that the vessel set sail for Colombo.

The evidence on record reveals that the vessel left the Port of Mersin, and called at the port in Limersol due to engine trouble, and from there sailed to Thessaloki on or about the 20th of June 1987. The documents submitted together with the claims P8 and P11 confirm that the consignment of 2000 metric tons of red split lentils and 200 metric tons of chickpeas were shipped on board the vessel M.V. Elitor as covered by the policy. Document P4 from Lloyds established that the ship has reached the port in Limersol and left the port on the 29th of June and hence no information is available.

There is no doubt that the vessel has in fact left the port of Mersin, and the documents on record indicate clearly that the shipment is to Colombo from Mersin via the steamer M.V. Elitor (Vide documents P6, P9(a), which established that the voyage contemplated was in fact the voyage insured - from Mersin, Turkey to

Colombo, Sri Lanka). I find that the Learned Judge correctly held that vessel did sail from the Port of Mersin on or about 24th May 1987 for the port of Colombo.

As part of the same ground, the defendant-appellant has also contended the issue that there has been a deviation from the authorised voyage and that this discharges the insurer from all liability on the policy of insurance. It is unnecessary to examine the merits of this argument as this is a new issue which the defendant-appellant failed to raise at the trial stage. The defendant-appellant is prohibited

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from setting up a different case from that set up at the trial. I agree with the plaintiff-respondent's submission that deviation is a question of fact and the impact of such a deviation upon the insurer's liability must be considered in light of attendant circumstances.

The defendant-appellant has also alleged that it is not liable under the insurance policy since the plaintiff-respondent is in breach of a condition of the policy, namely the Institute Classification Clause. The written submissions of the defendant-appellant clearly mentions that the same issue is contained in paragraph 8 of the answer at page 45 and issue 5 of the defendant at page 164.

However a bare reading of both documents does not reveal any reference to the Institute Classification Clause or a breach thereof. In paragraph 8 of the answer reference is made to the un-seaworthiness of the vessel and also to the breach of the un-seaworthiness and unfitness exclusion clause. No clear mention is made of the breach in the manner taken up in appeal; that the plaintiff-respondent is in breach of the conditions of the policy pertaining to the Institute Classification Clause. There is no doubt that the defendant-appellant cannot take up a case in appeal, which differs from that of the trial. Therefore, where the defendant-appellant has failed to raise the matter clearly at the trial stage, it is prohibited from doing so in appeal.

However, even if this court considers the alleged breach of the Institute Classification Clause as raised by the defendant-appellant, the contention fails since the defendant-appellant has failed to discharge the burden of proving a breach of warranty by the plaintiff-respondent. It is the defendant-appellant's position that being a warranty, the burden was on the plaintiff-respondent to establish compliance. The defendant-appellant claims that as the plaintiff-respondent has failed to discharge its burden and prove compliance with the conditions in this clause, the defendant-appellant is discharged from any liability under the policy.

The Institute Classification Clause stipulates that:

"The marine transit rates agreed for this insurance apply only to cargoes and/or interests carried by Mechanically self-propelled vessels of steel construction Classed as below by one of the following classification societies",

"Provided such vessels are:

(i) Not over 15years of age or

(ii) Over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised scheduled to load and unload at specific ports. "

The clause clearly requires that the vessel be classed with a Classification Society agreed by the underwriters, remains in the same class and also that the Classification Society's recommendations, requirements and restrictions regarding seaworthiness and of her maintenance thereof be complied with by the date(s) set by the Society. (Vide, Hodges on Law of marine Insurance at page 113).

The main objective of the clause is to improve safety standards and ensure the seaworthiness of the vessel through the intervention of a reputed Classification Society agreed by the underwriters. Though not specifically mentioned as such, the clause be considered as a warranty if there is an intention to warrant. It follows that a breach of this clause would relieve the insurer from all liability under the policy as from the date of the breach.

It is not uncommon that a policy will contain a warranty that the vessel will not be operated without a certificate of seaworthiness or\ that the vessel will be surveyed and inspected by an approved surveyor and a certificate issued by the surveyor attesting to the seaworthiness of the vessel. (Vide, Parks on the Law and Practice of Marine Insurance and Average at page 247; *Royster Guano Co. v Globe & Rutgerg*(1). In The *AI Jubail IV,*(2) it was held that the compliance with the warranty was a condition precedent to coverage, and the assured failed to recover.

There is little doubt therefore that the Institute Classification Clause in the policy is a warranty which requires compliance by the plaintiff-respondent. However, the question of where the onus of proof lies in such a case is for the court to consider when coming to a determination.

Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. (Vide. Colinvaux on The Law of Insurance at page 115) In *Stebbing v Liverpool and*

London and Globe(3) where a claim by the applicant was challenged by the respondent insurers on the basis that the applicant had suppressed material facts and had made untrue answers in the proposal form, the court held that the burden of proving the untruth of the answers in the proposal, lay on the respondents; if they cannot establish it, then they fail in the defence. Laying down a test for determining the onus of proof in a given case, Lord Reading stated that, "the burden of proof

lies at first on the party against whom judgment would be given if no evidence at all was adduced."

Similarly in *Marshall v Emperor Life,*(4) where the right of the assured to recover on a policy is disputed on the ground that he had stated in the proposal that he had not had certain diseases, whereas he in fact had one of them at the time, it was held that the insurer is obliged to give particulars of the symptoms of the disease alleged.

In the case of marine insurance it is well established that the burden of proving a breach of the implied warranty of seaworthiness lies on the insurer where he alleges it. (Vide, Ivamy on Marine Insurance at page 298). Ivamy refers to the decisions in *Parker v Potts*(5)*and Franco v Natuscfi* (6)*.* In *Pickup v Thames and Mersey Marine Insurance Co.,*(7) the court upheld the principle that even where a ship springs a leak soon after commencing her voyage, the burden of proof remains on the insurer and there is no shift in the principle that the party alleging un-seaworthiness must prove it.

Parks in The Law and Practice of Marine Insurance and Average at page 249, states conclusively that, "the burden of proving a breach of warranty is on the underwriter, and that is so even where compliance is expressed as a condition precedent to recovery under the policy." The same view is expressed in Arnold on The Law of Marine Insurance and Average at page 684.

In *Bond Air Services Inc v Hill,*(8) the court clearly held that "the burden of proof of breaches of conditions was on the respondents in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless the policy otherwise provided, on the insurer." Also in *Barett v London General Insurance Co. Ltd.*(9) at 238 it was pronounced that the burden of proof lies on the insurers.

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I do not believe there to be any doubt regarding the fundamental position of insurance law that the burden of proof related to an alleged breach of warranty lies on the insurer alleging it. I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the warranty contained in the Institute Classification Clause lies on the plaintiff-respondent. In this case the burden of proving non-compliance with the warranty lies squarely on the defendant-appellant. It is clear that the defendant-appellant has failed to prove the charge against the plaintiff-respondent.

The final ground of appeal put forward by the defendant-appellant related to the admissibility of documents P3 and P4, which were admitted by the learned Judge under section 35(1) of the Evidence Ordinance. The witness, S. Ashokan stated in evidence that due to the non-arrival of the ship, the plaintiff-respondent Company made inquiries as to the whereabouts of the ship, through Lloyds by telex and also the local agents and owners of the ship.

The documents P3 and P4 produced by the witness are communications from Lloyds to the plaintiff-respondent Company in response to inquiries made in the ordinary course of business of the plaintiff-respondent company. With regard to the originals of these documents, the witness stated that these documents were taken over by the CID as part of an investigation on matters concerning the vessel M.V. Elitor. The witness gained access to these documents when he became a Director of the plaintiff-respondent company following the death of both his father and uncle .The witness has certified that these were copies taken from the originals which were
handed over to the CID and they were copies taken in the ordinary course of business related to the company.

Section 35(a) of the Evidence Ordinance makes admissible a statement of fact contained in a record compiled,

(a) by a person in the course of any trade or business in which he is engaged or employed or for the purposes of any paid or unpaid office held by such person, and
(b) from information supplied to such person by any other person who had or may have had personal knowledge of the matter dealt with in that information.

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The law of evidence provides that the documents maintained by a party in the ordinary course of business can be produced by such party as evidence. Section 34(a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents.

It is contended by the defendant-appellant that the said documents have not been maintained in the ordinary course of business. The record shows that the documents were admitted subject to proof and that objections were raised by the defendant against their reception in evidence as they had not been proved. However the defendant did not raise a challenge at the trial to the statement of the witness that the documents were maintained in the ordinary course of business. No questions were put to the witness on whether the documents had been maintained in the ordinary course of business of the company. The documents are admissible under 35(a) of the Evidence Ordinance. The Director of the plaintiff-respondent Company has certified in Court that the documents were maintained in the ordinary course of business.

I find no reason to disbelieve the statements of the witness. I find that the documents P3 and P4 produced before court were maintained in the ordinary course of business of the company and find no impediment to the admissibility of this evidence in light of the provisions contained in the Evidence Ordinance.

The defendant-appellant has also sought to rely on the Evidence (Special Provisions) Act No. 14 of 1995. It was contended that while this Act provides for the admissibility of contemporaneous recordings by electronic means, such evidence would only be admissible if notice is given to the other party and an opportunity to inspect the evidence and the machine used to produce the evidence. I find it unnecessary to comment on the merits of this submission, as this too is a fresh submission made at the appeal stage which finds no place in the trial proceedings.

It is clear having considered all three grounds of appeal submitted by the respondent that the vessel M.V. Elitor certainly left the port in Mersin for Colombo as evidenced by the several shipping documents and communications produced in Court. It is also clear that the burden

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of proving the breach of warranty lay on the defendant-appellant and that no evidence has been produced to establish its claim against the plaintiff-respondent. On the admissibility of documents, I find that the documents are admissible under section 35(a) of the Evidence Ordinance as they had been maintained in the ordinary course of business of the plaintiff-respondent Company.

For these reasons, I find that the judgment of the High Court is correct in fact and law and this appeal is refused and dismissed. I order that the defendant-appellant pay costs in the sum of RS.10,000/- to the plaintiff-respondent.

S.N. SILVA, C.J. **-** I agree
JAYASINGHE, J. **-** I agree

Appeal dismissed.

Kariyawasam v. Southern Provincial Road Development Authority And 8 Others - SLR - 33, Vol 2 of 2007 [2007] LKSC 6; (2007) 2 Sri LR 33 (5 July 2007)

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KARIYAWASAM
v
SOUTHERN PROVINCIAL ROAD DEVELOPMENT AUTHORITY AND 8 OTHERS

SUPREME COURT
SHJRANEE TILAKAWARDANE, J.
DISSANAYAKE,J. AND
AMARATUNGA, J.
S.C. APPLICATION NO. 157/2006

Fundamental rights - Article 126(2) of the Constitution - Has the petitioner filed the application within the period prescribed by Article 126(2) of the Constitution? - Section 13(1) of the Human Rights Commission Act, No. 21 of 1996- Affidavit - Jurat.

At the hearing the respondents raised three preliminary objections, namely;

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(1) Application of the petitioner is not filed within time;
(2) The affidavit filed by the petitioner in support of his application is defective;
(3) The petitioner has not disclosed that he had made an application to the Human Rights Commission on the same matter.

Held:

(1) An application for alleged infringement of a fundamental right which has been filed in the Human Rights Commission within one month from the alleged infringement of a fundamental right is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution.

(2) The jurat (of the affidavit) contains all necessary particulars including the date of affirmation and attestation. There is no requirement that the Justice of the Peace must put the date below his signature in addition to the date given in the jurat.

Failure to put the date below the J.P.'s signature cannot affect the validity of the affidavit when the date of attestation is embodied in the jurat.

Per Gamini Amaratunga J. -

"... However, where the J.P. has written below his signature a date different to the date given in the jurat, such writing creates a doubt not only with regard to the exact date of affirmation and attestation, but also with regard to the other particulars given in the jurat. If this doubt is not cleared by a reasonable explanation consistent with petitioner's contention the affidavit is liable to be rejected as defective..." ,

(3) The failure to disclose by the petitioner in his petition that he had made an application to the Human Rights Commission on the same matter is not a ground to reject this application as he has not gained any undue advantage by his failure to refer to it.

APPLICATION under Article 126(1)
On a preliminary objection being taken.

Saliya Pieris with Sapumal Bandara for the petitioner.

D.S. Wijesinghe, P.C. with Kaushalya Mol/igoda for the 1st, 2nd, 3rd and 8th respondents.

Cur.adv. vult

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July 5, 2007
GAMINI AMARATUNGA, J.

The petitioner, a Technical Training Coordinator of the Southern Provincial Road Development Authority has filed this fundamental rights application, dated 28.4.2006 and filed on 2.5.2006, challenging his transfer from the Head Office at Galle to the Regional Engineer's Office at Elpitiya. The transfer has been made by letter dated 14.3.2006. The reliefs sought by the petitioner are a declaration that the respondents have violated his fundamental right guaranteed by Article 12(1) and an order quashing the impugned transfer.

At the hearing before us the learned President's Counsel for the 1st to 8th respondents raised three preliminary objections, namely;

(1) That the application of the petitioner is out of time.

(2) That the affidavit filed by the petitioner in support of his application is defective for the reason that the date written below the signature of the Justice of the Peace who attested the petitioner's affidavit is different from the date given in

the jurat.

(3) That the petitioner has failed to disclose that he had made an application to the Human Rights Commission on the same matter.

After oral submissions, both parties have filed their written submissions on the preliminary objection.

The petitioner's application for relief against the impugned transfer dated 14.3.2006 has been filed on 2.5.2006. On the face of it, it is clearly out of time for not being within the period of one month prescribed by Article 126(2) of the Constitution.

The learned Counsel for the petitioner submitted that the petitioner has made an application to the Human Rights Commission seeking relief against the impugned transfer. The petitioner has not averred this fact in his application. However along with his written submissions the learned Counsel has filed a copy of the petitioner's application made to the Matara branch of the Human Rights Commission. It is dated 27.3.2006 and the date

stamp on it indicates that it has been received by the Matara branch on the same date. The Copy of a letter dated 14.6.2006 written by the Regional Co-ordinating Officer of the Matara branch of the Human Rights Commission to the 3rd respondent shows that the Commission has sent two letters dated 28.3.2006 and 24.4.2006 to the 3rd respondent calling for a report on the petitioner's complaint and that the 3rd respondent had failed to respond to those letters even by 14.6.2006.

According to section 13(1) of the Human Rights Commission Act No. 21 of 1996, **"where an inquiry into a complaint made by an aggrieved party to the Human Rights Commission within one month of the alleged infringement of a fundamental right is pending before the Commission, the period within which such inquiry is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution."**

The petitioner's application to the Human Rights Commission was within one month of the impugned transfer. The Human Rights Commission, by calling for a report from the respondent Authority has set in motion the process of holding an inquiry into the petitioner's application, but the Authority has failed to submit its report to the Commission. In those circumstances, the petitioner is entitled to claim the benefit conferred by section 13(1) of the Human Rights Commission Act. I accordingly hold that the petitioner's application to this Court is not time barred.

The second objection is that the date given in the jurat of the petitioner's affidavit

is different from the date written by the Justice of the Peace (the J.P.) below his signature and therefore the affidavit is defective. The date given in the jurat is "27th day of April 2006" and the date written below the J.P's signature is 2006.4.12. The learned Counsel for the petitioner submitted that the petitioner has signed the affidavit on 27th April 2006 before the JP but the latter in writing the date below his signature had made a mistake by writing the date as 2006.4.12. On the other hand the contention of the learned President's Counsel for the 1st to 8th respondents was
that the date given by the J.P. coincides with the one month requirement as the period of one month from the impugned transfer

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letter expired on 14.4.2006. The learned President's Counsel submitted that the 13th and 14 April being public holidays on account of the New Year, the probabilities are that the J.P. signed the affidavit on 12th before the onset of the holidays.

A jurat "is a certificate of officer or person before whom writing was sworn to. In common use the term is employed to designate the certificate of the competent administering officer that writing was sworn to by the person who signed it. "Black's Law Dictionary - 5th Ed.p.765. In other words, the jurat is the J.P.'s attestation clause which is essential to the validity of an affidavit.

The jurat in the petitioner's affidavit states that it was read over and explained to the affirmant; that he understood its nature and contents and that he affirmed and signed it on 27th day of April 2006 at Colombo. On the right hand side of the jurat the J.P. has signed below the printed words "before me." Thus the jurat contains all necessary particulars including the date of affirmation and attestation. There is no requirement that the J.P. must put the date below his signature in addition to the date given in the jurat. The failure to give the date below the J.P.'s signature cannot affect the validity of the affidavit when the date of attestation is embodied in the jurat.

However where the J.P. has written below his signature a date different to the date given in the jurat, such writing creates a doubt not only with regard to the exact date of affirmation and attestation, but also with regard to the other particulars given in the jurat. If this doubt is not cleared by a reasonable explanation consistent with the petitioner's contention that the date 2006.4.12 written below the J.P.'s signature was a mistake made by the J.P., the affidavit is liable to be rejected as defective.

The learned Counsel for the petitioner submitted that the petitioner has signed the affidavit on 27.4.2006. The petition filed in this Court is dated 28.4.2006, which was a Friday. The next two days Le. 29th and 30th April, 2006 were Saturday and Sunday. The 1st of May was a public holiday. The petitioner's application has been filed on 2.5.2006, which was the first working day after 28.4.2006. This sequence of events supports the petitioner's contention that the petitioner signed the affidavit on 27.4.2006.

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In the body of the affidavit, in paragraph 14, (paragraph 13 in the petition) there is a reference to a letter dated 19.4.2006, sent by the 3rd respondent to the petitioner. A copy of that letter is attached to the petition marked P10. It is the 3rd respondent's reply to the petitioner's appeal dated 16.3.2006 sent to the 3rd respondent to get the transfer cancelled (P8). The 3rd respondent in his affidavit has admitted that the petitioner's appeal against the transfer was rejected by P10. If the affidavit had been prepared and signed by the J.P. by 12.4.2006, the petitioner could not have referred to P10 dated 13.4.2006 in his affidavit. This intrinsic evidence contained in the affidavit clearly shows that the affidavit had been prepared on a date subsequent to 19.4.2006.

In considering the submission of the learned Counsel for the petitioner that the date 2006.4.12, written below the J.P.'s signature was a mistake, this Court can taken into account ordinary human conduct as well. The date "27th day of April 2006" is printed in the jurat. The J.P. had placed his signature parallel to the printed jurat, towards the right hand edge of the same paper. In the absence of reasons so compelling, this Court is unable to hold that the J.P. had consciously and deliberately put the date as 2006.4.12 when the jurat, parallel to his signature, has the date '27th day of April' in the printed form.

The learned Counsel for the petitioner also submitted that the date written by the J.P. appears to be 2006.4.17 and not 2006.4.12. In fact in the way the date is written it is not clear whether the date is 12 or 17. The learned Counsel for the petitioner submitted that the J.P. in writing the date 27th had written figure 1 instead of figure 2. If the second figure in the date written by the J.P. is taken as 7, it is consistent with the second figure of the date given in the jurat. As pointed out earlier, in considering the ordinary human conduct it is not possible to rule out the possibility of human error.

The petitioner's reference in his affidavit to P10 dated 19.4.2006 is a clear indication that the affidavit could not have been prepared and signed on a date prior to 19.4.2006. The date given in the Jurat (27.4.2006) is consistent with the position that the affidavit had been signed on 27.4.2006 (which is a date subsequent to P10 dated 19.4.2006). On the other hand the date 2006.04.12 (or 17) written by the J.P. cannot be a correct date in view of the reference

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in the body of the affidavit to P10 dated 19.4.2006. Thus the only reasonable conclusion this Court can come to is that the date written by the J.P. below his signature was an inadvertent error and as such it cannot affect the validity of the jurat. Accordingly I hold that the affidavit of the petitioner is not defective and the second preliminary objection is also overruled.

The third preliminary objection is that in his petition the petitioner has failed to disclose that he had made an application to the Human Rights Commission on the

same matter. It is true that in his application the petitioner has not referred to his communication to the Human Rights Commission. However by his failure to refer to it, the petitioner has not gained any undue advantage and as such the 3rd preliminary objection is not a ground to reject the petitioner's application. Accordingly I direct to list the petitioner's application for hearing on its merits.

SHIRANEE TILAKAWARDANE, J. - I agree.
DISSANAYAKE, J. - I agree.

Preliminary objections overruled.
Matter set down for argument.

Dissanayake v. Priyal De Silva - SLR - 134, Vol 2 of 2007 [2007] LKSC 8; (2007) 2 Sri LR 134 (25 July 2007)

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DISSANAYAKE
V
PRIYAL DE SILVA

SUPREME COURT
DR. SHIRANI BANDARANAYAKE,J.
FERNANDO, J.
SOMAWANSA, J.
SC FR 256/2005
OCTOBER 13, 2006
NOVEMBER 8, 2006
FEBRUARY 27, 2007
APRIL 5, 2007
JULY 2,2007

Constitution - Article 12 (1) - Right to equality - Equal protection of the law and not equal violation of the law - Time frame - Mandatory? - Excellence in sports - Can sports and umpiring be treated as one and the same?

The petitioner, a Sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department alleged that his fundamental rights guaranteed in terms of Article 12(1) had been violated. He claimed that, he was not given marks for excellence in sports - as he has officiated international and national cricket tournaments. He further alleged that another candidate was given marks for sports, although such was not at the national level.

Held:

(1) The right to equality means that among equals, the law should be equal and should be equally administered and thereby the like should be treated alike. Provisions in Article 12 (1) would only provide for the equal protection of the law and shall not provide for the equal violation of the law.

It cannot be understood as requiring officers to act illegally because they have acted illegally previously.

(2) It is abundantly clear that 'sports and umpiring' cannot be treated as one and the same and if a decision had been taken to allocate marks for 'excellence in sports that cannot be used to adduce marks for umpiring'.

(3) Time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) is mandatory.

APPLICATION under Article 126 of the Constitution.

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Cases referred to:

1. Satish Chanderv Union of/ndia AIR 1953 SC 250.

2. Ram Prasad v State of Bihar AIR 1953 SC 219.

3. C.W. Mackie and Company Ltd. v Hugh Molagoda, Commissioner General of Inland Revenue and Others 1986 1 Sri LR 300.

4. Gamaethige v Siriwardane 1988 1 Sri LR 384.

5. Jayasekera v Wipulasena and others 1988 2 Sri LR 237.

6. R.P. Jayasuriya v R.CA Vandergert, Secretary, Ministry of Foreign Affairs and Others SC FR 620/97 SCM 30.10.1998.

7. Jayawardane v Attorney-General FRO Vol. 1 175.

8. Gunawardane and others v E.L. Senanayake and others, FRO Vol. 1.175.

9. Thadchanamoorthyv Attorney-General 1979 79 801 Sri LR 154 (SC)

10.Mahenthiran v Attorney-General FRG, Vol. 1 175.

11.Namasivayan v Gunawardane 1989 1 Sri LR 394.

12.Gomez v University of Colombo 2001 1 Sri LR 273.

13.Karunadasa v People's Bank SC 147/2007 SCM 20.6.2007.

Uditha Egalahewa with Gihan Galabodage for petitioner.

Harsha Fernando SSC for respondents.

Bimba Jayasinghe TillekeratneDSG for respondents.

Cur.adv. vult.

July 25, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a Sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department, alleged that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the non-granting of the promotion to the post of Inspector, for which this Court had granted leave to proceed.

The facts of this application, as submitted by the petitioner, albeit brief, are as follows:

The petitioner joined the Sri Lanka Railway Department as a Sub-Inspector of the Railway Protection Force on 02.05.1988 (P1). According to the relevant scheme of promotions, the petitioner's next promotion was to the post of Inspector and the sub-Inspectors were eligible to make their applications for the said promotion on completion of seven (7) years of service in that post. Accordingly, the petitioner became eligible for promotion to the post of Inspector on 02.05.1995. Since the petitioner's initial appointment to the post

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of sub-Inspector in 1988, no applications were called for subsequent promotions until 2002 (P2).

Applications were called for the promotions to the post of Inspector from among the sub-Inspectors, who had completed seven (7) years in the said post. The notice calling for applications had stated that there were four (4) vacancies as at the date of calling for applications (P3).

In terms of the notice calling for applications for promotions to the post of Inspector, a competitive examination was held on 19.07.2003. By letter dated 19.11.2003, the General Manager (Operations) had informed the petitioner that he had successfully completed the competitive examination and that the interview will be held on 25.11.2003. The said interview was postponed on several occasions and later was held on 23.09.2004. The results of the examination or the interview were not published until 11.07.2005 (P8).

By letter dated 23.06.2005, four (4) sub-Inspectors were promoted to the posts of Inspector with effect from 19.07.2003 (P7). Upon inquiry, the 1st respondent had informed the petitioner that he had been the 6th in order of merit at the interview and had obtained marks as follows:

Competitive Examination		
	Subject 1	58 marks
	Subject 2	58 Marks
Interview		56 Marks

Total		172 marks

Upon enquiry the petitioner had become aware that he had not been given marks adequately at the interview and on that basis his allegations against the respondents were mainly two fold.

(a) that he has not been given marks according to the Scheme of Recruitment;

(b) that there were seven (7) vacancies in the post of Inspector as at the date of calling for applications and as such, the

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petitioner should have been appointed to the said post of Inspector.

The petitioner along with two others, who obtained the 5th and 7th positions in order of merit at the interview, had appealed to the 2nd respondent through the 3rd respondent. They had referred to the three (3) additional vacancies that were available as at the date of calling for applications for the post of Inspector and had requested that they be appointed to fill the aforesaid vacancies (P14 and P 15).

By letters dated 20.06.2005 and 27.06.2005 the 3rd respondent had referred the aforementioned appeals to the 2nd respondent and had recommended that this matter be looked into (P16 and P17). Thereafter, the 2nd respondent, by his letter dated 27.06.2005 had requested the 3rd respondent to submit details of sub-Inspectors, who had served the Sri Lanka Railway Force as at 27.01.2005. The 3rd respondent had furnished the relevant information by letter dated 05.07.2005 {P18 and (19)}.

Accordingly the petitioner took up the position that the 1st to 3rd respondents have acted arbitrarily in calling for applications for only four (4) vacancies in the post of Inspectors, when in fact seven (7) vacancies had existed as at the date of calling for applications. In support of this position it was further stated that posts in the Sri Lanka Railway Protection Force had ceased to be cadre based and
varying numbers have served in the post of Inspector at different points of time.

In the aforementioned circumstances, the petitioner alleged that the petitioner's fundamental right to equality and equal protection of the law guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents.

Learned Deputy Solicitor-General for the respondents contended that the petitioner cannot now challenge the number of vacancies that existed in these proceedings as the notice calling for applications for the post of Inspector was in January 2001 and that it had specifically stated that the said notice was in respect

of 'existing vacancies as of now'. Her position was that the number of vacancies, which existed at the time of the calling of the applications, had been only four (4).

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The contention of the learned Counsel for the petitioner was that the petitioner was not given any marks for excellence in sports despite the fact that he was engaged in several extra curricular activities during his period of service in the Sri Lanka Railway Department.

In the circumstances let me now turn to consider the main allegations referred to earlier, which were raised by the learned Counsel for the petitioner.

(A) Marks for excellence in sports

Admittedly, the petitioner was not given any marks for excellence in sports. His allegation that he should have been given marks at the interview for excellence in sports was based on the fact that he had officiated international and national cricket tournaments.

The petitioner had stated that he had also played cricket at national level since 1990 and that he had submitted the relevant certificates at the interview, which were submitted marked P32(a) to P32(h). Certificates marked as P32(a), (b), (c), (d) and (f) were issued by the Sri Lanka Sate Service Cricket Association for participants at the Inter-club Tournament and the Annual Tournament and the certificate marked as P32(c) was issued by the Railway Sports Club. The rest of the documents (P32(a), P32(h)) were news items, which stated that the petitioner had been selected as the best umpire from among the cricket umpires examination held in 1994.

Considering these certificates, the 2nd respondent in his affidavit had averred that marks under the heading of 'excellence in sports' was given for national level sports activities engaged in by the officer concerned during his tenure of office, provided that the applicant produces certificates indicating achievements in sports. Further it was averred that umpiring was not considered as a category for which marks would be given, as umpiring was not considered as being 'an engagement in national level sports.'

A careful perusal of the petitioner's bio-data and the certificate submitted by him clearly reveals that most of his achievements are in the field of umpiring. As stated earlier, the criteria stipulated in the

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allocation of marks at the interview, specifically stated that upto a maximum of 10 marks could be given for 'excellence in sports'. Based on this criterion, the respondents had decided to allocate marks for participating, in national level sports

activities by the officer concerned during his tenure of office. For this purpose, admittedly, it is necessary for the officer in question to produce certificates indicating his achievements in sports. Umpiring was not considered by the respondents, quite correctly in my view, as a category for which marks could be given, as that was not considered being 'an engagement in national level sports'.

It is not disputed that the marks were to be allocated for excellence in sports. The word 'sports' is defined in the Oxford English Dictionary (2nd Edition, Vol XVI, Clarendon Press, 1989 pg. 315) to read as follows:

"Participation in games or exercises, esp. those of an athletic character or pursued in the open air; such games or amusements collectively." The words 'umpire' and 'umpiring' on the other hand, have been defined in the following terms [Oxford English Dictionary, (supra) Vol. XVIII pg. 836).]

"umpire- One who decides between disputants or contending parties and whose decision is usually accepted as final;- an arbitrator.

Umpiring -The action of acting as an umpire, expo of doubtful points in game."

Considering the aforementioned definitions, it is abundantly clear that "sports and umpiring' cannot be treated as one and the same and if a decision had been taken by the respondents to allocate marks for 'excellence in sports' that cannot be used to adduce marks for umpiring. Accordingly, I am of the view that the respondents cannot be found fault with for not allocating marks for the certificates submitted by the petitioner on umpiring.

Learned Counsel for the petitioner also contended that, the respondents had not, allocated marks for excellence in sports, although the petitioner had taken part in several cricket

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tournaments. As pointed out earlier, the certificates submitted by the petitioner were from the Sri Lanka Railway Association, which cannot be accepted as achievements in sports at the national
level.

Learned Counsel for the petitioner, took up the position that the State Counsel, who appeared for the respondents at the commencement of the hearing had produced a certificate issued by the 'Government Service Sports Society Limited' and had stated that it has been accepted as national level sports and that candidate, who was one of the promotees was allocated marks for that certificate. Learned Counsel for the petitioner therefore contended that if the said person was given marks for the said certificate issued by the 'Government Service Sports Society Limited', the petitioner should also be given full marks under the category of 'excellence in sports'. Learned Counsel for the petitioner had however conceded

that the said person has been given marks for excellence in sports although he had never taken part in national level sports activities.

Accordingly, would it be possible for this Court to come to a conclusion that, because the other candidate was given marks for sports, although such was not at the national level, that the petitioner also should be given marks for excellence in sports on the basis of an infringement of fundamental rights guaranteed in terms of Article 12(1) of the Constitution?

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

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

The right to equality in simple terms, means that among equals, the law should be equally administered and thereby the like should be treated alike Satish Chander v Union of India (1),Ram Prasad v State of Bihar (2), (Sir Ivor Jennings, Law of the Constitution, 3rd Edition 49). The purpose of the concept of the right to equality is to secure every person against intentional and arbitrary discrimination. However, it is abundantly clear that the provisions in terms of Article 12 (1) of the Constitution would provide only for the equal protection of the law and shall not provide for the equal

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violation of the law. It cannot be understood as requiring officers to act illegally because they have acted illegally previously. This position was considered by Sharvananda, C.J., in C.W. Mackie
and Company Ltd. v Hugh Molagoda, Commissioner General of Inland Revenue and others (3),where it was clearly stated that,

"But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."

In Mackie's case, the petitioner Company had duly paid the Business Turnover Tax and had complained that the denial of the refund of the said tax paid by it was mala fide and constitutes unlawful discretion as the respondents had not collected or enforced the payment of the said tax from other dealers in rubber, who were similarly placed and liable to pay the said tax. This principle stipulated in C.W. Mackie (supra) was referred to and followed in Gamaethige v Siriwardene (4) where Mark Fernando, J. stated thus:

"Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong."

This position was considered and affirmed once again in Jayasekera v Wipulasena and Others[5])without referring to C.W. Mackie's case (supra), where it was held by G.P.S. de Silva, J. (as he then was) that Article 12(1) cannot confer on the petitioner a right to which he is not entitled in terms of the very contract upon which he found his complaint of 'unequal treatment'.

This question was again considered in R.P. Jayasooriya v R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and others[6] where reference was made to the decision in C.W. Mackie (supra) to hold that Article 12(1) of the Constitution provides only for the equal protection of law and not for the equal violation of the law.

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It is to be borne in mind that the petitioner had not made any of the successful candidates respondents nor has he prayed for the cancellation and holding a fresh interview in order to re-evaluate all the candidates.

In such circumstances, it is apparent that the petitioner cannot rely on the provisions of Article 12(1) of the Constitution, which guarantees the right to equality and equal protection of the law to
compel the relevant officers to act illegally and add marks under the heading of 'excellence in sports', because it is alleged that they have acted illegally with regard to another candidate.

(B) The number of vacancies in the post of Inspector

Learned Counsel for the petitioner contended that although in terms of the Scheme of Promotion (P2) and the notice calling for applications (P3) had stated that there were only, four (4) vacancies in fact there were seven (7) vacancies in the post of Inspector and accordingly the petitioner, who was placed sixth in order of merit should have been selected for promotion to the post of Inspector.

It is not disputed that the notice calling for applications for the promotions to the Post of Inspector by document dated 07.01.2002, had specifically mentioned that there are only four (4) vacancies to be filled. The said notice had further stated that these four (4) vacancies should be filled on the basis of the highest marks obtained at the written competitive examination, the marks awarded for seniority and at the interview. It was also clearly stated that a waiting list would not be maintained in regard to the said promotions for the post of Inspector.

The contention of the learned Counsel for the petitioner was that prior to the competitive examination, the petitioner and several others had inquired from the administration as to the actual number of vacancies and they had been informed

that although six (6) Inspectors were retired, two (2) of them had retired under Public Administration Circular No. 44/90 and as such according to the said circular these vacancies cannot be filled. The petitioner's position is that the said contention is not correct and those vacancies could be filled.

Learned Counsel for the petitioner in his written submissions had clearly stated that by letter dated 14.06.2005 the petitioner had

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informed the 2nd respondent that seven vacancies in the post of Inspector were available as at the date of calling for applications. According to the petitioner, two vacancies arose as a result of the cancellation of Public Administration Circular No. 44/90 and the third vacancy was due to one N.W.A.C. de Silva's promotion to the post of Assistant Superintendent being back dated to 15.01.1993.

The 2nd respondent being the Additional General Manager (Administration) in his affidavit had categorically stated that the departmental cadre is periodically reviewed and with regard to the estimates for the year 2002, the approved cadre in the grade of Inspector had been 13 (R3). When applications for the said post were called in 2002, nine (9) officers had been holding the posts of Inspector and accordingly only 4 vacancies had existed at the time of calling for applications as stated in the notice dated 07.01.2002.

The 2nd respondent had further averred that the appeals referred to earlier sent by the petitioner had been considered, but relief could not be granted as the number of vacancies in the posts of Inspector were limited to four (4).

It is to be noted that, the applications for the promotion to the post of Inspector were called by notice dated 07.01.2002 (P3), which as stated earlier, has specifically referred to the number of vacancies as four (4). The applications were therefore called for to fill the said number of vacancies without maintaining a waiting list. In such circumstances it is apparent that if the said number of vacancies had been clearly stated in the notice (P3), the petitioner should have taken up that issue at the time the notice in question was published.

It is now well settled law that the time frame within which an application has to be made to the Supreme Court, specified in Article 126 (2) of the Constitution, is mandatory. A long line of cases had considered this matter Jayawardane v Attorney-General and others (7), Gunawardane and others v E.L. Senanayake and others(8), Thadchanamoorthi v Attorney-General (9) and Mahenthiran v Attorney-General (10) (supra 129), Gamaethige v Siriwardane (supra 385), Namasivayam v Gunawardane.(11),Gomezv University of Colombo(12) Karunadasa v The People's Bank (13).

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As correctly submitted by the learned Deputy Solicitor General for the respondents, the question with regard to the number of vacancies now raised by the petitioner cannot be taken up in these proceedings as it is clearly out of time in terms of Article 126(2) of the Constitution.

On a consideration of the aforementioned circumstances I hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents. This application is accordingly dismissed, but in all the circumstances of this case, without costs.

FERNANDO, J. I agree.

SOMAWANSA, J. I agree.

Application dismissed.

Hatton National Bank Ltd. v. Jayawardane And Others - SLR - 181, Vol 1 of 2007 [2007] LKSC 3; (2007) 1 Sri LR 181 (31 July 2007)

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HATTON NATIONAL BANK ITD.
v
JAYAWARDANE AND OTHERS

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE, J.
MARSOOF, J.
SC (CHC) APPEAL 6/06
SC LA (CHC) 73/2005
CHC 108/2004 (01)

Recovery of Loans by Banks (Sp. Prov.) Act 4 of 1990 - Sections 15(1), 15(2), 15(3), 16 - Parate Execution - Property of 3rd parties mortgaged - Cannot be sold - Directors property mortgaged - Could the property be parate executed? Civil Procedure Code - Section 207. Principle of Laesio Enomes - Not applicable when Bank re-sells property? Lifting the veil of incorporation.

The respondents were directors of Company N obtained banking facilities and to secure the loans granted hypothecated the properties belonging to the respondent Directors. As the Company defaulted the petitioner Bank adopted a resolution in terms of Law 4 of 1990, to sell the property by way of parate execution. The defendant-respondents instituted action in the Commercial High Court (CHC 252/2001 (1)) and sought an enjoining order to restrain the Bank from conducting the public auction. The enjoining order granted was later dissolved the special leave to appeal application filed in the Supreme Court against the order dissolving the enjoining order was rejected. Later the defendant-respondents withdrew the action.

Subsequently the property was sold by public auction and purchased by the petitioner Bank.

The defendant-respondents instituted action again in the Commercial High Court and sought an order that, the purported auction sale is a nullity and the auction should be declared null and void on the ground of laesio enomes.

The Commercial High Court granted an interim injunction, holding that the relief claimed in the present case was different from the case - CHC 252/2001 and that the ratio in Ramachandra v Hatton National Bank is applicable and

the petitioner Bank cannot sell the property of the Directors, mortgaged to secure the loan taken by the petitioner Bank.

Held:

(1) On examination of the reliefs claimed in Case No. 252/2001 (1) and the relief claimed in the instant case, though they do not appear to be identical, but based on the resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the resolution, the Commercial High Court erred in holding that the reliefs claimed are dissimilar.

Held further

Per Nihal Jayasinghe, J.

"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Company N whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."

(2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a devise to defraud creditors.

Per Nihal Jayasinghe, J.

"It is quite obvious that the 1st and 2nd respondents being Directors of the Company benefited from the facilities made available to the said Company by the petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgagee" as contemplated in the majority judgments of the Court in Ramachandra v Hatton National Bank".

Per Nihal Jayasinghe, J.

"It would be an exercise totally illogical to seek to differentiate the 1st and 2nd respondents as third party mortgagors".

(3) In terms of section19 if the Bank purchased the property the Bank is obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19, and the property is resold by the Bank

under section 10 - there cannot be an application to set aside the sale on the basis of laesio enormis."

APPEAL from an order of the Commercial High Court.

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Cases referred to:

1. Ramachandra v Hatton National Bank - (distinguished)
2. Haji Omar v Wickremasinghe - 2002 - 1 Sri LR 105
3. Salomon v A. Salomon and Co. Ltd. - 1897 - AC 22
4. Merchandise Transport Ltd. v British Transport Commission - 1962- 2QB 173
5. Jones v Lipman - 1962 1 WLR 832
6. Atlas Maritime Co. SA v Avalon Maritime Ltd. - 1991 - 4 All ER 769 at 779

Romesh de Silva, PC with Palitha Kumarasinghe PC and Sugath Caldera for appellant.
Mohan Peiris PC with M. C. M. Muneer and Ms. Nuwanthi Dias for respondents

July 31,2007
NIHAL JAYASINGHE,J.

The 1st plaintiff-respondent (hereinafter referred to as the 1st respondent) was the owner of the property morefully described in schedule 1 of the plaint and the 1st respondent and the 2nd plaintiff (hereinafter referred to as the 2nd respondent) were joint owners of the property morefully described in schedule 2 of the plaint. The 1st respondents at all times material to this application was the Managing Director and the 2nd respondent Director of Nalin Enterprises Private Limited. The said Nalin Enterprises obtained certain banking facilities from the defendant-petitioner Bank (hereinafter referred to as the petitioner) against the recovery of which, upon default of Nalin Enterprises, the 1st and 2nd respondents hypothecated the properties described in schedules 1 and 2 of the plaint. It was urged on behalf of the plaintiffs respondents that the 1st and 2nd respondents were not borrowers or beneficiaries of the facilities granted by the petitioner Bank but merely guarantors to the loan granted to Nalin Enterprises. Since Nalin Enterprises defaulted making payment as agreed upon the petitioner Bank in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act NO.4 of 1990 adopted a Resolution to sell the properties described in the schedules to the plaint by way of Parate Execution at a public auction in order to recover the unpaid loan installments. Accordingly the public auction was fixed

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for 24.10.2001. It is to be noted that 2nd plaintiff as the Attorney of the 3rd respondent filed partition action No. 19430/P on the basis that the 3rd respondent is the owner of the land and building and sought an enjoining order preventing the auction scheduled for 24.10.2001. The Court however refused to grant the

enjoining order but issued notice of interim injunction. The District Court of Colombo having considered the Petitioner's objection in the partition action dismissed the application for interim injunction and subsequently terminated the proceedings. After the enjoining order was refused on 15.10.2001 the 1st and 2nd respondents instituted action No. 252/1 (i) in the Commercial High Court for enjoining order and an interim injunction preventing the sale fixed for 24.10.2001 suppressing the filing of the partition action 19430/P and the refusal of the enjoining order by the District Court and obtained an enjoining order from the Commercial High Court. The Commercial High Court after inquiry refused the application for interim injunction on the basis of suppression of the partition action and held that the Bank was entitled to sell the property mortgaged to the bank as security for loans in default. Thereafter the 1st and 2nd respondents sought leave to appeal SCLA 18/2003 against the said order which was dismissed by the order dated 26.06.2003 by the Supreme Court. Subsequently the said case No. 252/2001(i) was withdrawn in the Commercial High Court and was dismissed and decree entered accordingly.

The petitioner Bank by letter of 11.09.2003 informed the respondents that the petitioner Bank had purchased the said property and certificate of sale issued in petitioner's favour.

The respondents thereafter instituted another action HC Civil 108/04(i) on 31.05.2004 in the Commercial High Court against the petitioner seeking -

(a) A declaration that the purported auction sale conducted in respect of the properties referred to in the schedules to the plaint is null and void.

(b) That the said auction be declared null and void on the ground of Laesio Enormis.

(c) The petitioner be restrained from taking any steps to eject the occupants including the respondents from thepremises in the 1st and 2nd schedules to the plaint until the final determination of this matter.

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(d) The petitioner be restrained by way of interim injunction from selling, alienating or transferring the properties described in the 1st and 2nd schedules to the plaint to third parties pending the determination of this action.

The Commercial High Court on 25.10.2005 granted an interim injunction as prayed for by the respondents. It is against this order the petitioner Bank has invoked the jurisdiction of this Court.

The petitioner contended that the High Court failed to consider the fact that the Case No. 252/2001 (i) had been dismissed and by the said dismissal the respondents forfeited their right to agitate the same matter in any other court. That the Court also failed to consider the fact that the liability of the 1st and 2nd respondents to repay the said facilities was joint and several along with the said

Nalin Enterprises Private Limited. That in terms of section 16 of the Act No.4 of 1990 the petitioner is entitled to make an application for delivery of possession of the property and any interim injunction issued would be inconsistent with the statutory right of the petitioner to have vacant possession through judicial intervention. It is the contention of the petitioner Bank that as there were no bidders at the auction held for the sale of the property set out in the schedules the petitioner Bank purchased the property and the Board of Directors issued a certificate of sale under section 15(1) of the Act.

Section 15(1) provides that -

"If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser, and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser."

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Section 15(2) provides that -

"A certificate signed by the Board under sub section (1) shall be conclusive proof with respect to the sale of any property, that all the provisions of this Act relating to the sale of that property have been complied with".

Section 16(1) provides that -

"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where the property is situate, and upon the production of the certificate of sale issued in respect of that property under section 15 shall be entitled to obtain an order for delivery of possession of that property".

After the respondents supported for notice of interim injunction on 01.06.2004 and the same served on the petitioner the petitioner filed its objections and prayed for dismissal of the application for interim injunction. Parties thereafter agreed to dispose of the said inquiry by way of written submissions. Subsequently, on the application of the petitioner Court permitted the petitioner to tender additional written submission in view of the Divisional Bench judgment Ramachandra v Hatton National Bank(.1) and in the said written submissions the petitioner contended that -

(a) The 1st and 2nd respondents and the said Nalin Enterprises instituted action in the Commercial High Court No. 252/2001(i) praying for a declaration that the

resolution adopted by the petitioner is illegal and therefore null and void and no force or avail in law and prayed for an interim injunction preventing the Bank from auctioning the property.

(b) That. the learned High Court Judge of the Commercial High Court dismissed the respondents' application for interim injunction.

(c) That the application for leave to appeal against such order to the Supreme Court No. 18/2003 was dismissed by the Supreme Court.

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(d) That the said 252/2001 (i) was dismissed and decree entered accordingly.

(e) That decree entered in Case No. 252/2001 (i) operates as res judicata.

Section 207 of the Civil Procedure Court enact that

"All decree passed by the Court shall, subject to the appeal, when an appeal is allowed, be final between the parties, an no plaintiff shall hereafter be non-suited.

Explanation - Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the auction, becomes, on the passing of the final decree in the action, a res adjudicata, which can not afterwards be made the subject of action for the same cause between the same parties."

It is the submission of the petitioner that when there is a decree in an action instituted by a person on a particular property right, damage or other relief, the parties to the said action cannot institute further proceedings for the same property, right, damage or the relief whether any matter was put in issue or not. That the respondents who instituted action to set aside the resolution adopted by the Bank on the basis that the resolution is null and void cannot institute another action after the dismissal of the previous action for a declaration that the auction conducted in pursuance of the said resolution is null and void. While the said matter was pending for order on the written submissions filed on 04.04.2005 the respondents instituted action No. 20693/L in the District Court of Colombo for a declaration that the property described in the schedule thereto has not been vested with the petitioner in view of the decision of the Divisional Bench in Ramachandra v Hatton National Bank (supra) and prayed for an enjoining order and interim injunction preventing the petitioner from possessing the property. The respondents having obtained the enjoining order ex-parte dispossessed the petitioner who was in possession of the said property on the strength of the enjoining order. Consequently, the

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District Court dismissed the application 20693/L.

It is in this context that the Commercial High Court by its order on 25.10.2005 issued interim injunction:

(a) Preventing the petitioner from ejecting the respondents and those holding under them and claiming title to the property,

(b) Restraining the respondent Bank reselling the property described in the schedule to the plaint.

The learned High Court Judge held that

"as far as the reliefs prayed by the plaintiffs are concerned it cannot be strictly construed that the reliefs prayed for in this case and the earlier case are similar or identical in any form. Consequently, I should express in my inability to apply section 207 as being a bar to the institution and maintainability of this action by the plaintiff."

On examination of the reliefs claimed in Case No. 252/2001 (i) and the relief claimed in Case NO.1 08/2004(1) though they do not appear to be identical, but based on the Resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the Resolution. The learned Judge of the Commercial High Court was in error in holding that the reliefs claimed are dissimilar.

It has been urged by the plaintiff-respondents that in terms of the judgment in the case of Ramachandra v Hatton National Bank (supra) property mortgaged by a third party who is not a borrower cannot be sold by way of Parare Execution under and in terms of the Recovery of Loans by Banks (Special Provisions) Act NO.4 of 1990. There, is of course as urged by the plaintiff a bar preventing the petitioner from Parate Execution of the land mortgaged by a third party who is not a borrower after the judgment of Ramachandra. What the plaintiff-respondents are seeking to accomplish in this application is to invite the Court to adopt the reasoning of Ramachandra v Hatton National Bank (supra) to the circumstances of the present case which in my view is a far cry.

The petitioner contended that in view of the certificate of sale that has been issued the matter is finally laid to rest and there

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cannot be any scope for challenging the validity of the certificate of sale and submitted that even though the property was purchased for a sum of Rs. 1000/- for want of competitive buyers, when a sum of Rs. 34 million and interest thereof from 1990 is due and therefore the sale is void on the ground of laesio enormis is not tenable in law. Counsel submitted that laesio enormis is not applicable forpublic

auctions conducted with the authority of statute or court and that in any event Parate Execution is available in terms of Act No. 4 of 1990. After Parate Execution and certificate of sale issued, which is enforced under the provisions of Civil Procedure Code Laesio enormis is not applicable. In Hajj Omarv Wickremasinghe(2) Supreme Court held that -

" it is my view that where it is not open to a person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property to move to invalidate a sale certainly it cannot be said that the borrower on whose title and interest in the property a third party's claim is based, has right to move the invalidate the sale."

That in terms of section 19 of the Act if the Bank purchased the property the Bank is then obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19 and the property is resold by the Bank under section 19 there cannot be an application to set aside the sale on the basis of the principle laesio enormis.

In my considered opinion, the 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, while being the "alter ego" of the said company of which the 1st respondent has been the Managing Director and the 2nd respondent, who is the wife of the 1st respondent, has been a Director. Although the independent personality of the company as distinct from its directors and shareholders has been recognized by the Courts since the celebrated decision of Salomon v A. Salomon and Co. Ltd.(3), Courts have in appropriate circumstances lifted the veil of incorporation. In particular, Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defraud creditors

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Merchandise Transport Ltd. v British Transport Commission(4) and Jones v Lipman(5).As Staughton L.J. observed in Atlas Maritime Co. SA v Avalon Maritime Ltd.(6)at 779 -

'To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being Directors of Nalin Enterprises (Pvt) Ltd.; benefited from the facilities made available to the said company by the petitioner Bank, and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgage" as contemplated in the majority judgments of this Court in "Ramachandra v Hatton National Bank (supra).

The 1st and 2nd plaintiff are integrated to Nalin Enterprises and when Nalin Enterprises sought to obtain facilities from the petitioner Bank the borrowers are in fact the said Nalin Enterprisesalong with the 1st and 2nd plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and 2nd plaintiffs as third party mortgagers within the meaning of Ramachandra v Hatton National Bank (supra).

I accordingly set aside the order dated 25.10.2005 of the Commercial High Court marked 'G'. Application of the plaintiff respondents for interim injunction as prayed for in the prayer of the petition is dismissed with costs.

TILAKAWARDANE, J. - I agree.

MARSOOF, J. - I agree.

Appeal allowed.
Interim injunction vacated.

National Insurance Corporation v. Wijesinghe - SLR - 263, Vol 2 of 2007 [2007] LKSC 9; (2007) 2 Sri LR 263 (7 September 2007)

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NATIONAL INSURANCE CORPORATION
V
WIJESINGHE

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J.
SOMAWANSA,J.
SC 97/2006
SC Spl LA 93/06
HCALT 936/2005
IT/1/Add - 116/2002
JUNE 5, 2007

Industrial Disputes Act - Section 31 B (1), Section 31 B (1) (a) - Granting of extensions upto 60 years - Employee retires - Jurisdiction of the Labour Tribunal - Retirement and termination by employer?

The applicant-respondent alleged that the appellant employer had constructively terminated his service by not granting further extensions of service upto 60 years. The position of the appellant-employer was that the respondent retired from the service upon the expiration of his extension of the services for one year and that the services were not terminated, but that the employee had retired, therefore the labour Tribunal did not have jurisdiction to entertain the application. The labour Tribunal held that the services were terminated unfairly and awarded him compensation, the High Court upheld the order of the labour Tribunal. On appeal, to the Supreme Court,

Held:

(1) The application related to an alleged constructive termination of the respondent's services - Section 31B (1) (a) of the Industrial Disputes Act and in terms of the provisions of the said Act the labour Tribunal has no jurisdiction to entertain an application unless there has been a termination of services of the workman by the employer.

(2) The respondent's own conduct further establishes that he accepted the decision of the employer to retire him by not granting any further extensions, for which the respondent was informed in writing that he

would not be granted the second extension, the respondent neither appealed nor protested to the employer-appellant that he had a right to work until he reached 60 and to re-consider its decision.

Held further:

(3) The respondent workman had no legal right to invoke the jurisdiction of the Labour Tribunal and in terms of the Section 318(1)a - the Labour Tribunal had no jurisdiction to entertain the respondent's application.

APPEAL from the judgment of the High Court of Colombo.

Case referred to:

(1) *Gunaratne v De Zylva* SC 463/87 SCM 17.9.68

Gomin Dayasiri with Chanaka de Silva and Ms. Manoli Jinadasa for appellant.

P.L.S. Bandara with Iranga Siriwardane for respondent.

Cur.adv. vult.

September 07, 2007
ANDREW SOMAWANSA, J.

The applicant-respondent-respondent (hereinafter referred to as the respondent) filed an application in the Labour Tribunal of Colombo alleging interalia that the respondent-petitioner-petitioner (hereinafter referred to as the petitioner) had constructively terminated his services by not granting him further extensions of service up to the age of 60 years and prayed for arrears of salary related to the period he claimed he would have been able to continue in employment and compensation for wrongful termination.

The position of the petitioner was that the respondent retired from the service of the petitioner on 13.12.2001 upon the expiration of his extension of service for one year and that the service of the respondent was not terminated but that he retired. Thus the respondent was not entitled to have and maintain this instant application before the Labour Tribunal and moved for a dismissal of the same.

After an inquiry the learned President of the Labour Tribunal of Colombo delivered his order on 25.01.2005 holding that the services of the respondent was unfairly and unjustly terminated and awarded him compensation of 12 months salary amounting to a sum of Rs. 227,052/-

The petitioner lodged an appeal from the aforesaid order to the High Court of the Western Province holden in Colombo and the High Court Judge of the Western Province by his judgment dated 03.03.2006 affirmed the order of the learned President of the Labour Tribunal.

The petitioner thereafter sought leave to appeal from the aforesaid judgment of the High Court Judge of the Western Province and this Court has granted special leave to appeal from the said judgment on the questions of law as set out in paragraphs 'o' and 'p' of paragraphs 8 of the petition of the petitioner dated 10.04.2006 which reads as follows:

(o) Did the learned High Court Judge fail to appreciate that the Labour Tribunal had no jurisdiction to entertain the applicant's application?

(p) Did the learned High Court Judge, having made a finding that it was the petitioner's discretion to refuse extending the services of the applicant by one year, err in law and misdirect himself in concluding that the retirement of the applicant consequent to non-extension of employment amounted to a termination by the petitioner of the applicant's services?

It is to be seen that the jurisdiction of the Labour Tribunal is conferred by Section 31 B(1) of the Industrial Disputes act which states as follows:

31 8(1) "A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters:

(a) the termination of his services by his employer.

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(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits:

(c) such other matters relating to the terms of employment, or the Conditions of labour, of a workman as may be prescribed."

As the instant application related to alleged constructive termination of the respondent's services the applicable section would be Section 31 B(1) (a) of the Industrial Disputes Act and in terms of the said section the Labour Tribunal has no jurisdiction to entertain an application unless there has been a termination of services of the workman by the employer. In the case of *Gunaratne v De Zylva(1)* this Court held that in order to make an application under Section 31 B(1)(a) there must be a termination in law.

It is to be seen that the respondent's own testimony before the Labour Tribunal

clearly demonstrates that the retiring age of employees of the petitioner company is 55 years and if any employees desired to continued in service after reaching the age of 55, such an employee had to make an application to the petitioner requesting an extension of service for a period of one year at a time. However it is apparent that extensions of service were not given automatically but must be applied for and even then such an application can be made only for a period of one year and the approval of the extension of service is at the discretion of the petitioner's management. In the circumstances, there was no automatic right to serve in the petitioner's company up to 60 years. In the instant case the respondent in his evidence admits that prior to reaching the age of 55 years he applied for an extension of his services for one year and the petitioner's management approved the same. However when the respondent made a further application for his second extension prior to the expiry of his first extension of service the respondent was informed by the petitioner that a further extension of service would not be granted.

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In fact, the respondent's own conduct further establishes that he accepted the decision of the petitioner to retire him by not granting any further extensions. For when the respondent was informed in writing that he would not be granted the second extension of service the respondent neither appealed nor protested to the petitioner that he had a right to work until he reached the age of 60 years and to re-consider its decision. In fact his subsequent conduct clearly establishes that not only did the respondent accept the decision of the petitioner to retire him at the expiry of the first extension of service but that he acted upon it by writing several letters to the petitioner company manifesting his intention to retire. By letter dated 12.11.2001 marked R1 the respondent requested the petitioner to furnish him with his balance leave entitlements and also inquired as to whether any payment would be made in lieu of his unutilised annual leave. He further requested the petitioner to take charge of all documents in his custody as he intend taking leave before retiring. By his letter dated 29.11.2001 marked R2 addressed to the petitioner the respondent states that as he is due to retire from service of the corporation with effect from 13.12.2001 he would consent to the deduction of the balance sums of money due from 'him on all loans taken by him from the petitioner from his gratuity dues. Thus it could be seen that documents R1 and R2 clearly establish that the respondent had every intention to retire and had accepted the petitioner's decision not to extend his services by another year beyond his retiring age.

Counsel for the respondent contended that the learned President of the Labour Tribunal as well as the learned High Court Judge have correctly come to the conclusion that some others worked until the age of 60 years and the application of the respondent for a further extension of service for one year should have been considered properly, duly and fairly. I am unable to agree with the aforesaid conclusion for the reason that the respondent has failed to produce any evidence whatsoever either documentary or oral to establish his assertion that the retiring age for employees of the petitioner was 60 years and not 55 years. In fact the petitioner in his evidence admits that if he did not submit the application for

extension he would have retired from service upon reaching the age of 55 years. The contention

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that others worked until the age of 60 years is also not supported by any evidence either oral or documentary. Though the respondent alleged that other employees had worked until 60 years surprisingly he failed to give any particulars as to who these other workers were in his examination-in-chief. Instead under cross-examination he conceded that several employees who worked with him were not granted extension of service until the age of 60. Strangely however in re-examination the respondent mentioned for the very first time that there were about 5 employees who had been granted extensions but was able to give the name of only one such employee whose services he claimed had purportedly been extended until the age of 60. This item of evidence introduced at the time of re-examination and without being tested for its veracity under Cross-examination cannot be relied upon to come to the conclusion that others worked until 60. Unfortunately, the learned President of the Labour Tribunal as well as the High Court Judge has erroneously relied very heavily upon this very item of un-corroborated statement of fact in arriving at the conclusion that others have worked until 60.

It was also contended by counsel for the respondent that the respondent was granted a distress loan by the petitioner which was to be re-paid on 72 installments ending in 2005. However it is to be seen that the respondent himself has admitted in his evidence that this loan was subject to the specific condition that the balance due on the loan had to be re-paid upon retirement or termination of service. It is to be noted that by document R2 the respondent had requested the petitioner to deduct the balance sums of money due on all loans taken by him from his gratuity.

It was the respondent's burden to establish that the retiring age was 60 years which the respondent has failed to discharge. In the circumstances, there was no evidence of legitimate expectation for him to work until 60 years of age.

Evidence led at the inquiry as well as the subsequent conduct of the respondent clearly demonstrates that the respondent was retired from his services. Thus he ceased to be an employee of the petitioner by virtue of his retirement and not because of

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termination of service by his employer the petitioner.

In the circumstances, the respondent had no legal right to invoke the jurisdiction of the labour Tribunal as he had failed to satisfy the requirements as set out in Section 31 (B(1)(a) of the Industrial Disputes Act and also in terms of the said Section the Labour tribunal had no jurisdiction to entertain the respondent's application. Thus it appears that the learned President of the Labour Tribunal had

erred in coming to a conclusion that there was termination when in fact the evidence conclusively shows that it was retirement and not termination. The learned High Court Judge had also affirmed the order of the Labour Tribunal without considering this aspect of the matter. As such the order of the learned President of the Labour Tribunal as well as the judgment of the learned High Court Judge are perverse and cannot be permitted to stand.

For the aforesaid reasons I would answer the aforesaid two questions of law in the affirmative. In the circumstances I allow the appeal and set aside the judgment of the learned High Court Judge dated 03.03.2006 and also the / order of the Labour Tribunal dated 25.01.2005. I also dismiss the application of the respondent tendered to the Labour Tribunal. In all the circumstances, I make no order as to costs.

DR. SHIRANI BANDARANAYAKE,J. - I agree.
AMARATUNGA,J. - I agree.

Appeal allowed.

Order of the Labour Tribunal and the judgment of the High Court set aside.

Wannigama v. Incorporated Council Of Legal Education And Others - SLR - 281, Vol 2 of 2007 [2007] LKSC 10; (2007) 2 Sri LR 281 (11 September 2007)

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WANNIGAMA
Vs
INCORPORATED COUNCIL OF LEGAL EDUCATION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE
AMARATUNGA, J.
BALAPATABENDI, J.
SC 20/2007
SC SPL LA 9/2007
CA WRIT 588/2006
MAY 4,2007
JUNE 12, 2007

Writ of Certiorari - Administration of Sri Lanka Law College - Council of Legal Education - Public body? - Legal right to the performance of a legal duty by party against whom mandamus is sought - Material - Legitimate expectation - Could a prerogative writ be refused on the ground of administrative inconvenience?

The appellant who sat the entrance examination in the Sinhala medium was informed that he had obtained only 66 marks, and that he had not been successful at the entrance examination as 69 was the cut off mark and 239 candidates were selected on that basis. The appellant contended that 21 students who had sat the examination in the Tamil medium were called for an interview and 11 candidates had been admitted to the Sri Lanka Law College, and alleged that they had been admitted, not according to the marks obtained at the entrance examination but according to their performance at the interview. Alleging that the process employed for the selection of the 7th - 17th respondent was ultra vires the rules of the Council of Legal Education, the appellant and 8 others challenged the decision of the 1st respondent. The appellant's application was dismissed by the Court of Appeal.

In the Supreme Court, it was contended by the appellant that, the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instructions in the Sri Lanka Law College - Sinhala and Tamil, and the Court of Appeal was wrong in denying relief to the appellant, on the

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basis that his credit pass in the G C.E. O' Level examination is in the Sinhala language and that he sat for the entrance examination in the Sinhala language.

The respondents contended that the appellant had failed to establish a specific right as a prerequisite for the Writ of Mandamus to be issued and that there was no basis for legitimate expectation and that the relevant authority would have to encounter administrative inconvenience, if relief was to be granted.

Held:

(1) It is a pre-entry requirement that the candidates should possess a credit pass in the English language and Sinhala or Tamil language. Considering the pre-entry requirements, the students, who have a credit pass in the relevant language are only entitled to admission to the relevant mediums, when admission is considered for the relevant medium of instructions.

In the circumstances, there were two mediums of instructions at the Sri Lanka Law College.

The appellant could not have been considered along with the students, who had sat for the entrance examination in the Tamil medium and called for the interview for a special selection process.

Held further:

(2) For the appellant to insist that, Mandamus be issued to direct Sri Lanka Law College to admit him to follow its programme, he should have fulfilled the basic requirement for the said writ by indicating that he has a legal right as he had obtained over and above 69 marks. The appellant has obtained only 66 marks, thus has no legal right for admission, on the basis of the results. When the appellant has no such legal right there cannot be any legal duty for the 1st respondent to admit the appellant to the Sri Lanka Law College.

The appellant could not have any legitimate expectation on the basis of his marks obtained at the entrance examination. The intervening circumstances, was the selection of a group of students who had sat for the entrance examination in the Tamil medium. The appellant did not belong and could not have belonged to that group. It is not possible to rely upon a legitimate expectation, unless such expectation is founded upon either a promise or an established practice.

(5) A writ may be refused not only upon the merits, but also by reason of the special circumstances of the case. The Court will take a liberal view indicating whether or not the writ will issue. It is apparent that to admit the appellant - would lead to several

administrative difficulties. Writ of mandamus will not be issued when it appears that it is impossible of performance, by reason of the circumstances.

APPEAL from the judgment of the Court of Appeal reported in 2006 - 3 Sri LR 287.

Cases referred to:
1. Vasana v Incorporated Council of Legal Education and others. 2004 1 Sri LR 163.
2. Maha Nayake Thera, Malwatte Vihare v Registrar General 1937 3 Sri LR 186.

M.A. Sumanthiran with Viran Corea, Sharmaine Gunaratne, H. Vamadeva, Suresh Fernando and Erimza Tegal for the petitioner-appellant.

Shavindra Fernando DSG with Nerin Pulle SSC and S. Barrie SC for respondents.

Cur.adv. vult.

September 11, 2007
DR. SHIRANI BANDARANAYAKE,J.

This is an appeal from the judgment of the Court of Appeal dated 13.12.2006. By that judgment, the Court of Appeal refused to issue a writ of mandamus and dismissed the petitioner appellant's (hereinafter referred to as the appellant) application. The appellant filed an application before this Court on which Special Leave to Appeal was granted on the following questions:

1. Has the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instruction in the Sri Lanka Law College, namely Sinhala and Tamil?

2. Was the Court of Appeal wrong in denying relief to the petitioner on the basis that his credit pass in the G.C.E. Ordinary Level Examination is in the Sinhala language and that he sat for the entrance examination in the Sinhala language?

3. Whether in any event the relief sought in this application is futile?

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The facts of this appeal, albeit brief, are as follows:

The entrance examination for admission to the Sri Lanka Law College to follow the course for admission as Attorneys-at-Law of the Supreme Court was held on 01.10.2005 and the appellant was a candidate for the said examination who sat in the Sinhala medium. The entrance examination was conducted by the 6th respondent at the request of the Incorporated Council of Legal Education in terms of its Rules.

In December 2005, the appellant had received the result sheet indicating that he had obtained 66 marks and that he had not been successful at the entrance examination (P4 in X2) as it had been decided by the Incorporated Council of Legal Education to select students, who had obtained over and above 69 marks at the said examination and 239 candidates were selected on that basis.

The appellant thereafter had become aware that four (4) students, who had sat for the said entrance examination in the Tamil medium had filed fundamental rights applications alleging that only one candidate has been selected from the Tamil medium for the year 2006 from the said entrance examination for admission to Sri Lanka Law College. Those petitioners had sought to re-scrutinize their papers.

According to the appellant this Court had directed the Senior State Counsel to ascertain whether the Commissioner General of Examinations was agreeable to constitute a committee consisting of a Chief Examiner to re-scrutinize the answer scripts without releasing the answer scripts from the Commissioner General of Examinations and if he was agreeable to such a course of action steps were to be taken accordingly and proceedings in those applications were terminated on that basis (P6 in X2). However the 6th respondent had declined to recorrect the answer scripts as the results sheet had specifically stated that no re-scrutinizing would be carried out.

Following the said order, the 3rd respondent, by his letter dated 01.03.2006 had called certain students to be present at the Chambers of the Hon. The Attorney-General on 08.03.2006 for an interview in relation to admission to Sri Lanka Law College

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(P7 in X2). Thereafter the appellant had become aware that out of the 21 students, who were called for the interview, eleven (11) candidates, namely 7th to 17th respondents, had been admitted to Sri Lanka Law College. They had been admitted, not according to the marks obtained at the entrance examination to the Law College, but according to their performance at the interview.

The appellant submitted that several students, who were admitted after the said interview had obtained lower marks than the appellant who had obtained 66 marks, whereas others, who were so selected had got only 60, 62 or 65 marks. Further the appellant stated that he was aware that there were students in the Tamil medium who had received more marks than the 7th to 17th respondents at the entrance examination to the Sri Lanka Law College, but were not admitted.

In the circumstances, the appellant stated that the entire process of admission of 7th to 17th respondents had lacked transparency and that they were selected outside the criteria of the Rules of the Incorporated Council of Legal Education. According to the appellant, the scheme for the admission to Sri Lanka Law College is only based on the applicant's performance at the entrance examination and there is no provision to grant marks at interviews. The said interviews were made only for

the selected few and there was no public notification of such an interview and therefore the 2nd, 3rd and 4th respondents had acted ultra vires the Rules of the Incorporated Council of legal Education in conducting the said interview.

Accordingly eight (8) candidates, who sat for the entrance examination and the appellant had filed writ applications seeking inter alia mandates in the nature of writs of mandamus and certiorari challenging the admission of the 7th to 17th respondents and the non-admission of those 8 candidates and the appellant and stating that the process employed for the selection of the 7th to 17th respondents to Sri Lanka Law College was ultra vires the Rules of the Council of Legal Education, was unreasonable, arbitrary, lacking transparency and was flawed by procedural and substantive irregularity

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All nine (9) applications were taken up together for hearing before the Court of Appeal. Out of these, seven (7) applications were allowed and the two (2) applications filed by the appellant and another student, both of whom had sat for the entrance examination in the Sinhala medium, were dismissed. Being aggrieved by the said decision. the appellant filed a Special Leave to Appeal application.

Having stated the facts of this appeal let me now turn to consider the appeal based on the questions on which Special Leave to Appeal was granted by this Court.

1. Has the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instruction in the Sri Lanka Law College, namely Sinhala and Tamil?

Learned Counsel for the appellant in his application to this Court for Special Leave to Appeal, had specifically stated that the learned Judge of the Court of Appeal had dismissed the application filed by the appellant in the Court of Appeal inter alia for the reason that there were only two mediums of instructions at the Sri Lanka Law College, namely Sinhala and Tamil media and therefore he sought for Special Leave to Appeal inter alia on the question whether it was a misdirection to hold that there are only those two mediums of instruction.

Learned Judge of the Court of Appeal had stated in his judgment that there are two mediums of instructions at the Sri Lanka Law College. However, it is interesting to note that this fact had been common ground and the Judge has clearly stated so in the judgment, which reads thus:

"It is common ground that there are two mediums of instructions at the Sri Lanka Law College, namely: 'Sinhala medium' and the 'Tamil medium'."

It is therefore apparent that this has been the view taken not only by the learned Counsel for the respondents, but also by the learned Counsel for the appellant.

Otherwise it cannot be considered to be a fact by the Court of Appeal to be common ground at that stage. Moreover, as contended by the learned

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Deputy Solicitor General for the 1st and 3rd respondents it is clear that the learned Judge of the Court of Appeal had formed such an opinion purely on the basis of the submissions made by the learned Counsel for the appellant.

This position is strengthened, when one reads the following paragraphs of the judgment, where the learned Judge of the Court of Appeal had stated that,

  ; **The counsel for the petitioner contended that even though there were two mediums of instructions** the candidates are free to sit the Entrance Examination, in any language and to follow lectures in any language (emphasis added)."

Be that as it may, it is not disputed that the admission to the Sri Lanka Law College and the conduct of academic activities are governed by the Rules of the Incorporated Council of Legal Education. Accordingly it is a pre-entry requirement that the candidates should possess a credit pass in the English language and Sinhala language or Tamil language.

Learned Deputy Solicitor-General for the respondents contended that 'it is the practical reality that at the Sri Lanka Law College there are the Sinhala and Tamil mediums of instruction'. Considering the pre-entry requirements and the medium of instruction at the Sri Lanka Law College it cannot be found to be in correct that the learned Judge of the Court of Appeal had come to the conclusion that 'the students, who have a credit pass in the relevant language are only entitled to admission to the relevant mediums, when admission is considered for the relevant medium or instruction'.

In the circumstances, since it had been quite clearly common ground that there were two mediums of instructions at the Sri Lanka Law College it is imperative that this question has to be answered in the negative.

2. Was the Court of Appeal wrong in denying relief to the petitioner on the basis that his credit pass in the G.C.E. Ordinary Level Examination is in the Sinhala language

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and that he sat for the entrance examination in the Sinhala language?

Admittedly the appellant sat for the entrance Examination for the admission to Sri Lanka Law College in the Sinhala medium. It is also not disputed that the appellant had obtained a credit pass in the Sinhala language and that he had not offered

Tamil language as a subject for the Ordinary Level Examination. It is thus apparent that whilst all the candidates, who were later selected on the basis of an interview had been from the Tamil medium, the petitioner was the only such candidate, who had sat for the entrance examination in the Sinhala medium.

The appellant had not contended that he had the ability and that he was deprived from sitting for the said entrance examination in the Tamil medium. In the circumstances it is apparent that the appellant had selected Sinhala medium as his choice of medium for the purpose of sitting for the entrance examination.

Learned Deputy Solicitor General for the 1st and 3rd respondents contended that the said respondents had made a clear distinction between those who sat for the entrance examination for admission to Sri Lanka Law College in the Sinhala medium and Tamil medium in order to redress a grievance relating to a mistake in the question paper and certain problems that were found by the teaching and practice of law in the Tamil language. Learned Deputy Solicitor General submitted that the Incorporated Council of Legal Education had also adopted a policy decision to increase the intake to the Tamil medium of the Sri Lanka law College in order to redress the problems of inadequacy of qualified Attorneys-at-Law, who could practice in the Tamil language in the Northern and Eastern Provinces of the country. Since there was no established procedure to follow in such a situation, the Incorporated Council of Legal Education had selected students from amongst the candidates, who had obtained high marks in the Tamil medium by following an interview process.

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The contention of the learned Counsel for the appellant was not on the correctness of the process that was adopted by the Incorporated Council of Legal Education, but to elaborate the reasons for the non-consideration of the appellant along with that group of students, who had sat for the entrance examination in the Tamil medium, for admission to Sri Lanka Law College. However, it is to be noted that the learned Counsel for the appellant had not contended that the appellant could either pursue his studies at the Sri Lanka Law College in the Tamil medium or that he was capable of engaging in the profession as an Attorney-at-Law in the Tamil language. In such circumstances, the appellant could not have been considered along with the other students, who had sat for the entrance examination in the Tamil medium and called for the interview for a special selection process.

Accordingly this question also has to be answered in the negative.

3. Whether in any event the relief sought in this application is futile?

The contention of the learned Counsel for the appellant was that the appellant had prayed for a writ of mandamus to grant him admission to the Sri Lanka law College. Learned Counsel for the appellant strenuously contended that the technical objections raised by the learned Deputy Solicitor General to the grant of the writ of mandam us will not apply in this case. Learned Deputy Solicitor General

for the respondent show ever contended that it was necessary for the appellant to establish a specific legal right as a pre-requisite for the writ of mandamus to be issued and also that it is incumbent on the appellant to demonstrate, that the respondents are 'beholden by a public duty' to admit the appellant to the Sri Lanka Law College. Learned Deputy Solicitor General referred additionally that there was no basis for legitimate expectation and that the relevant authority would have to encounter administrative inconvenience, if relief was to be granted in this appeal.

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I would accordingly consider these contentions separately.

(a) The question of legal right and public duty.

Learned Counsel for the appellant relying on the decision in Vasanav Incorporated Council of Legal Education and others(1) stated that it was clearly stated by Amaratunga, J. that the Incorporated Council of Legal Education is indeed a public and statutory body and there is a legal duty to perform in enrolling the students to the Sri Lanka Law College. Learned Deputy Solicitor General for the respondents also relied on the decision in Vasana (supra) and stated that the Court of Appeal in that case had unequivocally laid down that,

  ; "In order to succeed in an application for a writ of mandamus the petitioner has to show that he or she has a legal right "

  ; The writ of mandamus has been described as an order, which is of a most extensive remedial nature and is a command directed to any person, Corporation or inferior tribunal requiring him or them to do some particular thing, which is in the nature of a public duty (Halsbury's Laws of England, 4th Edition, Vol.I, para 89, pg. 111). Referring to the conditions precedent to issue of mandamus, it is stated in Halsbury's Laws of England (supra, para 120, pg 131) that,

"The applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought, or alternatively that he has a substantial personal interest in its performance."

  ; It is therefore apparent that, as has been clearly and correctly pointed out in the decision in Vasanaby Amaratunga, J. (supra), the appellant must show that he has a 'legal right to the performance of a legal duty' by the party against whom the mandamus is sought; viz. the Incorporated Council of Legal Education.

  ; It is common ground that the appellant had obtained only 66 marks at the entrance examination and did not qualify for admission to the Sri Lanka Law College. As stated earlier 239

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candidates were selected for admission to the Sri Lanka Law College who had obtained over and above 69 marks. A writ of mandamus would be issued only if a person can clearly show that he has a legal right to insist on such performance. Accordingly, for the appellant to insist that mandamus be issued to direct the Sri Lanka Law College to admit him to follow its programme, he should have fulfilled the basic requirement for the said writ by indicating that he has a legal right as he had obtained over and above 69 marks at the entrance examination. The appellant who had admittedly obtained only 66 marks, at the entrance examination to the Sri Lanka Law College thus has no legal right for the admission to the Sri Lanka Law College on the basis of the result of that examination. When the appellant has no such legal right, there cannot be any legal duty for the Incorporated Council of Legal Education to admit the appellant to the Sri Lanka Law College.

The next ground, which was strenuously contended by the learned Counsel for the appellant was that the appellant had a legitimate expectation that he would be admitted to the Sri Lanka Law College along with the 7th to 17th respondents as he too had obtained marks over and above 60.

Legitimate expectation, in general terms, was based on the principles of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. As has been pointed out by D.J. Galigan (Due Process and Fair Procedures. A Study of Administrative Procedure, 1996, Pg. 320),

"In one sense legitimate expectation is an extension of the idea of an interest. The duty of procedural fairness is owed, it has been said, when a person's rights, interests, or legitimate expectations are in issue."

Discussing the concept of legitimate expectation, David Foulkes (Administrative Law, 8th Edition, Butterworths, 1995, pg. 290) has expressed the view that a promise or an undertaking could give rise to a legitimate expectation. In his words,

"The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the

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authority itself. This action may take one or two, or both forms, a promise (or a statement or undertaking) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that an expectation of the kind which the courts will enforce."

The procedure followed by the Sri Lanka Law College was to select the students for admission in the order of merit based on their performance at the entrance examination and the number of vacancies available as determined by the Incorporated Council of Legal Education.

Accordingly as stated earlier, the students, who had obtained over and above 69 marks were selected for admission. The appellant, when he became aware that he

had obtained only 66 marks, knew quite well that, in terms of the practice and the procedure followed by the Incorporated Council of Legal Education in admitting students to the Sri Lanka Law College, that he was not qualified for admission.

In such circumstances it is evident that the appellant could not have had any legitimate expectation to have been selected to the Sri Lanka Law College on the basis of his marks obtained at the entrance examination. The intervening circumstances, as referred to earlier, was the selection of a group of students, who had sat for the entrance examination in the Tamil medium. As examined earlier, the appellant did not belong to and could not have belonged to that group. It is not possible to rely upon a legitimate expectation unless such expectation is founded upon either a promise or an established practice. It is abundantly clear that the appellant has no such grounds to rely on and in such circumstances it becomes futile for him to have any claim on the basis of legitimate expectation.

The final ground on which submissions were made was based on administrative inconvenience.

Learned Deputy Solicitor General for the 1st and 3rd respondents contended that any order, which directs the Sri Lanka Law College to admit the appellant would lead to several administrative difficulties as there are a large number of other applicants, who

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have obtained higher marks than the appellant. Learned Deputy Solicitor General submitted that if an order is given to admit the appellant considering fair procedure, all those applicants, who would exceed one thousand in number, will have to be admitted. He further contended that, the Sri Lanka Law College is not equipped to accommodate over one thousand students in a given batch. Accordingly, relying on the decision of *Soertsz, J. in Maha Nayake Thera, Malwatte Vihare v Registrar General(2)*, it was contended that the harm to the appellant, **who did not qualify for admission to the Sri Lanka Law College** is not sufficiently significant to outweigh the administrative inconvenience that would undoubtedly follow in the event a decision is taken to admit the appellant to the Sri Lanka Law College. In Maha Nayake Thera, Malwatte Vihare (supra), Soertsz, J. had stated that,

"... the writ may be refused not only upon the merits, but also by reason of the special circumstances of the case. The court will take a liberal view in determining whether or not the writ will issue."

This position has been considered by many other authorities. For instance, in Halsbury's Laws of England (4th Edition, Vol.I, page 125, page 134), it is clearly stated that the writ of mandamus will not be issued when it appears that it is impossible of performance, by reason of the circumstances and the writ will normally be refused' **if the party against whom it is prayed does not, for some other reason, possess the power to obey'.**

Considering all the aspects examined hereinbefore, it is thus apparent that the relief sought by the appellant in this appeal is futile and I answer the 3rd question in the affirmative.

In the circumstances, questions NO.1 and NO.2 are answered in the negative and question No.3 is answered in the affirmative. For the reasons aforesaid, this appeal is dismissed and the judgment of the Court of Appeal dated 13.12.2006is affirmed.

I make no order as to costs.

AMARATUNGA, J. - I agree.
BALAPATABENDI, J. - I agree.

Appeal dismissed.

Nalinda Kumara v. Officer - SLR - 332, Vol 1 of 2007 [2007] LKSC 5; (2007) 1 Sri LR 332 (12 December 2007)

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NALINDA KUMARA
v
OFFICER-IN-CHARGE TRAFFIC POLICE KANDY
AND ANOTHER

SUPREME COURT
8ANDARANAYAKE, J.
MARSOOF, J.
SOMAWANSA, J.
SC 57/2006
SC Spl LA 31/2006
HC KANDY 141/2006
MC KANDY 53583
MARCH 21, 2007
MAY 23, 2007
JULY 19, 23, 2007

Motor Traffic Act as amended by Act 40 of 1984 - section 151 (1) (B), section 214, section 216- Regulations - Breathalyzer test- Quantum of alcohol in the blood - Procedure to be followed- Death caused by driving a motor vehicle, after consumption of alcohol - Penal Code section 298 - Driving after consuming alcohol and driving under the influence of liquor?

The accused was charged with (i) driving a private car on a public highway negligently and causing the death of one R. Offence punishable under section 298 - Penal Code (ii) driving after consuming liquor - under section 215 of the Motor Traffic Act -read with section 151 (1) 8 of Act 31 of 1979 - Punishable under section 216 of the Act and 5 other counts.

The Magistrate found the accused guilty on all counts. The High Court in appeal varied the sentence imposed in respect of counts 2, 3 and 4. The appellant appealed against the conviction and sentence on count 2. Special leave was granted on the questions.

(i) Does the evidence led to establish that the consumption of alcohol was above the quantum contemplated by regulations?

(ii) Does the evidence establish that the appellant caused the death by driving the motor vehicle after the consumption of alcohol?

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Held:

(1) In order to establish the concentration of alcohol in the blood the police officer was required to carry out a breathalyzer test using an alcolyser. The procedure to carry out abreathalyzer test using the Alcolyser is found in IG Circular 697/87.

(2) For a positive reading, it is necessary to read that, the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube. There is no mention in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

(3) In terms of the circular the parties in question should blow only once and should not blow thrice as alleged. In order to ascertain as to whether a suspect driver had been under the influence of liquor, it is apparent that, 15 second period of one continuous blowing is extremely important to obtainthe reading of an assume content of 0.08 gms per 100 millilitres of blood. Per Shirani 8andaranayake, J. "It is evident that a serious doubt has been created as to the concentration of blood in the appellant's blood at the time of the accident.

Held further:

(4) Section 151 (1)8 of the Motor Traffic Act was introduced by the Motor Traffic Act 31 of 1979 (amended), with the amendment to section 151, "any person who drives a vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person shall be guilty of an offence under the Act". Prior to the amendment which came into effect in 1979 the known concept was on the basis of "under the influence of liquor - section 151(1) read as no person shall drive a motor vehicle on a highway when he is "under the influence of liquor" or any drug.

(5) The question whether the ingredients that has to be proved under section 151 (1) 8 be limited to the appellant having consumed alcohol, driving onthe highway and causing the death - a mere statement to indicate that a person had consumed alcohol is not enough. Section 15(c), section 151(1)8. Section 151(1c) (a) and section 151 (1C) (c) clearly have provisions for the police either to obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects had consumed alcohol/drug and in order to facilitate theprocess of these tests, the amendment had made provision to make regulations - section 151 (1 D).

Such regulations in terms of the Motor Traffic Act were introduced under
I.G. Circular 679/87 of 1.9.87. The circular clearly stipulated the need for a breath test.

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Per Shirani Bandaranayake, J.

"It is evident that when a person is charged in terms of sections 151 for having committed an offence under the said section having consumed alcohol the prosecution has to prove that the said person had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood Regulations 1.3, 1.4, 1.5, 1.6.

(6) The prosecution has failed to prove that the appellant had a minimum concentration of 0.08 of alcohol per 100 millilitres in his blood - the appellant should be acquitted on count 1.

APPEAL from the Judgment of the High Court of Kandy.

Faiz Musthapha PC with Amarasiri Panditharatne and Neomal Perera for accused-appellant-appellant.
Riad Hamza SSC with Harshika de Silva SC for respondent-respondentrespondent.

December 12, 2007
SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Provincial High Court of the Central Province holden in Kandy dated 09.12.2005. By that judgment the learned Judge of the High Court acquitted the accused-appellant (hereinafter referred to as the appellant) from counts 1 and 5 and affirmed the convictions in respect of counts 2, 3,4,6 and 7. The learned Magistrate had found the appellant guilty f all counts and in respect of count 1, the Magistrate has imposed a sentence of one year's rigorous imprisonment and on counts 6 and 7, a fine of Rs. 10001-each with a default sentence of 3 months simple imprisonment had been imposed. he appellant had appealed from that order against the conviction and sentence to the Provincial High Court of the Central Province. The High Court varied the sentences imposed by the learned Magistrate in respect of counts 2, 3 and 4 and imposed the following sentences.

count 2 - mandatory sentence of two (2) years rigorous imprisonment and cancellation of his driving licence.

count 3 - Rs. 5001- fine with a default sentence of three (3) months simple imprisonment.

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count 4 - Rs. 10001- fine with a default sentence of three (3) months simple imprisonment.

There was no variation in regard to the sentences imposed by the learned Magistrate in respect of counts 6 and 7. The appellant appealed to this Court for which special leave to appeal was granted on the following questions:

(1) Does the evidence led in the trial establish that the concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act?
(2) Does the evidence led in the trial establish that the appellant caused death or injury by driving the motor vehicle after the consumption of alcohol as contemplated by section 151(1)B of the Motor Traffic Act?

The facts of his appeal, albeit brief are as follows:
The appellant, a 24-years old junior executive of a Bank, at the time of the alleged offence, was charged in the Magistrate's Court, Kandy for the following offences:

(1) driving private car No. 17-0332 on a public highway negligently, viz., at an excessive speed and without due care and control and consideration for other users of the road and causing the death of one Saraswathi Rajendran and thereby committing an offence punishable under section 298 of the Penal Code.
(2) driving on the highway after consuming liquor and thereby committing an offence under section 214 of the Motor Traffic Act, read with section 151(1)B of Act, No. 31 of 1979 and punishable under section 216 of the said Act;

(3) driving a vehicle on a highway negligently, viz. -

(a) at an excessive speed under the circumstances,
(b) without necessary control,
(c) without due care,
(d) without due consideration for other users and colliding with a pedestrian crossing the road and causing her death

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and thereby committing an offence under section 214(1)A of the Motor Traffic Act read with section 151(3) of the Motor Traffic Act read with section 271 (2) as amended by Act, No. 40 of 1984.

(4) failing to avoid an accident due to -

(a) driving at an excessive speed,
(b) without due precaution,
(c) without taking due care and colliding with a pedestrian crossing the road and thereby committing an offence under section 214 of Motor Traffic Act punishable under section 224 as amended by Act, No. 24 of 1984.

(5) failing to drive the vehicle on the left side thereby committing an offence under section 214(1) of the Motor Traffic Act punishable under section 224 of the said Act.

(6) not possessing a valid third party insurance cover for the vehicle an offence punishable under section 218 of the Motor Traffic Act.

(7) not possessing a valid revenue licence for the vehicle an offence punishable under section 214(A) of the Motor Traffic Act.

The incident relevant to this appeal took place near Royal Mall Hotel on the William Gopallawa Mawatha, Kandy around 11.30 p.m., on 06.07.2001. Ramaiah Rajendran, the husband of the deceased had attended a function of the Lions Club with his wife at the Royal Mall Hotel situated along William Gopallawa Mawatha, Kandy. After the function, Rajendran had walked across the road with his wife to get into their car parked on the opposite side, close to the rail road. While Rajendran had been in the process of opening the car door, his wife was hit by the appellant's vehicle and was thrown 6 feet forward. The appellant had also attended a function on that night at the Earls Regency Hotel in Kandy, where the Rotary Club had presented scholarships to selected students and the appellant had been one of the recipients. He had been returning with his friend, one Samitha Wickramaratne, and was driving towards the said friend's home at Pilimatalawa, when this incident had occurred. Having stated the facts of this case, let me now turn to examinethe questions on which special leave to appeal was granted.

Don Shelton Hettiarachchi v. Sri Lanka Ports Authority And Others - SLR - 307, Vol 2 of 2007 [2007] LKSC 11; (2007) 2 Sri LR 307 (12 December 2007)

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DON SHELTON HETTIARACHCHI
v
SRI LANKA PORTS AUTHORITY AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SOMAWANSA, J.
BALAPATABENDI, J.
SC FR APPLICATION NO/89/2oo3
FEBRUARY 21, 2007

Fundamental Rights - Article 12 of the Constitution- Necessary parties - Non inclusion - Fatal? - Pursuing any exercise in futility - Equality - Discrimination. The petitioner, a civil engineer, was the Chief Engineer (Planning and Development) of the Sri Lanka Ports Authority (the 1st respondent). The 1st respondent appointed the 5th respondent as the Director (Technical) and the 4th respondent as Special Advisor (Technical, Planning and Development). The petitioner contended that the Director (Technical) was the highest post in the engineering hierarchy to be held by a civil engineer, and the appointment of the 5th respondent who was an electrical engineer as Director (Technical) and the appointment of the 4th respondent as Special Advisor were therefore an infringement of Article 12.

Held:

(1) There was no evidence to substantiate his claim that the highest post in the engineering hierarchy of the port was always held by a civil engineer. Equality requires that all should be treated equally without any discrimination. There cannot be any special privileges in favour of any individual and that persons who are similarly placed under similar circumstances should be treated equally.

(2) As the petitioner and the 5th respondent had retired from services after the filing of the application pursuing any exercise in futility could only serve as an academic purpose.

(3) The non-inclusion of all the parties who would be affected by an order made in the application was fatal to the validity of the application.

Cases referred to:

(1) S.S. Royappav State of Tamil Nadu AIR 1974 SC 555.
(2) Velupillai v The Chairman, Urban District Council Secretary 39 NLR 464.
(3) Farook v Siriwardene, Election Officer and others (1997) 2 Sri LR 145.

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Dr. Sunil Cooray with M. Premachandra for petitioner.
Shibly Aziz PC with Senany Dayaratne for 1st, 2nd, 3rd and 5th respondents.

Cur. adv.vult.

December 12, 2007
DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a Chartered Civil Engineer by profession and a member of the Institute of Civil Engineers, was serving as a Head of a Division under the designation, Chief Engineer (Planning and Development) with effect from 02.10.2001 subject to a probationary period of one year of the 1st respondent Authority. The petitioner alleged that his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated by the 1st and 2nd respondents by the appointment of the 4th respondent as a Special Advisor (Technical, Planning and Development) and by the appointment of 5th respondent to the post of Director (Technical).

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

The facts of this case, as stated by the petitioner, albeit brief, are as follows:

The petitioner was appointed as an Engineer by letter dated 02.02.1968 (P2) at the Colombo Port Commission and subsequently by letter dated 22.08.1970 (P3), he was appointed as a Civil Engineer at the Colombo Port Commission. Since 1968, the petitioner had been serving in the Port Infrastructure Management for over a period of 35 years.

According to the petitioner, the chief tasks of the 1st respondent Authority belong to the discipline of Civil Engineering and it had been the practicesince1912 that the position giving the leadership to all port civil engineers was held by a Port Civil Engineer. Presently the highest such designation is the post of Director (Technical). The 5th respondent, according to the petitioner, is not a Civil Engineer, but a qualified Chartered Electrical Engineer and therefore he does not hold the requisite qualifications in terms of section 58(iii) of the Manual of Administrative Procedure of the Sri Lanka Ports Authority (P11) to be appointed as the Director (Technical). The 4th respondent is not an employee of the 1st respondent Authority and is an employee of Port

Management Consultancy Services Limited, which is a subsidiary Company of the 1st respondent Authority headed by the 2nd respondent. The 4th respondent, who is over 60 years of age was appointed as Special Advisor, as the 5th respondent is not a Civil Engineer and the 5th respondent is carrying out the duties, which the petitioner is entitled to carry out and also there is no recognized post in the Ports Authority known as 'Special Advisor'.

Accordingly, the petitioner's grievance is that the appointments given to 4th and 5th respondents should be cancelled and the petitioner should be appointed to the post of Director (Technical) in the 1st respondent Authority on the basis that the said post has been reserved for Civil Engineers.

The contention of the learned Counsel for the petitioner was that the position of Director (Technical) should be held by a Port Civil Engineer as has been the practice since 1912. In support of this contention learned Counsel for the petitioner referred to the previous positions held in respect of the highest position in the Civil Engineers' cadre, which is illustrated in the following chart:

Period	**Designation**	**Organization/ Department**	**Profession**	**Relevant Statute**
1912-1950	Harbour Engineer	Harbour Engineer's Department/ PWD	Chartered Civil Engineer	Thoroughfare Ordinance
1951-1967	Harbour Engineer/ Chief Engineer (Ports)	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Actof1951
1968-1978	Port Commissioner	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Actof1951
1979- 2001	Managing Director	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No.51 of 1979
2002- 2003	Director (Technical)	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No.51 of 1979

Learned Counsel for the petitioner further submitted that the Port Engineers are divided into two categories, which include the Port Infrastructure Management and Port Superstructure Management. According to his submission Port Civil Engineers are all involved in the Port Infrastructure Management whereas the electrical, mechanical and marine engineers belong to the Port Superstructure Management. The contention therefore was that since the highest position of the post of Port Civil Engineers' is presently identified a Director (Technical), such position should be held only by a Civil Engineer.

Learned President's Counsel for the 1st, 2nd, 3rd and 5th respondents (hereinafter referred to as the learned President's Counsel for the respondents) strenuously contended that the post of Director (Technical) is not limited to the discipline of Civil Engineers, but open to all the other disciplines such as mechanical, electrical, electronics and marine engineering for the reason that it would be patently unfair and discriminatory to reserve the said post for members of one branch of port engineering.

The petitioner, as stated earlier is challenging the appointments made to the 4th and 5th respondents and specifically the appointment made to the 5th respondent. The 5th respondent was admittedly appointed as the Director (Technical) of the 1st respondent Authority.

The nature and scope of the work of the said position was described in detail in the affidavit of the 1st to 3rd and 5th respondents, where it was averred that the said post is largely an administrative position, which is concerned with co-ordinating and overseeing activities of all the disciplines of port engineering. Such a position should be open to members of various disciplines of port engineering since the specialisation in engineering has not been a deciding factor when appointments were made to this post.

Learned President's Counsel for the respondents submitted that the 5th respondent was appointed to the post of Director (Technical) in terms of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority. Section 58 of the said manual, deals with the covering up duties and section 58(iii) reads as follows:

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"58. *The general terms and conditions relating to appointments to cover up duties of other posts are indicated below:*

.....

(iii) where the covering up period is expected to be over one month, the most senior employee in the grade immediately below should be appointed to cover up duties provided he is considered suitable."

Learned President's Counsel for the respondents contended that on the basis of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority, the 5th respondent, who was the senior most employee in the Head of Director grade, which was the grade immediately below that of the Director, who had over nine (9) years of experience in that grade as opposed to the petitioner, who had only one (1) year and nine (9) months experience in that grade was appointed to cover-up on duties of Director (Technical). It was further submitted that the 5th respondent was also deemed to be suitable for the said position on the basis of inter alia seniority, ability, managerial capabilities and contribution towards the achievement of organizational targets and goals.

Subsequently to the said appointment, the Board of Directors of the 1st respondent Authority had obtained approval from the Ministry of Port Development and Shipping to confirm the 5th respondent in the post of Director (Technical) (1R2).

It is to be borne in mind that the post of Chief Engineer (Ports) as the post of Director (Technical) was then known, was held from 1984 to 1989 by one A.B. Wickramage, who was a Mechanical Engineer by profession (1 R1).

Thus it is evident that the position in question has not been confined to Civil Engineers and I am therefore in agreement with the submissions made by the learned President's Counsel for the respondents that the post of Director (Technical), being an administrative position, should not be restricted to one area of specialization, so that the most suitable officer could be selected on the basis of his seniority, ability, managerial capabilities and his contribution towards the achievement of targets and goals of the 1st respondent Authority.

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In the circumstances it is apparent that the contention of the learned Counsel for the petitioner that the post of Director (Technical) is limited only for civil engineers cannot be accepted.

The petitioner had also complained of the appointment of the 4th respondent stating that the said appointment was made as the 5th respondent, who was not a Civil Engineer was unable to effectively and efficiently carry out the duties as the Director (Technical).

Learned President's Counsel for the respondent contended that the 4th respondent was appointed as a Special Advisor for the purpose of utilizing his expertise and experience for special projects such as donor-funded projects. Further it was submitted that as the 1st respondent was engaged in effecting an expansion of the ports system of the country, it had required the advice and Counsel of port engineers of the 4th respondent's level of experience and expertise to better strategize the utilization of foreign funding in an expedient and efficient manner.

On a consideration of the submissions of the learned President's Counsel for the respondents, it is apparent that the purpose of employing the 4th respondent was for the purpose of strategical utilization of foreign funds on special projects.

Considering the types of duties that had been allocated to the 4th respondent, it appears that his service had been obtained for the sole purpose of functioning as a Special Advisor on donor - funded projects and not for the purpose of assisting the 5th respondent, who was functioning in the capacity of Director (Technical).

The petitioner's complaint was that his fundamental right guaranteed in terms of Article 12(1) was violated due to the appointments of the 4th and 5th respondents.

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

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

Equality requires that all should be treated equally without any discrimination and as Sir Ivor Jennings (The Law of the

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Constitution, P 49) had described, among equals the law should be equal and should be equally administered. It illustrates the concept that there cannot be any special privileges in favour of any individual and that persons, who are similarly placed under similar circumstances should be treated equally.

However, this does not mean that all laws should apply equally to all persons. What it postulates is that classification is permitted provided it is found on intelligible differentia and should be reasonable. There cannot be any arbitrariness in such classifications. Equality as pointed out by Bhagawati, J., (as he then was) in S.S. Royappa v State of Tamil NadtJ,1)is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. Nevertheless there cannot be any discrimination between two persons, who are similarly circumstanced, which emphasizes the concept that equals cannot be treated unequally and unequals cannot be treated equally.

This concept equally applies to employment opportunities as well. Accordingly in regard to appointments and promotions equals should not be placed unequally and unequals also should not be treated equally.

The question therefore at this point would be whether the petitioner and the 4th and 5th respondents were equals who should have been treated equally.

Admittedly, the 4th respondent was appointed to the post of Special Advisor and the 5th respondent was appointed as the Director (Technical) of the 1st respondent

Authority. The petitioner has neither submitted any supporting evidence to indicate that he was suitable and qualified to have been considered for either of these positions nor has he substantiated the position as to why the 4th and 5th respondents were not suitable to have been appointed to their respective posts. Although he has alleged that the 5th respondent should not have been appointed as he is not a Civil Engineer, there is no material that has been submitted by the petitioner to substantiate this position. Moreover, the petitioner had submitted that the purpose of appointing the 4th respondent as a Special Advisor was due to the fact that the 5th respondent was not a Civil Engineer, but only a qualified Electrical Engineer. This

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submission is again without any supporting evidence. Would it be possible for a petitioner to make submissions without any supporting and substantiating material? My answer to that question is clearly in the negative. If a petitioner is leveling allegations against another party; it is necessary that supporting evidence, should be submitted to this Court. To uphold one's fundamental rights, it is necessary that a petitioner places sufficient material to show that such rights have been infringed by executive or administrative action. In this matter as referred to earlier, the petitioner has not submitted any material in support of his grievance.

Further, it is to be noted that the petitioner relied on section 58(iii) of the Manual of Administrative Procedure of the 1st respondent Authority, where it was stated that the senior most employees in the grade immediately below would be considered to cover-up duties. The respondents had also relied on that provision and had appointed the 5th respondent as by that time the 5th respondent had over 9 years of experience in that grade as opposed to the petitioner's one year and 9 months. The appointment given to the 4th respondent was admittedly to a special position for the purpose of using his expertise and experience for special projects. In such circumstances it cannot be said that the petitioner and the 4th and 5th respondents were similarly circumstanced to be treated as equals for the purpose of considering the alleged infringement of petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution.

There are two other matters I wish to refer to before I part with this judgment.

Learned President's Counsel for the respondents brought to our notice at the time of the hearing, which was admitted by the petitioner, that both the petitioner and the 5th respondent had retired. from the 1st respondent Authority during the pendency of this application and there it was futile for the petitioner to proceed with this application.

Pursuing an exercise in futility, could only serve an academic purpose and as quite correctly pronounced by Abrahams, C.J. **this is "a Court of Justice and not an Academy of Law.** (Velupillaiv The Chairman, Urban District Council Secretary) (2)

Secondly learned President's Counsel for the respondents submitted that the necessary parties to this application have not been brought before Court, as the petitioner had contended that only Civil Engineers are entitled to be appointed to the post of Director (Technical) of the 1st respondent Authority.

As submitted by the learned President's Counsel for the respondents, the persons most likely to be affected by such an order were the port engineers of the 1st respondent Authority attached to different branches and who were not civil engineers. Since they were not made parties they were unable to resist such a contention, if not en masse, at least by representation.

Learned President's Counsel for the respondents also submitted that the present incumbent of the post of Director (Technical) is also a non Civil Engineer and if a decision was to be taken by this Court that the post of Director (Technical) should only be held by a Civil Engineer, he would have had to vacate his position.

The need for having necessary parties before Court was considered by this Courtin Farookv Siriwardena, Election Officer and others(3),where it was clearly stated that the failure to make a party to an application of person/s, whose rights could be affected in the proceedings, is fatal to the validity of the application.

It was therefore an essential requirement that the parties, who were necessary to this application, should have been brought before this Court and the petitioner had not adhered to this requirement.

Considering all the circumstances of this application and for the reasons aforesaid I hold that the petitioner has not been successful in establishing that his fundamental right guaranteed in terms of Article 12(1) of the Constitution had been violated. This application is accordingly dismissed.

I make no order as to costs.

SOMAWANSA, J. - I agree
BALAPATABENDI, J. - I agree

Application dismissed.

Organization Of Protection Of Human Rights And Rights Of Insurance Employees And Others v. Public Enterprises Reform Commission And Others - SLR - 316, Vol 2 of 2007 [2007] LKSC 13; (2007) 2 Sri LR 316 (12 December 2007)

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ORGANIZATION OF PROTECTION OF HUMAN RIGHTS AND RIGHTS OF INSURANCE EMPLOYEES AND OTHERS
V
PUBLIC ENTERPRISES REFORM COMMISSION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE,J.
DISSANAYAKE,J.
SOMAWANSA, J.
FR 385/2003
JUNE 11, 2007
JULY 16,19,31,2007

Fundamental rights - Article 12, Constitution - Executive or administrative action? - Tests?- Conversion of Public Corporations and Government Owned Business undertakings into Public Companies Act - No. 23 of 1987

The two petitioners - trade unions - which represented all the employees of the 2nd respondent Sri Lanka Insurance Company Ltd (SUC Ltd) and the 3rd petitioner an employee of SUC Ltd, had contended that the decision of the 2nd respondent SUC Ltd., to retire employees who have reached the age of 55 years on the basis of the letters of retirement already issued and or on the basis of criteria other than fitness of the employee to work would be an infringement of Article 12 (1). It was also contended that the right of employees of the 2nd respondent to extension of service beyond the age of 55 years was a right enjoyed not only when it was a State owned corporation but also when it was converted into a share based public company under Act 23 of 1987, and that the employees have always had the right to request for extension of service after 55 years up to 60 years of age.

The respondent contended that, the refusal of the petitioners' extension of service do not constitute executive or administrative action.

Held:

Per Dr. Shirani Bandaranayake, J.

"The constitutional guarantee of fundamental rights are directed against the State and its organs, however there is no definition of executive or administrative action in the Constitution, its definition is postulated by the decisions of this Court which have been arrived at after several deliberations at various stages through majority and dissenting

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(1) Except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated there are no share of 2nd respondent SUC Ltd:, held by the Government - SUC Ltd., did not have a single Director representing the Government in its Board of Directors. No financial assistance is being provided to the 2nd respondent SLiC Ltd., by the Government and it does not enjoy a State conferred or State protected monopoly.

(2) It is evident that the 2nd respondent - SUC Ltd. is not an instrumentality or an agency of the Government and there is no deep and pervasive Government control over the 2nd respondent - since the signing of the share sale and purchase agreement on 11.04.2003.

Per Dr. Shirani Bandaranayake, J.

"The percentage of the share capital of the relevant institution held by the Government the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action, as a consideration of all the circumstances it is apparent that there is no state control over the 2nd respondent and it is not an instrumentality or an agency of the Government".

APPLICATION under Article 126 of the Constitution on a preliminary objection taken.

Cases referred to:-

(1) Leo Samson v Sri Lanka Air Lines Ltd and others 2001 Sri LR 914
(2) Ajay Hajia v Khalid Mujib AIR 1981 SC 487
(3) S. C. Perera v U. G. C. FRO Vol. 103
(4) Velmurugu v Attorney-General 1981 1 Sri LR 406
(5) Mariadas v Attorney-General FRO Vol. 11 397
(6) Ratnasara Thero v Udugampola Superintendent of Police 1983 1 Sri LR 461
(7) Gunawardane v Perera 1983 1 Sri LR 305
(8) Wijetunga v Insurance Corporation 1982 1 Sri LR 1

(9) Chandrasena v Paper Corporation FRO Vol 11 281
(10) Rajaratne v Air Lanka Ltd. 1987 2 Sri LR 128
(11) Rajanthan State Electricity Board Jaipur v Mohanlal AIR 1967 SC 1857
(12) Sukhder Singh v Bhagatram AIR 1975 SC 1331

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(13) In re R. D. Sheity International Airport Authority of India AIIIR 1979 se 1628
(14) Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd and others 2001 1 Sri LR 365

Batty Weerakoon with Chamantha Weerakoon Unamboowe for petitioner.

S. L. Gunasekera with Priyantha Jayawardena for 2nd respondent.

Nerin Pulle, sse for 1st and 3rd to 6th respondents.

December 12, 2007
DR. SHIRANI BANDARANAYAKE, J.

The 1st and 2nd petitioners are two trade unions, duly registered under the Trade Union Ordinance, which represent all the employees of the 2nd respondent and the 3rd petitioner was an employee of the 2nd respondent. The petitioners stated that the employees of the 2nd respondent have always had the right to request for extensions of service after the age of 55 years up to 60 years of age. This, according to the petitioners, had been the practice from the time of the establishment of the Insurance Corporation of Sri Lanka. The petitioners alleged that the right of employees of the 2nd respondent to extensions of service beyond the age of 55 years was a right they enjoyed not only when it was a state owned Corporation, but also when it was converted into a share-based Public Company under Act, No. 23 of 1987. Accordingly the petitioners submitted that by the decision of the 2nd respondent to retire employees, who have reached the age of 55 years on the basis of the letters of retirement already issued and/or on the basis of criteria other than fitness of the employee to work considering the health and service record, irremediable loss would be caused to the said employees and would be an infringement of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

When .this matter was taken for hearing several preliminary objections were raised by the learned Senior State Counsel for the 1st, 3rd, 4th, 5th and 6th respondents and the learned Counsel for

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the 2nd respondent. Learned Senior State Counsel, accordingly took up the following preliminary objections:

01. The refusal of the petitioners, extensions of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution; and

02. This application is time barred.

Learned Counsel for the 2nd respondent, whilst associating himself entirely with the aforementioned preliminary objections also raised the following preliminary objections:

03. The 1st and 2nd petitioners are Trade Unions which do not have corporate personality and therefore have no fundamental rights guaranteed to them by the Constitution;

04. the 3rd petitioner had made an application to the Labour Tribunal which granted him compensation in a sum of Rs. 260,850/- and that order was set aside in appeal by High Court of the Western Province and therefore he is not entitled to any relief in terms of section 318(5) of the Industrial Disputes Act;

05. Since there is no allegation whatsoever of the violation of a fundamental right of any person by the 2nd respondent, the petitioners cannot be granted any relief against the 2nd respondent; and

06. Article 126 only permits a petitioner to make an application in respect of the violation of a fundamental right of such petitioner and relief only in respect of such petitioner.

At the hearing it was agreed that out of the aforementioned preliminary objections only the items No. 01, 02 and 03 would be taken into consideration.

The refusal of the petitioners extension of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution.

Learned Senior State Counsel contended that on several grounds it is evident that this application should be dismissed in

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limine, as the impugned decision of the 2nd respondent to refuse extensions of service to its employees and more specifically to the 3rd petitioner, is clearly a decision outside the scope of executive or administrative action in terms of Article 126 of the Constitution. Accordingly his position was that the 1st and 3rd to 6th respondents have no control as the 2nd respondent has ceased to be an agency of the Government.

Learned Senior State Counsel specifically submitted that since 11.04.2003, upon the signing of the Share Sale and Purchase Agreement, the Government of Sri Lanka ceased to have any control and/or authority in the management of the 2nd respondent. Moreover, since 11.04.2003 there was not even a single Director representing the Government in the Board of Directors of the 2nd respondent Company.

The contention of the learned Counsel for the petitioners in this regard was based on the submission made by the 2nd respondent in its objections at paragraph 3.1, where it was stated that,

"The entire case of the petitioners is founded upon the alleged conduct of the 2nd respondent in refusing extensions of service to the 3rd petitioner and other unnamed and unidentified employees of the 2nd respondent which according to the petition itself occurred in June 2003 while the 'privatization' took place in April 2003'.

Based on the aforementioned position, learned Counsel for the petitioners contended that this statement projected a patently false position. It had been the understanding of the petitioners that the infringement of their fundamental right in terms of Article 12(1) of the Constitution had commenced with the privatization of the Sri Lanka Insurance Corporation Ltd., and was revealed to the petitioners only by the 1st respondent's letter dated 07.07.2003 (P26). Accordingly the petitioners' contention was that the sale of the State's 90% of shares of the 2nd respondent by the Government through the 1st respondent under the Public Enterprises Reform Commission Act, that necessary steps to protect the rights of the employees of the Company to security of service, which included the right to be considered for yearly extensions of service after they had completed 55 years of age

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(as amended later to 57 years), has not been taken.

Having stated the position taken by the respondents and the petitioners let me now turn to consider whether the refusal of the petitioners' extension of service constitute executive or administrative action within the meaning of Article 126 of the Constitution.

The 2nd respondent's affidavit is quite revealing in this regard as it contains the relevant details pertaining to pre 2003 and post 2003 position. Accordingly, the 2nd respondent was initially incorporated in terms of the Insurance Corporation Act, NO.2 of 1961 and was known as the Insurance Corporation of Ceylon. The status of the 2nd respondent had changed in 1993 as it was converted into a company incorporated under the Companies Act in terms of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987. Since the conversion, the 2nd respondent was known as the Sri Lanka Insurance Corporation Ltd.

A Director of the 2nd respondent had averred in his affidavit that since the said incorporation in 1993 until 11.04.2003, the 2nd respondent was wholly owned by the Government of Sri Lanka.

The contention of the respondents was that this position changed on 11.04.2003 with the Government of Sri Lanka entering into an agreement for the sale of shares of the 2nd respondent with Milford Holdings (Pvt.) Ltd., Greenfield Pacific E. M. Holdings Ltd., The Distilleries Company of Sri Lanka Aitken Spence and Co. Ltd., and Aitken Spence Insurance (Pvt.) Ltd. (2R1). Accordingly the Government of Sri Lanka had sold 45 million shares representing 90% of the issued share capital of the 2nd respondent on 11.04.2003 to Milford Holdings (Pvt.) Ltd and Greenfield Pacific E. M. Holdings Ltd. in terms of the agreement 2R1. Under the said agreement, provision was also made to give an option to the permanent employees of the 2nd respondent to purchase the balance 10% of the issued shares of the 2nd respondent. Such quantity of shares, which were not purchased by the said employees were to be purchased by the said Milford Holdings (Pvt.) Ltd., and Greenfield Pacific E.M. Holdings Ltd., and until such

time the said shares were purchased by the employees of the 2nd respondent and/ or the said two Companies, the Government of Sri Lanka were to retain ownership of the said 5 million shares. Further, provision was made in the said agreement that the Government of Sri Lanka,

"shall have no special right to the Company (i.e. the 2nd respondent) (including without limitation the right to nominate Directors of the Company), but the seller (i.e. the Government of Sri Lanka) be entitled to exercise the voting rights attached to such employee shares."

Accordingly out of the said balance of 10% of shares, 0.1229% (61,441 shares) were opted to be taken as shares by the employees and 9.8336% (4,916,807 shares) were purchased by the Milford Holdings (pvt.) Ltd., the proceeds of which had been distributed among the employees. The balance 0.0435% (21,750 shares) was retained by the Secretary to the Treasury in respect of disputed claims to shares and the shares, which would be allocated to employees against whom disciplinary inquiries were pending, in the event of them being exonerated. The said Director of the 2nd respondent had further averred in his affidavit that after 11.4.2003 when 90% of the issued share capital of the 2nd respondent was sold to the aforementioned two Companies, the Government of Sri Lanka ceased to have any control in the management of the 2nd respondent (except to the extent that it had the voting powers ordinarily enjoyed by any shareholder of a Company of limited liability) and did not even have a Director representing it on the Board of Directors of the 2nd respondent.

On a consideration of the aforementioned circumstances, the question arises as to whether the 2nd respondent can be regarded as an agency and/or institute or

instrumentality of the Government after 11.04.2003. Supporting his contention that since 11.04.2003, the 2nd respondent had ceased to be an agency or an instrumentality of the Government, learned Senior State Counsel relied on the decision in Leo Samson v Sri Lankan Air Lines Ltd. and OtherS(1).

In that matter the petitioners had complained of the termination of service and posting of an officer as Manager, Kuwait by the Sri Lanka Air Lines Ltd.,which in their view was violative of Article 12(1)

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of the Constitution. A preliminary objection was raised on behalf of the Sri Lanka Air Lines Ltd., that consequent to the shareholder 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. Further it was stated that the amended Memorandum and Articles of Association, the business of the Company was to be conducted by a Board of Directors having 7 members, 4 of whom were appointed by the Government and the other 3 members were appointed by Emirates, which number included the Managing Director. It was held by a Divisional Bench of this Court that on a consideration of the provisions of the Memorandum and Articles of Association and the shareholders Agreement that the control and authority over the business of the Company was vested in the investor. Applying the test of government agency or instrumentality, and referring to the decision of Bhagwati, J. (as he then was) in Ajay Hasia v Khalid Mujif(2), Ismail, J. in his judgment (supra) stated that,

".... it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement... that the Government has lost the 'deep and pervasive' control exercised by it over the Company earlier. The action taken by Sri Lankan Airlines cannot now be designated 'executive or administrative action'."

The Constitutional guarantees of fundamental rights are clearly directed against the state and its organs S. C. Perera v University Grants Commission(3). According to Article 17 of the Constitution,

"every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions "

  ; However, there is no definition of executive or administrative action in the Constitution. Its definition is postulated by the decisions of this Court, which has been arrived at, after several deliberations at various stages through majority and dissenting judgments *Velmurugu v Attorney-Generat4), Mariadas v Attorney*

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Generaf[5], Ratnasara Thero v Udugampola, Superintendent of Police(6), Gunawardene v Perera(7).

  ; The decision in Wijetunga v Insurance Corporation(8) could in this context be cited as a case in point, where serious consideration was given to the question of the relationship between the then Insurance Corporation and the State. Referring to this question Sharvananda, A.C.J. (as he then was) stated that,

"Is it a Department of Government or servant or instrumentality of the State? Whether the Corporation should be accorded the status of a Department of Government or not must depend on its Constitution, its powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions. For determining the integral relationship between the State and the Corporation we have to examine the provisions of the statute by which the Corporation has been established."

  ; In Wijetunga's case (supra), the Supreme Court, after considering the provisions of the Insurance Corporation, Act, NO.2 of 1961, took the view that even if the functional test or governmental control test is applied, the Corporation cannot be identified as an organ of the State and its action cannot be designated 'executive or administrative' action in terms of Articles 17 and 126 of the Constitution.

  ; Following the decision in Wijetunga v Insurance Corporation (supra), a similar view was taken in Chandrasena v Paper Corporation(9), where it was held that, in terms of Act, No. 49 of 1957, the Paper Corporation was not an instrumentality of the government for the action in question to come within the scope of 'executive or administrative action'.

  ; In Rajaratne v Air Lanka Ltd.(10),Atukorale, J. referred to several decisions of our Supreme Court and of the Indian Supreme Court in deciding that Air Lanka was an agent or organ of the Government and its action could be designated as executive or administrative action for the purpose of granting relief in terms of Article 126 of the Constitution.

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Considering the test applicable in determining, whether a particular institution would come within the meaning of executive or administrative action in terms of Article 126 of the Constitution, it would be of paramount importance to examine, briefly the decisions in Rajanthan State Electricity Board, Jaipur v Mohanlaf.. [11],Sukhder Singh v Bhagatram[12] and Ajay Hasia v Khalid Mujib Schravardi (supra).

  ; In Rajanthan State Electricity Board, Jaipur (supra) the question, which arose was whether the Rajanthan Electricity Board was an authority within the meaning of 'other authorities' in terms of Article 12 of the Indian Constitution. Article 12 of the Indian Constitution states that,

"In this part, unless the context otherwise, requires, 'the State' includes the Government and Parliament of India and the Government and Legislature of each of the States and al/local or other authorities within the territory of India or under the control of the Government of India."

  ; Considering the question at issue Bhagwati, J. (as he then was), delivering the majority judgment held that the phrase 'other authorities' included all statutory authorities on whom powers are conferred by law.

  ; In Sukhder Singh v Bhagatram Sardan (supra) the question which arose was whether the Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12 of the Indian Constitution. Considering the issue at hand, Mathew, J., expressed the view that, in order to answer the question, it would be necessary to ascertain for whose benefit the Corporations were carrying on their business and stated that,

"When it is seen from the provisions of that Act that on liquidation of the Corporation, its assets should be divided among the shareholders, namely, the Central and State governments and others, if any, the implication is clear that the benefit of the accumulated income would go to the Central and State governments."

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The position taken by Mathew, J., in Sukhder Singh (supra) was cited with approval by Bhagwati, J., (as he then was) in Ajay Hasia v Khalid Mujib (supra), where the Court considered whether a society registered under the Societies Registration Act is an 'authority' falling within the definition of 'state' in terms of Article 12 of the Indian Constitution. In the process of considering this question, Bhagwati, J., (as he then was) summarised the relevant tests, which were culled out from the decision in R. D. Shelty International Airport Authority of India(13)stating that,

  ; 'These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution."

  ; The said tests as stated by Bhagwati, J. (as he then was) are as follows:

  ; "(a) ... if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government;

  ; (b) where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character;

  ; (c) it may also be a relevant factor ...whether the Corporation enjoys monopoly status which is the State conferred or State protected;

  ; (d) existence of 'deep and pervasive' State control may afford an indication that the Corporation is a State agency or instrumentality;

  ; (e) if the functions of the Corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government; and

  ; (f) specifically, if a department of the Government is transferred to a Corporation it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

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Having stated the Indian decisions in relation to the matter in issue and specially the tests identified by the Indian Supreme Court, let me now turn to consider the question in hand pertaining to this application.

  ; As stated earlier, except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated, there are no shares of the 2nd respondent held by the Government. In Leo Samson's case (supra), where this Court had held that the acts of Sri Lankan Airlines Ltd. do not constitute executive or administrative action, Emirates had acquired only 26% of the shares although they had agreed to purchase 40% of the shares of Air Lanka.

  ; Moreover, in terms of the amended Memorandum and Articles of Association of the Sri Lankan Airlines Ltd., the business of the Company was to be conducted by a Board of Directors having seven (7) members out of which four (4) were approved by the government.

  ; Learned Senior State Counsel for the 1st and 3rd to 6th respondents submitted that the 2nd respondent did not have a single Director representing the Government in the Board of Directors of the 2nd respondent. Furthermore, it was stated that, no financial assistance is being provided to the 2nd respondent by the Government and that it does not enjoy a State conferred or State protected monopoly status.

  ; In the circumstances, on the basis of the test stipulated in International Airport Authority of India (supra), it is evident that the 2nd respondent is not an instrumentality or agency of the Government and there is no deep and pervasive Government control over the 2nd respondent since the signing of the Share Sale and Purchase Agreement on 11.04.2003 (2R1).

  ; Our attention was also drawn to the decision in Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd. and Others(14)where this Court had held that the State had the effective ownership and control over the Sri Lanka Insurance and Robinson Hotel Co. Ltd.

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It is to be clearly borne in mind that Jayakody (supra) was decided in 2001, prior to the privatization of the 2nd respondent Corporation. For the purpose of the present application what is relevant would be the Share Sale and Purchase Agreement dated 11.04.2003 (2R1) which clearly stipulates that except for the 0.0435% of share retained by the Secretary to the Treasury, the rest of the shares were purchased by the 2nd respondent.

  ; Thus it is to be noted that since 11.04.2003, the character of the the then Sri Lanka Insurance had been changed from its previous status and a comparison suggestive of State control based on the position of the 2nd respondent prior to 11.04.2003 cannot be considered for the purpose of this application.

  ; The percentage of the share capital of the relevant institution held by the Government, the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution, in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action contemplated in terms of Article 126 of the Constitution. On a consideration of all the circumstances of this application it is apparent that there is no State control over the 2nd respondent and it is not an instrumentality or an agency of the Government.

  ; In such circumstances I uphold the preliminary objection raised by the learned Senior State Counsel for the 1st and 3rd to 6th respondents with which the learned Counsel for the 2nd respondent associated himself entirely that the refusal of the petitioners' extensions of service does not constitute executive or administrative action within the meaning of Article 126 of the Constitution.

  ; Since the said preliminary objection has been upheld I see no reason to indulge in an examination of the other preliminary objections raised by learned Counsel for the respondents.

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For the reasons stated above, this application is dismissed in *limine*.

  ; I make no order as to costs.

DISSANAYAKE, J. - I agree.
SOMAWANSA, J. - I agree.

Application dismissed.

