SRI LANKA SUPREME COURT **Judgement Delivered (2008)**

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Somasekaram v. Lanka Bell (Pvt.) Ltd - SLR - 9, Vol 1 of 2008 [2008] LKSC 3; (2008) 1 Sri LR 9 (26 February 2008)

SOMASEKARAM
v
LANKA BELL (PVT.) LTD.

SUPREME COURT
NIHAL JAYASINGHE, J.
NIMAL DISSANAYAKE, J.
GAMINI AMARATUNGA, J.
SC (CHC) 16/2000
HC CIVIL 28/97 (3)
MAY 17, 21,2007
AUGUST 5, 2007

Code of Intellectual Property Act 52 of 1979 - Permission granted by Surveyor General to produce A-Z Street Guide Map - Copyright acquired? Ownership of the copyright with the Surveyor General?

The appellant made an application to the Surveyor General for permission to produce a A-Z street guide map for selected cities/Greater Colombo.

The defendant-respondent caused to be published in several newspapers a reproduction of several parts of the map in the form of advertisement without the consent/permission of the appellant.

Action was instituted by the appellant, alleging that the respondent has violated his rights under Act 52 of 1979, and contended that the appellant had made several modifications and alterations to the map of the Surveyor General that conferred originally to his work.

The High Court dismissed the application holding that the work is a mere alteration of the Surveyor General's Plan without any creativity that defies originality.

On appeal to the Supreme Court.

Held:

The ownership of the copyright in the map remained with the Surveyor General.

APPEAL from the judgment of the Commercial High Court.

M.A. Sumanthiran with *A. Vamadeva* for plaintiff-appellant.
Romesh de Silva PC with *Dina Phillips* for defendant-respondent.

Cur. adv. vult.

February 26, 2008
JAYASINGHE, J.

In or around 1993 the appellant made an application to the Surveyor General for permission to produce an A-Z street guide map of Greater Colombo and selected cities. The grant of permission was conditional upon payment of Royalties to the Surveyor General as per guidelines set out in a Gazette Notification. In or about 1994 the appellant produced an A-Z street guide map for which approval has been obtained. The appellant submitted that in view of the unique and distinct features in the said work, the said A-Z guide map is an original creation and acquired copyright; that in or about December 1996 and January 1997 the defendant-respondent caused to be published in several newspapers a reproduction of several parts of the said A-Z map in the form of an advertisement without the consent or permission of the appellant. The respondent then sought to settle the dispute that ensued and upon the failure to reach any compromise the appellant dispatched a letter of demand claiming damages for the unauthorized publication of the appellant's work and consequently
instituted proceedings in the Commercial High Court alleging that the respondent company has violated his rights under the Code of Intellectual Property Act No. 52 of 1979. The main thrust of the appellant's argument is that the appellant had made several modifications and alterations to the map of the Surveyor General that conferred originality to his work and therefore is protected under the Code of Intellectual Property Act No. 52 of 1979 where all rights were reserved for the appellant.

The Commercial High Court came to a finding that the key issue for determination is whether the A-Z street guide map published by the appellant is an original work and held that the work of the appellant is a mere alteration of the Surveyor General's Plan without any creativity that defies originality. The Commercial High Court accordingly dismissed the application of the appellant.

The present appeal is against the judgment of the Commercial High Court. It is the submission of the defendant-respondent that the Surveyor General's map which the petitioner admittedly used as the ground work for the creation of the impugned map was prepared by the Surveyor General's Department and the copyright is vested with the Surveyor General; that the appellant was permitted to use the map in his publication subject to the condition that limited number of copies would be published, that Royalties were payable and more importantly the insertion of an acknowledgement that the map is reproduced with permission of the Surveyor General and accordingly the ownership of the copyright in the map at all times remained with the Surveyor

General. The defendant-respondent submitted that in the circumstances the appellant could not have had copyright in the said map.

I considered the submissions of Counsel carefully and I am of the view that there is no merit in this appeal. The appeal is accordingly dismissed but without costs.

N.E. DISSANAYAKE, J. - I agree.
N.G. AMARATUNGA, J. - I agree

Appeal dismissed.

Vanathawilluwa Vineyard Ltd v. Commercial Bank Of Ceylon - SLR - 68, Vol 1 of 2008 [2008] LKSC 6; (2008) 1 Sri LR 68 (27 February 2008)

VANATHAWILLUWA VINEYARD LTD
V
COMMERCIAL BANK OF CEYLON

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE,J.
MARSOOF, PC, J.
SC CHC 31/1999
HC CIVIL 27/1996 (1)
DC COLOMBO 12808 I MR
NOVEMBER 10, 2005
FEBRUARY 7, 2006
APRIL 25, 2006
MAY 8, 2006
SEPTEMBER 25, 2006
NOVEMBER 7, 2006
DECEMBER 5, 2006
JANUARY 16, 2007
FEBRUARY 28, 2007
MARCH 22, 2007

Commercial Transaction - Financing of Exports - Contracts of sale of goods on documents against payment (DIP) - Collection arrangement - Right of remitting Bank discounting Bills to have recourse to exporter? - Bankers duty of care and duty to follow instructions? - Estoppel by representation? - Applicability of Uniform Rules of Collection (URC).

VWV Ltd shipped two consignments of gherkins to a buyer in Holland (K) on two merchant vessels. The bills of lading issued by the vessels were made to the order of Commercial Bank (CB). For procuring payment VWV Ltd drew on the buyer K two bills of exchange payable to the order of CB at 'sight'. The Bills of lading were endorsed by CB with the words deliver to the order of Giro Van De Bank. On the instructions of VWV Ltd, CB discounted the two bills of exchange and credited the VWV Ltd account with the equivalent of the value of the said bills of exchange in SL Rupees. The CB debited the account of VWV Ltd with the rupee value of the bill of exchange, on the basis that the said bills of exchange have been dishonoured. VWV Ltd instituted action to recover the rupee equivalent of the value of the two bills of exchange that were debited by CB with interest. The Commercial High Court held with the CB.

The plaintiff-appellant VWV Ltd contended that the action filed by the plaintiff should be viewed as a case involving financing exports in the context of contracts of sale of goods on DIP terms involving a 'collection agreement', and the defendant-respondent CB contended that this transaction should be disposed of by applying the legal principles relating to discounting of bills of exchange. It was also contended by VWV Ltd that Giro Van De Bank was not a Bank in the commercial sense, and the CB has acted negligently and without due care and diligence in carrying out its duty function of a remitting Bank.

Held:

(1) The Commercial High Court has held that the payment for the said two exports were on DIP terms and in the absence of any cross appeal by CB, the appeal has to be dealt on the basis that the transactions in question were on DIP terms.

(2) There is a privity of contract between the exporter and the remitting Bank and also between the remitting Bank and the collecting bank but not between the seller and the collecting Bank, unless the seller contemplates that a sub agent will be implied and authorize the remitting Bank to create privity of contract between himself and the collecting bank.

The relations between the seller and the remitting bank and between the remitting bank and the collecting bank will normally be governed by the Uniform Rules of Collections (URC). These Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. The question as to the objectives of the remitting bank vis-avis the exporter, and the liability of the remitting bank for the wrongful acts and omission of the collecting bank have to be considered in the light of the provisions of URC 1978.

It is the duty of the remitting bank to keep track of the bills sent for negotiations to the collecting bank and to give instructions in regard to the handling of the documents. In the event that the bills of exchange are dishonoured by non-acceptance or non payment, it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received.

(3) The CB has failed to discharge its responsibilities as a remitting bank in terms of the URC Rules. The remitting bank cannot take refuge in the instructions given by the customer, if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedure set out in the URC Rules.

This case has to be dealt with as one involving a collection arrangement, the fact that the bills of exchange were discounted by CB does not change the character of a documentary collection.

(4) A bill of lading represents the goods to which they relate, so that the transfer of the bill of lading of itself constitutes a transfer of the goods themselves. It is not like

a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a bona fide transferee for valuable consideration without regard to the title of the parties who make the transfer. The Maxim 'memo dat quod non habet' does not apply to a bill of lading in favour of the shipper even against a bona fide purchaser for value. Under a collection arrangement the bill of lading is held as security for payment of the price and should only be released against payment.

Per Saleem Marsoof P.C. J

"It is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regardingthe handling of the documents, it is also contemplated that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received".

Held further

Per Saleem Marsoof P.C. J

"In order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representations he was led to believe that the said representation was true and acted thereon to his prejudice, it is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance, and which the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed".

(5) The trial Court was in error in holding that VWV Ltd was estopped from denying that Giro Do Van de bank was a bank by reasons of the instructions given.

APPEAL from the Commercial High Court - Colombo.

Cases referred to:

(1) Harlow & James Ltd v American Express Bank Ltd - 1990 - 2 Lloyds Report 343 at 349

(2) Minories Finance Ltd v Afribank Nigara Ltd - 1995 - 1 Lloyds Report 134 at 139

(3) Scholar v National Westminster Bank Ltd 139 - 1920 2 QB 719

(4) Commercial Banking Co. of Sydney Ltd v Jalsard (Pvt.) Ltd 1974 - AL 279

(5) Redomons v Allied Irish Bank PLC - 1987 - 2 KTLR 264 at 266

(6) Honourable Society of the Middle Temple v Lloyds Bank - 1999 - 1 All ER (common) 193

(7) Linklaters (afir) v HSBC Bank Ltd- 2003 - EWAC 1113 (common), 2003 All ER (D) 345 (May)
(8) Calico Printers Association Ltd. v Barclays Bank 1931 - 145 LT 51
(9) Boastone & Firminger Ltdv Nasima Enterprises (Nyma) Ltd-1996 - CLC 1902 at 1908
(10) RE Johns Ltd v Waring & Gillow Ltd 1926 - AL 670
(11) Sze Hai Tong Bank v Rambler Ceyde Co Ltd - 1959 - AL 576 at 586
(12) The Honda - 1994 - 2 Lloyes Rep 541 at 553
(12a) Gurney v Behrend - 1854 3 E&B 622 at 633.
(13) The Prinz Adalbert- 1917 - AL 586
(14) H. M. Procurator - General - v Mc Spencer Controller of Mitsui & Company Ltd -1945 Al 124
(15) Maclaine v Catty -1921 1 AL376 381 (H.L)
(16) Hirdaramani Ltd v De Silva - 55 NLR 294

K. Kanag Iswaran PC with Dr. Harsha Cabral PC and Ms. Dilrukshi Boteju for plaintiff-appellant.
Romesh de Silva PC with Hiran de Alwis and Shanaka Cooray for defendant respondent.

February 27, 2008

SALEEM MARSOOF, PC. J.

This is an appeal from the decision of the Commercial High Court dated 12th July 1999 dismissing the action filed byte plaintiff appellant Vanathawilluwa Vineyard Ltd., against the defendant respondent Commercial Bank of Ceylon Ltd., with costs. Vanathawilluwa Vineyard Ltd., hereinafter referred to as the 'VWV Ltd.' is a company incorporated in Sri Lanka, engaged in the export of Gherkins-in-Brine to USA, Europe and Australia. It is claimed that VWV Ltd. enjoyed 60% of the market share in exports to Belgium and 50% of the market share in exports to Holland. The Commercial Bankof Ceylon Ltd., hereinafter referred to as the 'Commercial Bank,' is a bank incorporated in Sri Lanka of which VWV Ltd. is a customer.

The facts material to this appeal may be briefly stated as follows: On 4th July 1990 and 14th August 1990 VWV Ltd., shipped two consignments of gherkins to a buyer in Holland named Hans Van Kilsdonk on two merchant vessels 'MV CGM Rimbaurd' and 'MV ;

Rubelend' respectively. The bills of lading issued by the said merchant vessels were made to the order of the Commercial Bank, the port of discharge being Antwerp. The name and address of Hans Van Kilsdonk also appear in the two bills of lading in the column meant for the address of notification. It is common ground that for procuring payment for the aforesaid consignments of gherkins, VWV Ltd. drew on the buyer Hans Van Kilsdonk two bills of exchange respectively for

Netherlands Guilders 46,800.00 (P4) and 40,800.00 (P5) payable to the order of the Commercial Bank 'at sight'. Admittedly, the bills of lading were endorsed by the Commercial Bank with the words "Deliver to the order of Giro Van De Bank'. It is the position of the Commercial Bank that the said endorsements were made as instructed by VWV Ltd. in the covering letters marked 'P6' and 'PT signed by the Director of VWV Ltd., with which the said bills of lading and bills of exchange were submitted to the Commercial Bank fornegotiation. In view of the importance of these letters, which were substantially similar, the undated letter marked 'P6' that related to the first of the two shipments, is quoted below in full -

"Vanathawilluwa Vineyard Ltd.,
44111A, Razeendale Gardens,
Colombo 4.

The Manager,
Commercial Bank of Ceylon Ltd.,
Wellawatte Branch,
Colombo 6.

Dear Sir,

HO LICENCENO.CU1890104772

We forward herewith final documents for negotiation by your Outward Bills Dept., Bristol St., Colombo 1. Kindly set off 5% of the Fob Value (US$. 1,627.50) as broker's fee as shown in our abovementioned licence and remit same by TIT to the under mentioned, and arrange for the balance proceeds to be credited to our AlC 5820 (Wellawatte Branch):-

MICHAEL L. JONES,
A 1C 232 096799
Security Pacific National Bank
NEWBURRY PARK OFFICE 0232
NORTH REINO ROAD,
NWBURRY PARK,
CALIFORNIA 913220, U.S.A.

Please courier the original documents to the under mentioned Bank and debit charges to our account:-

GIRO VAN DE BANK, KAMER VAN KOOPHANDEL
ODRDRECHT NR. 55988
HOLLAND.

Thanking you,
Yours faithfully,
VANATHAWILLUWA VINEYARD LTD.,

Sgd 1 Ms. V. Viswakula,
Director."

On the instruction of VWV Ltd. the Commercial Bank discounted the two bills of exchange and credited the account of VWV Ltd. with the equivalent of the value of the said bills of exchange in Sri Lanka Rupees. The dispute that gave rise to this action and appeal arose from the subsequent decision of the Commercial Bank to debit the account of VWV Ltd. with the rupee value of the bills of exchange, on the basis that the said bills of exchange have been dishonoured.

VWV Ltd., instituted this action on 23rd November 1992 to recover the rupee equivalent of the value of the two bills of exchange that were admittedly debited by the Commercial Bank but also the further amount charged by the bank as interest totaling to Rs. 2,377,759.72 and Rs. 1,433,286.01 respectively, together with interest at 28 % from 1st November 1992. This action was filed on the basis that 'Giro Van De Bank was not a bank in the commercial sense and that the Commercial Bank had acted negligently and without due care and diligence in carrying out its duty and function of a remitting bank VWV Ltd. alleged that the Commercial Bank had released the bills of lading and the other shipping documents to the said buyer wrongfully, unlawfully, negligently, without due care and without collecting payment thereon, and was therefore not entitled to debit the account of VWV Ltd.

At the trial which commenced in the District Court of Colombo, twenty issues were settled on 2nd November 1995, and by reason of the transfer of jurisdiction to the Commercial High Court in terms of the High Court of the Provinces (Special Provisions) Act, NO.10 of 1996, the trial was thereafter continued in the Commercial High Court on the same issues. It is unnecessary for the purpose of this appeal to set out in full all the issues on which the case went to trial, as the main thrust of the case of VWV Ltd. is embodies in issue No.10 raised on its behalf, and which is quoted below-

"10. Has the defendant-bank having discounted the said Bills 'P4' and 'P5' acted negligently and without due care and diligence in carrying out its duties and functions as a remitting bank?"

The position of the Commercial Bank was simply that the bills of lading and the bills of exchange were sent to the Giro Van De Bank in compliance with specific instructions received from VWV Ltd. in 'P6' and 'PT, and that in these circumstances, it cannot be liable for any loss that may have been sustained by VWV Ltd. The defence of the Commercial Bank is crystallized in issues 14, 15 and 16 which are quoted below-

"14. At all time material to this action, was the defendant entitled to and lor obliged to follow instructions given by the plaintiff.

15. (a) At all times material to this action did the defendant act as the agent of the plaintiff on whose behalf the Bills referred to in the plaint were sent for collection.

(b) If issue 15(a) is answered in the affirmative is the defendant not liable for the loss and damage, if any, caused thereby.

16. (a) By letters marked "P6" and "P?" did the plaintiff give specific instructions to the defendant to send the said Bills and documents by courier to the address sated therein.

(b) If so, did the defendant comply with the said specific instructions?

(c) If issues 16 (a) and (b) are answered in the affirmative can the plaintiff have and maintain this action."

The other substantial defence taken up on behalf of the Commercial Bank relating to estoppel was formulated as issue No. 18, and will be considered later in this judgement. Issue No. 19 raised on behalf of the Commercial Bank related to the question of prescription, but the issue was answered against the Commercial Bank by the learned trial Judge, and the Commercial Bank has not appealed. At the trial before the Commercial High Court, Sachyarachchige Don Cyril Jiasena Perera, a banking expert, Verena Nirmalee Viswakula, the Director of VWV Ltd. and Nimal Perera, Director of Aitken Spence Shipping Ltd. gave evidence on behalf of VWV Ltd. The latter was only a formal witness called to prove certain documents marked subject to proof.

The Pivotal Issue

The submissions of counsel throughout the argument of this appeal focused on one pivotal issue, namely whether the action filed by VWV Ltd. should be viewed, as suggested by President's Counsel for the said company, as a case involving the financing of exports in the context of contracts of sale of goods on 'Documents against Payment' (DIP) terms involving a 'collection arrangement', or should be treated, as contended by learned President's Counsel for the Commercial Bank, as one that can simply be disposed of by applying the legal principles relating to discounting of bills of exchange.

Learned President's Counsel for VWV Ltd., submitted that the appeal should be considered in the broader context of transactions based on 'documentary bills' which necessarily involve some collection arrangement. He has quoted extensively from Schmitthoff's Export Trade (10th Edition) and relies heavily on the following passage from page 145-

"The most frequent payment methods in which banks are involved are a collection arrangement or payment under a letter of credit. In a collection arrangement the bank receives its instructions from the seller. The exchange of the documents of title representing the goods and the payment of the price is normally effected at the place at which the buyer carries on business. Conversely, in the case of a letter of credit the instructions to the bank usually emanate from the buyer. The exchange of

the documents and the price is normally effected at the seller's place of business. A considerable amount of business is transacted under letters of credit under which the banker, on the instructions of the buyer, promises to accept, honour or negotiate bills of exchange drawn by the seller. Both these methods, the collection arrangement and the letter of credit, enable the interposed bank or banks to use the documents of title as a collateral security."

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel for VWV Ltd. submits that it is usual for the exporter to ask his bank to arrange for collection of the price by presenting the bill of exchange for acceptance and I or payment, and that the bank will carry out this task through it's own branch office abroad or a correspondent bank in the buyer's country. He further submits that banking practice relating to collection arrangements is contained in the Uniform Rules for Collection, and that at the relevant time it was the 1978 version of these Rules that were in force. He submits that the provisions of these Rules will have to be carefully examined and applied.

As against these submissions, learned President's Counsel for the Commercial Bank contends that even if the transactions were considered to be in the broader perspective as contended on behalf of VWV Ltd., some significance must be given to the issuance of the bills of exchange and the role played by the bills in the context of the transaction. He submits that the bills of exchange in fact relates to the method of payment, and is autonomous from the underlying sale of goods transaction. He quotes from Ross Cranston's book, Principles of Banking Law (2nd Edition) in which under the head 'The Underlying Transaction' at page 381, it is observed that-

"If the bank, having bought a trade bill and still holding it, seeks payment from the buyer or acceptor on its maturity, can it be defeated by any claim which the buyer had in relation to the underlying contract - failure of consideration, late or defective performance and so on? In general, the bank, as holder in due course of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves. So whatever claims the immediate parties to the bill - the buyer and supplier - might be able to raise in proceedings between themselves, the bank would not be troubled by them."

Learned President's Counsel submits that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly, if the drawee fails to honour the bill, the exporter as drawer is liable qua surety to the discounting bank. He submits that the remitting bank that discounts any bills of exchange has the ultimate right of recourse to the exporter.

I have no doubt in my mind that while the aspect of discounting of the bills of exchange is relevant, this case should be dealt with in the

broader perspective of the financing of an international trade transaction.

DIP terms and VRG

A question of fundamental importance that arises in this connection is whether the sale of gherkins to the buyer in Holland was on 'Documents against Payment' (DIP) terms. The trial court had formulated the issue as follows-

"2 (a) was payment for the said two exports on DIP terms?"

It is the case of VWV Ltd., that the two consignments of gherkins were sold on 'Documents against Payment' (DIP) terms and that the handling of documents relating to these transactions was governed by the Uniform Rules for Collections, 1978 Revision (ICC Publication No. 322). The Uniform Rules for Collections (URC) apply if incorporated into the contracts by the parties, whether expressly or by course of dealings or simply by the international custom and practice of bankers. See Harlow & Jones Ltd. v American Express Bank Ltd.(1) at 349, per Gatehouse J; Minories finance Ltd. v Afribank Nigeria Ltd,(2) at 139, per Longmore J. Fortunately, it is not necessary to go into the question of the applicability of URC 1978 to the collection in this case, as 'the Commercial Bank has in paragraph 13(c) of its answer admitted that URC is applicable, and in fact, both learned President's Counsel appearing for VWV Ltd. and the Commercial Bank have relied extensively on the provisions of URC 1978, which they have agreed apply to the case.

However, the Commercial Bank did not admit the position that the transactions were on 'Documents against Payment terms'. At the trial, the testimony of Verena Nirmalee Viswakula, who was a Director of VWV Ltd., to the effect that the sale was on Document against Payment (DIP) terms, was not challenged in cross-examination. In fact, Sachyarachchige Don Cyril Jiasena Perera, who was called on behalf of VWV Ltd. as a banking expert, testified that when a bill of exchange is used as a financing document and is drawn for payment on sight, it signifies payment on DIP terms. The learned Commercial High Court Judge has in his judgement dated 12th July 1999 answered issue No.2 (a) in the affirmative, and in the absence of any cross-appeal by the Commercial Bank, this court has to deal with this appeal on the basis that the transactions in question were on DIP terms.

The Duty of Carev the Dutyto follow Instructions

Two well-known duties of bankers and agents that are generally complementary to each other, come into loggerheads in the intriguing circumstances of this case. VWV Ltd. contends that having discounted the bills of exchange marked 'P4' and 'P5', the Commercial Bank acted negligently and without due care and diligence in carrying out its functions as a remitting bank in forwarding the documents for collection to Giro Van De Bank, which was in fact not a 'Bank' in the commercial sense. The Commercial Bank with equal force argues that in sending the

documents for collection to Giro Van De Bank, it simply acted in accordance with the instructions of VWV Ltd contained in the letters marked 'P6' and 'PT.

In this case, it is common ground that VWV Ltd has given express and clear instructions to the Commercial Bank to forward the documents to Giro Van De Bank for collection. Learned President's Counsel for the Commercial Bank has submitted that as the agent of VWV Ltd. and as the remitting bank, the Commercial Bank was obliged to obey the specific instructions of VWV Ltd. While learned President's Counsel for VWV Ltd. strenuously argued that the Commercial Bank, as the remitting bank, was bound to exercise a high degree of care and was under a duty to verify whether the "bank" nominated by VWV Ltd., in fact existed, and to satisfy itself of its standing and ability to function as the 'collecting bank', learned President's Counsel for the Commercial Bank submitted the contrary.

Before going into the legal issues, it may be useful to consider the evidence placed before the trial judge in regard to the conduct of the parties. The main witness called to testify on behalf of VWV td. in this connection was Verena Nirmalee Viswakula, the Director of VWV Ltd., who testified in detail about the transactions in question. It appears from the testimony of this witness that instructions relating to the first shipment of gherkins were given to the Commercial Bank by the undated letter 'P6' in consequence of which the Bank discounted the bill of exchange marked 'P4' and the account of VWV Ltd., was credited with a sum of Rs. 1,381,614.00 on 9th July 1990. Thereafter, on account of the second shipment regarding which the instructions were given by a letter dated 16th August 1990 marked oPT,the bill of exchange marked 'P5' was also discounted by the Bank and a further sum of Rs.880,275.25 was credited to the account of the said company. The aforesaid amounts were credited to the account of VWV Ltd. after discounting the 'on sight' bills of exchange marked 'P4' and 'P5' drawn on Hans Van Kilsdonk, the buyer of the gherkins in Holland and made payable "to the order of Commercial Bank of Ceylon Ltd." The account of VWV Ltd. was credited with the rupee values of the said bills of exchange less brokers fees, and the witness expected that the bills of exchange will be dispatched to Giro Van De Bank along with the bills of lading for collection.

The witness testified that she was perturbed when there was no intimation of payment on the bills of exchange and that around 16th or 17th August 1990 she got to know from the Manager - Exports of the Commercial Bank that no payment has been received on account of the first shipment. She thereafter requested the Manager - Exports to follow up with the Giro Van De Bank, and she produced in evidence a copy of the letter dated 17th August 1990 (P10) by which the Manager - Exports of the Commercial Bank drew the attention of the Manager of the Giro Van De Bank regarding the payment due on the first shipment. In fact the said letter refers to "a tele-inquiry of 29/7/1990 for fate thereof." This clearly shows that even on 17th August 1990, the Commercial Bank was under the impression that the Giro Van De Bank was a bank in the commercial sense. Thereafter, she got to know from the shipping agent, Aitken Spence Shipping Ltd., that the cargo on the first shipment had been delivered on 23rd August 1990. When she communicated this information to the Commercial Bank and asked the Bank to find out how the

gherkins were delivered without payment, she was informed by the Manager-Marketing of the Commercial Bank, for the first time, that there was no bank by the name Giro Van De Bank and that consequently the buyer had been able take delivery of the gherkins without payment.

When the account of VWV Ltd. was thereafter debited the witness addressed a letter dated 19th October 1990 (P13) to the Commercial Bank in which significantly she states as follows -

"We negotiated our documents with you as our Bankers (Buyer's Bank) under a complete fiduciary relationship to obtain payment on further negotiating the 'title to the goods'. In the circumstances, kindly refrain from debiting our account until you revert the 'title to the goods' negotiated through you. Please expedite the returning of the documents within another week as the goods are of perishable nature and necessary action has to be taken to recall the goods as soon as possible."

The only response she received from the Commercial Bank was the letter dated 24th October 1990 (P14) by which she was called upon to settle the sums of Rupees 1,381,536.00 on account of the first shipment and Rs. 881,198.25 on account of the second shipment and further informed that the company account would be debited with these amounts if she fails to settle. She further testified that the company account was thereafter debited with the aforesaid amounts wrongfully and unlawfully.

Witness Viswakula could not produce the original bills of lading and testified marking in evidence photo-copies thereof she had obtained from the respective shipping agents and produced in evidence without objection. The witness took pains to point out that the endorsements of the Commercial Bank on the reverse of the said bills of lading marked 'P2' and 'P3' had been made using a rubber stamp where the words "Pay / Deliver to the Order of" appear to be stamped, below which the words "Giro Van De Bank" have been inserted in the hand writing of the Authorized Signatory above his signature. The witness emphasized that the world "Pay" has been scored oft in ink at the time when the signature was placed, which significantly may have facilitated the taking of delivery of the cargo without making payment.

She also produced copies of the letters dated 8th February 1991 addressed by the Commercial Bank to Aitken Spence Shipping Ltd ('P18'), agents for Nedloyd Lines owning 'MV CGM Rimbaurd' and to Freudenberg Shipping Agencies Ltd ('P19'), agents for Happag-Lloyd owning 'MV Rubeland' claiming damages for the wrongful delivery of the gherkins without due endorsement of the relevant bills of lading by Giro Van De Bank. She also produced copies of the responses received from the owners of the said vessels, namely, the letter dated 19th March 1991 ('P20') from Happag-Lloyd and the letter dated 16th April 1991 ('P21') from Nedloyd Lines. It is admitted by the owners of the vessels in these letters that the gherkins were delivered to the buyer, Hans Van Kilsdonk, without due endorsement on the bills of lading by Giro Van De Bank. As justification for the said action of the carriers, it is expressly stated in both letters that there is no bank in existence with

the name 'Giro Van De Bank.' Additionally, it is stated in the letter of Hapag-Lloyd ('P20') that the words 'Giro Van De Bank' in Dutch meant "account of the bank" and consequently the endorsement was taken as "an order to deliver the goods to the holder of the bill of lading for the account of the Bank (Le. the Commercial Bank of Ceylon Limited)". The witness testified that the originals of the bills of lading, which had ben submitted by VWV Ltd with 'P6' and 'PT to the Commercial Bank for negotiation, were at no time returned to that company. She claimed that in these circumstances, the Commercial Bank had not properly discharged its duties as the' remitting bank and that the debiting of the account of VWV Ltd. without returning the original bills of lading was wrongful and unlawful. Under cross-examination she admitted that the said bills of lading had been sent to Giro Van De Bank in accordance with her instructions given in 'P6' and 'PT.

The other witness called on behalf of VWV Ltd. was Sachyarachchige Don Cyril Jiasena Perera, who admitted under cross-examination that he only has "a hazy idea" about the facts of the case, and was justifiably treated by the trial judge as "an expert with regard to banking practice only." The gist of his testimony was that Giro Van De Bank was a money transfer system and was not a commercial bank listed in the Bankers' Almanac. According to him, if there was any doubt in the mind of a remitting banker regarding the existence or standing of an entity such as the Giro Van De Bank named as a collecting bank, he should have the matter verified, and if necessary, negotiate the documents through his own correspondent bank. He expressed the opinion that in the event of a dishonour of a discounted bill of exchange, the discounting bank has recourse to the drawer of the bill only after returning the original shipping documents including the bill of lading. However, it is noteworthy that under cross-examination he admitted that in the event of dishounour of the bill, the remitting bank is entitled to debit the customer's account for the value of the discounted bill, after giving notice of dishonour to the drawee.

It is significant that the Commercial Bank, which was in the best position to explain the circumstances in which the bills in question were dishonoured, chose to close its case without leading any evidence. However, it appears that VWV Ltd. and the Commercial Bank had believed that Giro Van De Bank was a bank which would collect the proceeds of the bills of exchange as is customary in this kind of international commerical transaction, although it was admittedly not listed in the Bankers' Almanac.

Learned Counsel for the Commercial Bank submitted that both as agent for the exporter as well as the remitting bank, the Commercial Bank was under a duty to comply with the instructions of the principal, and was not under any duty to advise the principal or to warn against any commercial or other risks. He invited the attention of court to decisions such as Schioler v National Westminster Bank Ltd.(3) Commercial Banking Co. of Sydney Ltd. v Jalsard Pty. Ltd(4) Redmons v Allied Irish Banks PLC (5) at 266, per Saville J. Honourable Society of the Middle Temple v Lloyds Bank PLC (6)and Linklaters (a fir) v HSBC Bank Plc (7). Learned President's Counsel further submitted that since speed is of the essence in transactions involving international trade, the bank is obliged to follow the instructions of the customer without undue delay. He relied heavily on the following

dicta of Lord Diplock in Commercial Banking Co. of Sydney Ltd. v Jalsard Pty. Ltd. (supra) at 286 in a case dealing with the dealings of a bank with a letter of credit-

"Delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller. This is the reason for the rule that where the banker's instructions from his customer are ambiguous or unclear he commits no breach of his contract with the buyer if he has construed them in a reasonable sense, even though upon the closer consideration which can be given to questions of construction in an action in a court of law, it is possible to say that some other meaning is to be preferred."

Learned President's Counsel for the Commercial Bank contends that as far as the instant case is concerned there was absolutely no ambiguity in regard to the instructions that were given by the exporter to the Bank, and the instructions have been faithfully carried out by the Commercial Bank, and further submits that since the exporter had selected the Giro Van De Bank as the collecting bank, the Commercial Bank cannot be held responsible for any act or omission of the Giro Van De Bank.

In this context it may be relevant to observe that there is privity of contract between the exporter and the remitting bank, and also between the remitting bank and the collecting bank, but not between the seller and the collecting bank, unless the seller contemplates that a sub-agent will be implied and authorizes the remitting bank to create privity of contract between himself and the collection bank. See Calico Printers' Association Ltd. v Barclays Bank Ltd,(8) However, relations between the seller and the remitting bank, and between the remitting bank and the collecting bank, will usually be governed by the Uniform Rules for Collections (URC) and it is possible that as suggested by Rix J in Bostone & Firminger Ltd. v Nasima Enterprises (Nigeria) Ltd (9) at 1908, these Rules have introduced privity of contract between the seller and the collecting bank because they provide for the rights and liabilities of the parties to collections to be established contractually. Therefore, the question as to the obligations of the remitting bank visa- vis the exporter, and the liability of the remitting bank for the wrongful acts or omissions of the collecting bank have to be considered in the light of the provisions of URC 1978 which is admittedly applicable to this case.

Uniform Rules for Collection

The Uniform Rules for Collection embodies banking practice relating to documentary collections codified by the International Chamber of Commerce. Although the Uniform Rules are revised from time to time, it has been agreed by President's Counsel for both parties in this case that the version that is applicable is the 1978 Revision of the Uniform Rules for Collection. The provisions of these Rules apply to all 'collections' which term is defined as "the handling by banks, on instructions received, of documents in order to (a) obtain acceptance and/or, as the case may be, payment, or (b) deliver commercial documents against acceptance and/or, as the case may be, against payment, or (c) deliver documents on other terms and conditions."

It is expressly stated in these Rules that the term 'documents' would include financial documents such as bills of exchange and commercial documents such as invoices, shipping documents and documents of title such as bills of lading. In the context of the question that arises in this case as to the liability of the Commercial Bank as the remitting bank, it is instructive to quote, Article 3 of the Uniform Rules for Collection in full-

"For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise as the collecting bank- (1) the collecting bank nominated by the principal, or, (ii) in the absence of such nomination, any bank, of its own or another bank's choice, in the country of payment or acceptance, as the case may be.

The documents and the collection order may be sent to the collecting bank directly or through another bank as intermediary.

Banks utilizing the services of other banks for the purpose of giving effect to the instructions of the principal do so for the account of and at the risk of the latter.

The principal shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws or usages." (Italics added)

Learned President's Counsel for the Commercial Bank has argued that since in terms of 'P6' and 'PT the Commercial Bank acted on the clear instructions of VWV Ltd. in sending the relevant bills and other documents to Giro Van De Bank for negotiation, the services of Giro Van De Bank were utilised "for the account of and that risk of" the principal, VWV Ltd.

I cannot agree with this submission as it is in my view fundamental to Article 3 that the collecting bank should be a "bank" in the commercial sense. Giro Van De Bank does not appear in the Bankers' Almanac and no evidence has been placed before the original court as regards its existence or standing as a banker. In this context, it is necessary to refer to Article 1 of the URC 1978, which requires all banks governed by the Rules to "act in good faith and exercise reasonable care". It is evident from the correspondence produced in evidence marked 'P16', 'P18', 'P19', 'P20' and 'P21' that the Commercial Bank believed 'Giro Van de Bank' to be a commercial bank capable of functioning as a collecting bank, and had on that basis even presented a claim against the carriers for delivery of the goods without due endorsement by Giro Van de Bank, only to be informed by the carrier that 'Giro Van de Bank' was not a bank but was in Dutch the equivalent of a "blank endorsement" which enabled the buyer Hans Van Kilsdonk to collect the gherkins by presenting the bills of lading to the carrier.

An important feature of the URC 1978 is that they contain certain minimum standards for the conduct of business by remitting,collecting and other banks to which the Rules apply. For instance, Article 6 of the Rules expressly lays down that-

"Goods should not be dispatched direct to the address of a bank or consigned to a bank without prior agreement on the part of that bank. In the event of goods being

dispatched direct to the address of a bank or consigned to a bank for delivery to a drawee against payment or acceptance or upon other terms without prior agreement on the part of that bank, the bank has no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods."

The various articles of URC 1978 also contain the procedure for making the documentary collection. For example, Article 10 expressly provides that "the collection order should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (DIP)." It further provides that in the absence of such statement, "the commercial documents will be released only against payment." Article 14 provides that "amounts collected (less charges and I or disbursements and I or expenses where applicable) must be made available without delay to the bank from which the collection order was received in accordance with the instructions contained in the collection order." Article 17 requires that the collection order should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-acceptance or non-payment. There was no evidence placed before the original court that prior to dispatching the relevant bills of lading, which are documents of title to goods, to Giro Van De Bank, the Commercial Bank had entered into any "prior agreement" with the Giro Van De Bank as contemplated by Rule 6, nor has the Commercial Bank produced any evidence regarding the collection order dispatched by the Commercial Bank to the Giro Van De Bank. In the absence of anyevidence in this regard, it has to be inferred that the Commercial Bank had not only acted in total disregard of the provisions of the URC 1978, but had acted recklessly in violation of its obligations to act ingood faith and to exercise reasonable care in discharging its obligations as a remitting bank.

It is necessary at this stage to refer to Article 20 of the URC 1978, which requires collecting banks "to advise fate" of bills sent for collection. The Article provides the following guidelines to be followed in the event of a dishonour-

"..... the presenting bank should endeavour to ascertain the reasons for such non-payment or non-acceptance and advise accordingly the bank from which the collection order was received.

On receipt of such advice remitting bank must, within a reasonable time, give appropriate instructions as to the further handling of the documents. If such instructions are not received by the presenting bank within 90 days from its advice of non-payment or non acceptance, the documents may be returned to the bank from which the collection order was received." (Italics added)

It is very clear from the above quoted Article that it is a durty of the remitting bank to keep track of the bills sent for negotiation to the collecting bank and to give appropriate instructions in regard to the handling of the documents. It is evident that the Commercial Bank failed to discharge its responsibilities as a remitting bank in terms of this article. Furthermore, it is significant that this Article provides that in the event that the bills of exchange are dishonoured by non acceptance or non-

payment it is the duty of the collecting bank to return all the documents including the bills of lading to the remitting bank from which the collection order was received. It appears from the evidence in this case that instead of returning the bills of lading to the remitting bank and through it to the exporter VWV Ltd., the buyer in Holland Hans Van Kilsdonk was permitted to take delivery of the gherkins without making any payment on the bills of exchange. It is this kind of misadventure that responsible banks involved in documentary collection are expected to avoid through compliance with the accepted banking practice that has been codified by the ICC as the Uniform Rules. I am unable to agree that a remitting bank could take refuge in the instructions given by a customer if it had failed to act in good faith and with reasonable care or acted in reckless disregard of the procedures set out in these Rules.

The Right of Recourse on a Discounted Bill of Exchange

In my view this case has to be dealt with as one involving a 'collection arrangement' in which financial documents in the form of bills of exchange marked 'P4' and "P5" accompanied by commercial documents including the bills of lading marked 'P2' and 'P3' were submitted to the Commercial Bank with the covering letters marked 'P6' and 'PT for negotiation. The fact that the bills of exchange were discounted by the Commercial Bank does not change the character of a 'documentary collection'.

However, learned President's Counsel for the Commercial Bank has stressed the importance of the principles relating to the right of recourse of a discounting banker against the exporter in the event the discounted bill of exchange is eventually dishonoured. Learned President's Counsel contends that the issuance of the bills of exchange is a significant factor, and empahsises the autonomous nature of the bill of exchange from the underlying sale of goods transaction. He submits that as observed by Ross Cranston in Principles of Banking Law (2nd Edition) at page 381 "the bank, as holder in due course of the bill, holds the bill free from any defect of title of prior parties, as well as mere personal defences available to prior parties among themselves". He submits that this proposition is further fortified by Holden, Law and Practice of Banking (5th Edition) where at page 316 (Volume 1) it is stated that-

"The legal effect of the negotiation of the bill is that the negotiating bank becomes the holder in due course of the bill, and also holds the shipping documents by way of security."

He submits that therefore any claims that the buyer and supplier might be able to raise in proceedings between themselves are irrelevant when recourse is had against the seller on the discounted bill.

I find it difficult to agree with the submission that the Commercial Bank is a holder in due course of the bills of exchange marked 'P4' and 'P5'. This is because the Commercial Bank was named as the original payee of these bills. In R. E.

Johns Ltd. v Waring & Gillow Ltd.(10)it has been held by the House of Lords that the original payee of a bill of exchange does not fall within the expression 'a holder in due course'. The reasoning of the House of Lords was that in terms of section 29 (1) of the Bills of Exchange Act of 1882, 'a holder in due course' is a person to whom a bill has been "negotiated". Therefore, although generally a discounting bank may become 'a holder in due course' of the bill that is discounted, this does not occur when the banker is also the payee.

Nevertheless, I am impressed by the submission of the learned President's Counsel for Commercial Bank that in the instant case, the bills of exchange were included as a part of the transaction so that if the buyer does not pay on the bills drawn on him, the exporter as drawer of the bills is obliged to make payment to the bank. Accordingly ,if the drawee fails to honour the bill, the exporter-as drawer is liable qua surety to the discounting bank. In support of this proposition he relies on the following passage from Cranston's, Principles of Banking Law (2nd Edition) page 379-380 under the heading 'Trade Bills':-

"Now assume the Bill is first negotiated to the supplier's bank. The bank discounts the bill Le., it buys the bill at less than its face value, to reflect the fact that it is out of its money till the bill matures. The supplier is, of course, paid immediately, which is the very object of the exercise. The Bank claims against the buyer on maturity of the bill. It collects the bill on its own account. In the event of non-payment, the bank will have recourse against the supplier, its customer. The bank, having discounted the bill has clearly given value."

Learned President's Counsel submits that in these circumstances, if the bill is dishonoured, the negotiating bank will necessarily look to its own customer as drawer to re-imburse it in respect of the amount of the bill, together with interest and charges, and that therefore the debiting of the customer account by the Commercial Bank was perfectly lawful.

However, in this case there is absolutely no evidence in regard to the question whether the bills of exchange marked 'P4' and 'P5' were forwarded along with the relevant bills of lading marked 'P2' and 'P3' and other relevant documents to Giro Van De Bank. It is significant that at the trial no admission was recorded, nor any evidence lead with respect to the alleged dishonour of the two bills of exchange marked 'P4' and 'P5'. Indeed there is no admission or evidence even in regard to the question whether the bills of exchange in question were ever presented to the buyer Hans Van Kilsdonk for acceptance / payment. It is trite law that a remitting bank has no right of recourse against the drawer of a discounted bill of echange unless and until the bill has been duly presented for acceptance / payment and has been in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact dishonoured. In the absence of any evidence to show that the bills of exchange in question were in fact presented to the drawee Hans Van Kilsdonk, I hold that the Commercial Bank had no right of recourse against VWV Ltd. nor any right to debit its account with the value of the bills of exchange.

Duty of Discounting Bank to return Bills of Lading

In regard to the 'collection arrangement' on which this action is alleged by VWV Ltd. to be based, learned President's Counsel has referred us to Schmitthoff's Export Trade (10th Edition) page 155 wherein it is stated as follows-

"The seller often attaches to a bill of exchange which he has drawn on the buyer the bill of lading to the goods sold. Such a bill of exchange is known as a documentary bill. The purpose of issuing a documentary bill is mainly to ensure that the buyer shall not receive the bill of lading and with it, the right of disposal of the goods, unless he has first accepted or paid the attached bill of exchange according to the arrangement between the parties. If the buyer fails to honour the bill of exchange, he has to return the bill of lading, and, if he wrongfully retains the latter, the law presumes that the property in the goods sold has not passed to him." (italics added)

It is settled law that a bill of lading represents the goods to which they relate, so that the transfer of the bill of lading (in proper form and manner) of itself constitutes a transfer of the goods themselves. An order bill of lading entitles the holder to call for delivery of the goods. Where the goods are surrendered to a person other than the holder of the bill of lading, the shipowner so delivering is exposed to risk of liability to the holder: Sze Hai Tong Bank v Rambler Cycle Co Ltd (11) at 586. Leggatt LJ in The Houda (12)stated at 553-

"Under a bill of lading contract a ship owner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession."

A bill of lading differs from a bill of exchange and other negotiable instruments in one important respect highlighted in the following dicta from the old decision Gurney v Behrend (12a)at 633-

"A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and, in this instance the transfer of the symbol does not appear more than a transfer of what is represented".

It follows that the maxim nemo dat quod non habeX does apply in relation to a bill of lading in favour of the shipper even against a bona fide transferree for value. Under a collection arrangement, the bill of lading is held as security for payment of the price, and should only be released against payment. An instructive decision in

this connection is the Prinz Adalbert '[13] in which referring to a transaction of a similar nature with the immaterial difference that the financial document involved was a draft and not a bill of echange, Lord Sumner made the following observation at 589 and 590 of the judgement-

"When a shipper lakes his draft, not as yet accepted, but accompained by a bill of lading, endorsed in this way, and discounts it with a Banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, (he discounting Banker surrenders the bill of lading to security for its payment. If, in turn, the discounting Banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the endorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the Banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done."

The same principle is illustrated by the more recent decision in H. M. Procurator-General v M. C. Spencer, Controller of Mitsui & Company Limited.^*) In this case, a Japanese Company carrying on business in Japan, had branches in London and Hamburg. The business in Germany was later incorporated there, but the whole of the shares in the German company were owned by the Japanese company and their trustees, and, in addition, the German Company was controlled and staffed by, and was entirely dependent on, the Japanese company, being really a purchasing and selling house of that company. A contract, made before the outbreak of war in 1939, for the sale of goods by the Japanese company to the German company stipulated, inter alia, Hamburg as the destination, the price per ton, c.i.f. Hamburg, and that payment was to be by a three months sight draft against a letter of credit on a Bank. An irrevocable letter of credit was duly issued by the Hamburg branch of the Bank to the Japanese company, authorizing them to draw on the London branch of the Bank at three months for account of the German company for the price of the goods. The letter contained instructions that the bills of lading, drawn in triplicate, were to be made out to the order of the Bank, and the invoices and insurance, in triplicate, in the Bank's name or in that ot the shipper and bank endorsed. Two sets of documents were to be sent to the Bank at Hamburg, and one set, with drafts on London attached, was to be delivered to the Bank in London against acceptance of the drafts. The goods were shipped in Japan on the M. V. Glenroy, a British vessel, and bills of lading issued, invoices prepared and insurance taken out on 31st July 1939, in accordance with those instructions. On 7th August 1939, the Japanese company drew a bill in accordance with the credit, negotiated it through the Japanses branch of the Bank, which delivered three sets of the documents as arranged. The set sent to London was received on 13th September 1939, and owing to the outbreak of war the draft was not accepted nor the documents taken up. On September 13, 1939, the German company cancelled

the contract unconditionally. Meanwhile the Glenroy had been diverted to Liverpool, where she arrived on 17th October 1939, and there, on 2nd November, the goods were seized as prize. A claim was made by the Crown that the goods were enemy property or contraband of war and as such liable to condemnation. Lord Porter at page 134 of the judgement of the Privy Council referred to section 19 (2) and (3) of the Sale of Goods Act, 1893 which correspond to section 20 (2) and 20 (3) of the Sale of Goods Ordinance and observed that-

".....where the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him," (Italics added)

P. S. Atiyah, The Sale of Goods (1 Oth Edition) at page 430 extracts from the above decisions, the following principle-

"Even if the seller draws a bill of exchange on the buyer and discounts it with a Bank before it has been accepted by the buyer, the property will still not pass. Although the seller may obtain payment in this way he remains under a secondary liability as drawer of the bill of exchange and so property remains in him as security for this contingency. Indeed, even when the seller has received the full price in advance there may be special circumstances which give him some interest in retaining the property and it may be held that the transfer of the documents remains necessary to pass property."

As already noted, it is clear from Article 20 of URC 1978 that the remitting bank should act in collaboration with the collecting bank and must give timely and appropriate instructions to the latter regarding the handling of the documents. It is also contemplated by the said Article that if no contrary instructions are received from the remitting bank, the documents should be returned to the bank from which the collection order was received. As Schmitthoff in Export Trade (10th Edition) observes at page 164 -

"If the collecting bank releases the documents to the buyer contrary to instructions, for example, by not insisting on payment or the acceptance of a time bill, the bank is liable in damages to the seller for breach of contract and for conversion of the documents."

It is trite law that in the absence of any agreement to the contrary, the remitting bank would be liable to the exporter for the acts of the collecting bank, its agent. See Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes (15th Edition) paragraph 1128. These principles fortify the position taken up by VWV Ltd. that a discounting bank can have recourse to the seller as drawer, only after returning the original shipping documents.

The Question of Estoppel

The other question that arises in this appeal is one of estoppel, and learned President's Counsel for VWV Ltd. has sought to impugn the decision of the trial judge on this point. At the trial, the question of estoppel by representation was raised by the Commercial Bank in issues 18 (a) to {g) which are quoted below:-

(a) Did the Defendant send the said Bills and documents to the address pleaded in paragraph 9 of the plaint in compliance with specific instructions from the plaintiff?

(b) By the documents marked 'P6' and [P7' and / or in the circumstances pleaded in paragraph 12 (a) to 12 (h) or any one or more of them, did the plaintiff represent to the defendant that 'Giro Van De Bank' is a Bank?

(c) Did the plaintiff give the said instructions and make the said representation in order to cause the defendant to send the said Bills and documents to the said address?

(d) Did the defendant and its officers believe the said representation to be true?

(e) Did the defendant and its officers act on the said representation and cause the said Bills and documents to be sent by courier to the said address?

(f) If any one or more of the above issues marked 18 (a) to 18 (e) are answered in favour of the defendant, is the plaintiff estopped from denying that the 'Giro Van De Bank' referred to in 'P6' and 'P7' and the plaint is a Bank?

(g) If issue 18 (f) is answered in the affirmative, can the plaintiff have and maintain this action?"

The learned trial Judge has answered issues 18 (a), (b), (c) and (f) in the affirmative while noting that there is insufficient evidence to answering issues 18 (d) and (e). However, he has answered issue 18 (g) in the affirmative and arrived at the conclusion that VWV Ltd. cannot have and maintain the action as it is estopped from denying that the 'Giro Van De Bank' is a Bank.

In The Law relating to Estoppel by Representation, (4th Edition), paragraph 1.2.2, Spencer Bower explains the concept of estoppel by representation of fact as follows:

"Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any

averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (Italics added)

It is clear from this definition that in order to succeed with a defence based on estoppel, the person raising the plea should establish that by reason of the representation he was led to believe that the said representation was true and acted thereon to his prejudice. As Lord Birkenhead put it in the case of Maclaine v Catty t15), the essence of the doctrine may be illustrated as follows: where 'A' has by his acts or conduct justified 'B' in believing that a certain state of facts exists, and 'B' has acted upon on such belief to his prejudice, 'A' is not permitted to affirm against 'B' that a different state of facts existed at the same time.

It is obvious that the state of mind and the conduct of the person who raises the plea of estoppel is of great relevance. Where, as in this case, the plea is raised by a party that does not lead any evidence in support of it, the plea cannot succeed. This is very clear from the decision of the Supreme Court in Hirdaramani Ltd. v De Silva <16) in which Gratiaen, J. observed at 297 that he cannot see how 'estoppel' can be applied to the facts of that case in the absence of evidence to support the view that the plaintiff was misled into the belief that the defendant company would continue making certain payments that had been made to the plaintiff by the owner of a business that the defendant company had subsequently taken over. The learned trial

judge was clearly in error in holding that VWV Ltd. was estopped from denying that 'Giro Van De Bank was a Bank by reason of the instructions contained in 'P6' and 'P7'.

Conclusions

For the foregoing reasons, the appeal is allowed, the judgment of the Commercial High Court dated 12th July 1999 is set aside and judgment is entered in favour of the plaintiff-appellant Vanathawilluwa Vineyard Ltd. as prayed for in prayer fa) (i) and (ii) of the plaint. In all the circumstances of this case I am inclined to award the plaintiff-appellant nominal costs in a sum of Rs.10,000 both as costs of suit in terms of prayer (b) of the plaint and as costs of this appeal.

JAYASINGHE,J. - I agree.

TILAKAWARDANE, J. - I agree.

Appeal allowed.

Seylan Bank Ltd. v. Samdo Macky Sp - SLR - 96, Vol 1 of 2008 [2008] LKSC 5; (2008) 1 Sri LR 96 (26 June 2008)

SEYLAN BANK LTD
V
SAMDO MACKY SPORTSWEAR (PVT.) LTD. AND OTHERS

SUPREME COURT
S. N. SUVA, C. J.
TILAKAWARDANE, J.
SOMAWANSA, J.
SC 44/2007
SC 45/2007
SC (HC| LA 25/07
SC (HC) LA 26/07
HC {CIVIL} 239/04(1), 207/02(1)
NOVEMBER 19, 2007
MARCH 4, 2008

Stamp Duty Act, No. 43 of 1982 -section 51, section 69, section 71 - Regulations : - Gazette 224/3 of 20.12.1982 and 948/15 of 6.11.1996 - Guarantee Bond-Is it liable for the payment of stamp duty - What is a bond? - Deed? - Document? -Is the guarantee bond a bond attracting stamp duty?

Held

(1) Stamp Duty Act imposes a pecuniar/ burden on persons, and it has to be subject to strict consideration. There is no room for intention, construction or equity about duties or taxation.

(2) A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt.

In case of the guarantee bond, the term providing for guarantor liability is not the principal convenant between the parties, but merely a condition subsequent to a primary obligation.

The obligation to pay is in the form of a penalty that comes into operation, if and only if the proposed obligation of the principal debtor is violated. The arrangement contemplated by the guarantee bond is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the principal debtor obligation.

(3) Inherent in the monetary obligation of a bond' contemplated by section 7 (a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. Given the inherently indeterminate nature of the guarantors respective payment obligations under the guarantee bond, such an instrument cannot be construed as the type of bond referred to in section 7(a). As such the guarantee bond does not warrant stamp duty as a bond under the Stamp Duty Regulations.

Per Shirani Tilakawardane, J.

"The Ceylease case is distinguishable as the finance company in that case had entered into a bond with the security of the property - a vehicle - that was mortgaged and which could be considered movable property. No such arrangements exist in the current action that suggests their inclusion under section 7 of the regulations.

APPEAL from an order of the Commercial High Court, with leave being granted.

Cases referred to:

(1) Tisserav Tissera-2 NLR 238.

(2) Ceylease Financial Services Ltd. v Sriyalatha and another- 2006 - 2 Sri LR 169 (distinguished)

Romesh de Siiva PC with Maitri Wickremasinghe, Shanaka de Silva, Shanaka Cooray for plaintiff-petitioner-appellant.

Chandima Liyanapatabendi with Rangika Piiapitiya for defendant-respondent-respondent.

Sanjay Rajaratnam DSG as amicus.

June 26, 2008

SHIRANI TILAKAWARDANE, J.

Leave to Appeal from the Order of the Commercial High Court of Colombo (defined herein) dated 26th July 2007 with respect to Case No. CHC (Civil) 239/04 (1) and Case No. CHC (Civil) 207/02 (1) (hereinafter referred to as the "Commercial High Court Order") was granted by the Supreme Court by its order dated 15th December 2007 and it was agreed by the parties that the only issue to be determined was whether stamp duty was payable on the Guarantee Bond dated 25th of August 1999.

In response to the default of two loans it had granted, the plaintiff-petitioner-appellant (hereinafter referred to as the "appellant") instituted two actions in the High Court of the Western Province exercising jurisdiction pursuant to the High Court of the Provinces (Special Provisions) Act, No.10 of 1996 (hereinafter referred to as the "Commercial High Court of Colombo"). The appellant's first action was dated 13th September 2002 and was for the recovery of a sum of Rs.662,500/= together with interest thereon at 30% per annum and Business Turnover Tax on Rs.2,500,000/= from 1st July 2002 till date of decree. Appellant's second action was dated 26th October 2004 and was for the recovery of a sum of $781,842/- together with interest thereon at 9% till 26th October 2004 and at 21% per annum thereafter till payment in full. Such actions were initiated because neither the "Principal Debtors" nor their respective guarantors (also defendant-respondents-respondents to the respective actions and herein referred to collectively as the "guarantors"), paid the outstanding loan amounts when demand for repayment was made on them consequent to the Principle Debtors' defaults on the loans.

The matter to be determined in this case arises out of an appeal against the Commercial High Court Order, which held, in response to an attempt by the appellant to submit a Guarantee Bond into evidence in each action, that (i) the Guarantee Bond (marked 'P9' in the appellant's affidavits for the actions, dated 18th January 2006 and 24th May 2006, respectively, and hereinafter referred to as "Document P9") was not sufficiently stamped and (ii) the petitioner would be afforded a final opportunity of stamping the said documents by 20th September 2007.

Being aggrieved by the said Commercial High Court Order, the appellant has this filed application for a determination whether Document P9 is liable to be stamped under section 7 of the regulations made by the Minister in terms of section 69 of the Stamp Duty Act, No.43 of 1982 (referred to herein as the "Stamp Duty Regulations"). These Stamp Duty Regulations were published in Gazette Extraordinary No.224/3 of 20th December 1982 as amended by the Order published by the Minister of Finance under the said section in Gazette No. 948/15 dated 6th November 1996.

It is common ground that the only matter to be decided is whether the Document P9 is liable for the payment of stamp duty under section 7 of the amended regulations which, by subsection 7(a), mandates the payment of stamp duty on "a Bond, pledge, Bill of Sale or Mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act, (Chapter 365) ..." As it is clearly not within the meaning of "pledge", "bill of sale" or "mortgage" the only matter to be admittedly determined is whether it is a "Bond".

The lengthy arguments and submissions of the learned President's Counsel for the appellant averring that (1) there is no comma between the word "Bond" and "pledge" in the regulations, and (2) therefore, that the reference to a "Bond pledge" is what was intended, is without basis as the Sinhalese edition of the Gazette clearly evidences a separation between the words through the use of a comma, though the written submission incorrectly states that a comma between the two

operative words is missing from both the English and Sinhalese version of the Gazette.

Section 2 of the Stamp Duty Act No 43 of 1982 provides that stamp duty shall be charged on every instrument which is executed, drawn or presented in Sri Lanka, to be prescribed at a certain rate depending upon the class or category in which an instrument falls, unless such instrument is (i) exempted from stamp duty by virtue of its inclusion within section 5 of the Stamp Duty Act, as amended, or (ii) not contemplated by the Stamp Act altogether.

The type of "document" for which stamps must be affixed is defined in section 71 of the aforementioned Act and includes a Bond, and the question arises as to whether a Guarantee Bond is also included as a "Bond" which has been referred to by the aforesaid regulations prescribed by the Minister of Finance and referred to in subsection 7(a).

Needless to say, as the Stamp Duty Act imposes a pecuniary burden on persons, it has be subject to strict construction. There is no room for intention, construction or equity about duites or taxations. The explicit language of the Statute must be the yard stick which guides the imposition of the stamp duty, and assumption and presumptions must be strictly excluded. If the imposition of duty upon a particular instrument is not expressly contemplated by the simple reading of the language of the statute then the benefit of the exclusion must necessarily be afforded.

The simple meaning of subsection 7(a), finds clarity in both the English version referred to above, and more so in the Sinhalese edition of the Gazette which reads as follows:

Clearly the "Bond" contemplatd by the language above has to be one where the money obtained is secured by, and correlated to property. Document P9 did not, at the time of the creation of the principal covenant, seek to secure or refer to any property in other words it was not a bond that bound property for the payment of the money.

A bond conditioned for the payment of money such as referred to in section 6 of the Prescription Ordinance 22 of 1871, has also been defined in Tissera v 7/sseraC) where the meaning of a Bond was defined as "a document executed in triplicate before a Notary and two witnesses, whereby the person executing it acknowledges to have borrowed and received from the person in whose favor it is executed a certain sum of money and promises to pay the latter the same with interest on demand and binds all his property generally as security for the debt..."

"Bond" is defined in Stroud's Judicial Dictionary of Words and Phrases as "an obligation by deed." (3rd edition, Volume III, at p. 318)

In the case of a deed it is essential that a deed must be necessarily be under seal. A "deed" is defined in Wharton's Law Lexicon to mean "a formal document on

paper or parchment duly signed, sealed and delivered" (14th Edition, at p. 308). Adocument which is not under seal cannot be a deed.

A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt. In the case of Document P9, the terms providing for guarantor liability are not the principal covenant between the parties, but merely a "condition subsequent" to a primary obligation. In other words, the obligation to pay is in the form of a penalty that comes into operation if, and only if, the principal obligation of the Principal Debtor is violated. Had the Principal Debtors complied with the principal convenant to pay, then the Guarantors' obligations to pay would never have arisen. The arrangement contemplated by Document P9 is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the Principal Debtor's obligation.

Inherent in the monetary obligation of a "bond" contemplated by subsection 7(a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity, given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. However, when Document P9 was executed, no fixed amount of money could be said to have been agreed as payable, as the Guarantors' respective obligations to pay in connection with the loans, in fact, only arose upon the breach of the respective principal convenants to pay, with the owed amounts necessarily determined only after the respective breaches actually occurred. Given the inherently indeterminate nature of the Guarantors' respective payment obligations under Document P9, such instrument cannot be construed as the type of Bond referred to in subsection 7(a).

In construing the meaning of the word Bond in the context of subsection 7(a), the accrual of the obligation to pay money should precede the performance or non-performance of the specified act of payment. This is an essential distinction as even though the performance or non-performance of the specified act is incumbent upon the obligor, the obligation to pay does not precede the performance or non performance of the Act. Document P9 in this context is just an agreement to pay and cannot be considered as a bond as envisaged in terms of subsection 7(a) referred to above. Document P9 is merely an agreement to pay with consequences for default, with no attestation and no obligation by Deed. As such, Document P9 does not warrant stamp duty as a Bond under the Stamp Duty Regulations.

The Learned High Court Judge arrived at his determination, it appears, solely on the finding that he was bound by the decision in the case of Ceylease Financial Services Limited v Sriyalatha and another^2) (hereinafter referred to as the "Ceylease Case"). In that case Justice Bandaranaike considered section 7 of the Stamp Duty Regulations in the context of a document entitled Guarantee and Indemnity and executed in connection with a lease agreement, and held the document to be one contemplated by section 7. The aforementioned case was used as legal authority by the Learned Judge of the Commercial High Court, in

order to substantiate the fact that Document P9 would also come within section 7 of the regulations of the Stamp duty Act, as amended.

However, the decision in the Ceylease Case is inappliable to, and therefore not determinative of, the present matter at hand as the facts of the Ceylease Case are clearly distinguishable in a very material and relevant manner from the facts of the present actions before this Court . The Ceylease Case is distinguishable as the finance company in that case had entered into a bond with the security of the property - more particularly, a vehicle - that was mortgaged and which could be considered movable properly. No such arrangements exist in the current actions that suggest their inclusion within section 7 of the Stamp Duty Regulations.

Accordingly this Court sets aside the said Commercial High Court Order dated 26th July 2007 appeal is allowed no costs.

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

SOMAWANSA, J. - I agree.

Appeal allowed.

Sri Lanka Transport Board v. Colombo Metropolitan Bus Company And Others   - SLR - 1, Vol 1 of 2008 [2008] LKSC 2; (2008) 1 Sri LR 1 (2 July 2008)

SRI LANKA TRANSPORT BOARD
V
COLOMBO METROPOLITAN BUS COMPANY AND OTHERS

SUPREME COURT
SHIRANI BANDARANAYAKE,J.
FERNANDO, J.
SOMAWANSA, J.
SC SPL. LA 77/2007
CA 143/2003
JULY 10, 2007
SEPTEMBER 4, 2007
MARCH 11,2008

Sri Lanka Transport Board Act 27 of 2005 - S2-S3-S11 (1) a - S17 (1) - S18(1). Is the Sri Lanka Transport Board a body corporate? - Characteristic of a Corporation - Ceylon Tourist Boards Act 10 of 1966 - 531 Ceylon Broadcasting Corporation Act - S2 (2). S4 (1) Public Records Ordinance - Shipping Corporation Act S2 (2) - Gem Corporation Act S2 (2) - Common Amenities Board Law 10of 1973- S2 Public Trustee Ordinance S3.

Held:

(1) The common characteristics of a corporation are a distinctive name, a common seal and perpetuity of existence. As a Rule the contracts of a corporation must be under seal of the corporation.

Per Shiranee Bandaranayake, J.
"It is evident that for the establishment of an institution as a body corporate clear provision to that effect should be provided in the enactment".

(2) In the absence of any direct provision or any intent to incorporate, it is evident that the Sri Lanka Transport Board under the present Act cannot be registered as a body Corporate.

APPLICATION for Special Leave to Appeal - preliminary objection

Case referred to:

(1) *The Land Commissioner v Ladamuthu Pillai* - 62 NLR 182

Dulindra Weerasuriya with Amila Vithana for petitioner.
Murudu Fernando DSG for 1st and 2nd respondents
Manohara de Silva PC for 3rd respondent.
Percy Wickremaratne with Shanthi Silva for 4th, 5th and 6th respondents.

Cur.adv. vult

July 2, 2008

SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal dated 12.02.2007. By that judgment the application of the cluster Companies for a mandate in the nature of a writ of certiorari to quash the order made by the 1st respondent by his letter dated 03.09.2002 informing the cluster Companies that they will have to calculate the gratuity payable to the retiring employees, taking into account the entire period in which such employees were in service, including the period that they have served at the Regional Transport Boards prior to the cluster Companies being formed (for which period gratuity had already been paid by such Regional Transport Boards), subject to the deduction of the amounts that may have been paid by such Regional Transport Boards prior to such employees joining the cluster Companies, was dismissed. The petitioner, namely the Sri Lanka Transport Board, filed an application before this Court against that judgment. When this matter was taken for support for special leave to appeal, learned President's Counsel for the 3rd respondent took up a preliminary objection that the petitioner, described as the Sri Lanka Transport Board, was not a legal persona and therefore lacked capacity to institute and maintain this application.

All parties were accordingly heard on the preliminary objection.

Learned President's Counsel for the 3rd respondent contended that the petitioner in its application to this Court had stated that at the time, the application before the Court of Appeal was proceeding, the Sri Lanka Transport Board, Act No. 27 of 2005 was enacted and thereby the petitioner was established as the lawful successor to the 11 cluster Companies, which instituted the application in the Court of Appeal. Accordingly, the petitioner had come before this Court in the capacity of being the successor to the 11 cluster Companies that instituted action in the Court of Appeal. The contention of the learned President's Counsel for the 3rd respondent was that the said Sri Lanka Transport Board Act, No. 27 of 2005, does not contain any provision incorporating the 'Sri Lanka Transport Board' and therefore the said Board has no corporate personality.

Learned Counsel for the petitioner contended that the objection raised by the learned President's Counsel for the 3rd respondent is based on the fact that the Sri Lanka Transport Board Act, No. 27 of 2005 does not contain any provision, which expressly states that the 'said Board shall be a body-corporate with perpetual succession and a common seal and may by its name sue and be sued' and therefore the petitioner is not a body corporate.

Accordingly, the contehtion of the learned Counsel for the petitioner was that when examining or interpreting a statute, it should be considered as a whole and an interpretation should be given to that statute preserving the spirit and the object for what it was enacted. Further, it was submitted that when one examines the Preamble of the statute in question there is reference that the present Act was enacted to achieve similar objectives of the previous enactments and as the earlier Acts had specific reference of those Boards being body corporates, that position should apply to the present Act as well. Learned Counsel for the petitioner also made reference to Sections 11(1)a, 17(1) and 18(1) of the Act to stress the point that the Board has the legal status of a body corporate. His contention with regard to the aforementioned sections were as follows:

1. Section 11(1) makes provision for the Board to acquire, hold, give on lease, mortgage, pledge and sell etc. of immovable property;
2. Section 17(1) states that where any land is required for the purpose of the business of the Board, such land can be acquired under the Land Acquisition Act and be transferred to the Board; and

3. Section 18(1) makes provision that where any immovable property of the State is required for the purpose of the business of the Board, such land can be given to the Board by a special grant or lease.

Accordingly, learned Counsel for the petitioner took up the position that for the implementation of the aforementioned provisions, the Board has to have the legal status of a body corporate and therefore the statute in question has by implication recognized the said Board as a body corporate.

Considering the contentions of the learned President's Counsel for the 3rd respondent and the learned Counsel for the petitioner, it is evident that, the question that has to be examined is whether a Board such as the Sri Lanka Transport Board established in terms of Act, No. 27 of 2005 would have the status of a body corporate even if there is no specific provision to that effect, under the said Act.

The common characteristics of a Corporation, as generally known, are a distinctive name, a common seal and perpetuity of existence. Almost all enactments dealing with Public Corporations contain similar provisions, which provide for the establishment of the institutions as bodies corporate, having perpetual succession and a common seal. Referring to the basic features of a Public Corporation, Dr. A.A.B. Amerasinghe (Public Corporations, pgs. 22- 23) has stated that,

"Every Public Corporation in Ceylon is a separate legal person. **Substantially similar provisions in all the Acts provide for the establishment of the institutions as bodies corporate**, having perpetual succession and a common seal. (emphasis added)"

In his discussion, on the common characteristics of a Corporation, Dr. Amerasinghe had referred to several enactments, which had clearly made provision to state that they are bodies corporate, having perpetual succession and a common seal (Section 3 of the Tourist Board Act, Section 2(2) of Ceylon Broadcasting Corporation Act, Section 4(1) of the Rubber Research Ordinance, Section 2(2) of the Shipping Corporation Act, Section 2(2) of the Gem Corporation Act).

The salient features of a body corporate was considered by Professor C.G. Weeramantry (The Law of Contracts, VoLI, pg. 517- 518), where he had clearly made reference to the necessity of the existence of common characteristics for that to be incorporated. Professor Weeramantry had stated thus:

"The common characteristics of a corporation are a distinctive name, a common seal and perpetuity of existence As a rule the contracts of a corporation must be under the seal of a corporation. So important is a seal in the existence of a body corporate that the nonexistence of a seal in the case of a body alleged to be a corporation, though not conclusive, is cogent evidence against corporation."

It is therefore evident that for the establishment of an institution as a body corporate, clear provision to that effect should be provided in the enactment. The provisions specified in the Universities Act, No. 16 of 1978, as correctly submitted by the learned President's Counsel for the 3rd respondent, clearly demonstrate the necessity for specific provisions to be contained in the statute in order to establish legal personality. Section 2(2) of the Universities Act, No. 16 of 1978 refers to the University Grants Commission and states as follows:

"The Commission shall by the name assigned to it by subsection (1) be a **body corporate, with perpetual succession and a common seal and with full power and authority to**

(a) in such name to sue and be sued in all courts;

(b) to alter the seal at its pleasure &quot ; (emphasis added).

Section 24(a) of the Universities Act, also confers legal personality on the University College and this section reads as follows:

' ....establish a University College, which shall be a body corporate with perpetual succession and a common seal for the purpose of providing, promoting.... "

However, although the University Grants Commission and the University Colleges are incorporated with perpetual succession and a common seal in such

name to sue and to be sued in terms of Sections 40 to 51 of the Universities Act, the University Court, Council, the Senate, the Campus or Boards, or the Faculties are not conferred with any legal personality on them. Accordingly, in terms of the Universities Act only the University Grants Commission and the University Colleges would be regarded as bodies corporate and the University Council, the Senate or the Faculties of the Universities would not have such status under the said Act.

Learned Counsel for the petitioner submitted that there are statutes, which are similar to the Sri Lanka Transport Board Act, No. 27 of 2005. He referred to Section 2 of the Ceylon Tourist Board Act, NO.1 0 of 1906, Section 2 of the Common Amenities Board Law, No.1 0 of 1973 and Section 2(1) of the Ceylon Electricity Board Act, No. 17 of 1969 and stated that they have established the Ceylon Tourist Board, Common Amenities Board and the Ceylon Electricity Board, respectively. Learned Counsel for the petitioner accordingly submitted that Section 2(1) of the statute in question, similarly established the Sri Lanka Transport Board and as the structure of the aforementioned Boards are almost similar to the structure of the Sri Lanka Transport Board and as those three Boards under their respective statutes are bodies corporate, the Sri Lanka Transport Board also should be considered as a body corporate.

Section 2 of the Sri Lanka Transport Board Act refers to the establishment of the Sri Lanka Transport Board and Section 3 of the said Act deals with the quorum for and procedure at the meetings of the Board. However, the Ceylon Transport Board Act and the Common Amenities Board Law are evidently quite different.

Sections 2 and 3 of the Ceylon Tourist Board Act, read as follows:

"2. There shall be established a public authority which shall be called the Ceylon Tourist Board, and which shall consist of the persons who are for the time being members of that Board under Section 6.

3. The Board shall, by the name assigned to it by Section 2, be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in that name."

Sections 2 and 3 of the Common Amenities Board Law, too contain similar provisions which are reproduced below.

"2. There shall be established a public authority which shall be called the Common Amenities Board (hereinafter referred to as 'the Board') and which shall consist of the persons who are for the time being members of the Board under Section 8.

3. The Board shall by the name assigned to it by Section 2 be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in such name."

The Ceylon Electricity Board Act also contains similar provisions as in the Ceylon Tourist Board Act and the Common Amenities Board Law.

Accordingly it is apparent that unlike the Sri Lanka Transport Board Act, the other enactments have specific provisions, which had created the respective Boards, as bodies corporate and therefore it is evident that a Corporation and / or a Board cannot be regarded as a legal personality, if it is not expressly created by law.

Considering the basic principles which deals with bodies corporate, it is thus apparent that, for the purpose of incorporation, there should be express provisions, which would reveal such desire for incorporation. This position was specifically stated by Lord Morris in the Privy Council decision in *The Land Commissioner v Ladamuttu Pillai*[(1)],where the Privy Council had considered the Land Commissioner's liability to be sued and had held that,

"In the interpretation section (Section 2) it is laid down that 'Land Commissioner means' the officer appointed by the Governor under Section 3 of this Ordinance and includes any officer of this Department authorized by him in writing in respect of any particular matter or provision of this Ordinance." The Land Commissioner is not expressly created a Corporation Sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name. Futhermore no legislative enactment seems to reveal any intention to incorporate If there had been a desire to incorporate the Land Commissioner there could have been express words of incorporation. Thus in the case of the Public Trustee it is enacted by Section 3 of the Public Trustee Ordinance of 1930 as follows:

"The Public Trustee shall be a Corporation sole under that name with perpetual succession and an official seal and may sue and be sued under the above name like any other Corporation sole."

All these considerations including the absence of any evident intent to incorporate lead their Lordships to regret the submission that the Land Commissioner can be regarded as a Corporation sole." (emphasis added)

The contention of the learned Counsel for the petitioner regarding the objection raised by the learned President's Counsel for the 3rd respondent was that under the present Sri Lanka Transport Board Act, a Board was established and the said Board should have the legal status of a body corporate in order to achieve the objects and purpose of the Act and that this objective could be achieved, on a consideration of the provisions contained in the previous enactments dealing with the Sri Lanka Transport Board. It is however not disputed that the learned Counsel for the petitioner made no reference to any direct provisions or to any other provisions, which reveal the intention of the Sri Lanka Transport Board to be a body corporate under the present Act. In the absence of any direct provisions or any intent to incorporate, it is evident that the Sri Lanka Transport Board, under the present Act cannot be regarded as a body corporate.

Accordingly for the reasons aforementioned, I uphold the preliminary objection raised by the learned President's Counsel for the 3rd respondent and dismiss this application for special leave to appeal.

I make no order as to costs.

RAJA FERNANDO, J. **-** I agree.
ANDREW SOMAWANSA, J. - **-** I agree.

Preliminary Objection upheld.
Application dismissed.

Fowzie And Others v. Vehicles Lanka (Pvt) Ltd - SLR - 23, Vol 1 of 2008 [2008] LKSC 1; (2008) 1 Sri LR 23 (8 July 2008)

FOWZIE AND OTHERS
v
VEHICLES LANKA (PVT) LTD.

SUPREME COURT
BANDARANAYAKE, J.
DISSANAYAKE, J.
BALAPATABENDI, J.
SC SPL LA 286/2007
CA 944/2006
JANUARY 8, 28, 2008
FEBRUARY 5, 6, 2008

Applicability of SC Rules 1990 - Rule B (3) - Rule B (5) - Rule 40 - Tendering the relevant number of notices along with the application for service on respondents in time - Variation or extension of time permitted with permission Court- Does non compliance with Rule B (3) result in the dismissal of the application?

The respondent contended that the petitioners had not complied with Rule 8 (3) the SC Rules 1990 and sought the dismissal of the application, in limine.

Held

(1) A careful examination of Rule 8 (3) clearly indicates that the purpose of it is to ensure that the respondents have received the notices of the petitioners' application lodged in this Court and in the event that the said notice not been received by the respondents, to make provision for the Registrar to dispatch fresh notice by registered notice.

(2) The SC Rules 9 of 1990 makes provision for the petitioner to file an application for a variation or an extension of time, if and when the
need arises (Rule 40).

(3) There is non compliance with Rule 8 (9) of SC Rule 1990 and the petitioners also had not taken steps to make an application (Rule 40) for variation or an extension of time in tendering notices as required by Rule 8 (3).

APPLICATION for Special leave to appeal from a judgment of the Court of Appeal on a preliminary objection raised.

Cases referred to:

(1) *Samantha Niroshana* v *Senarath Abeyruwan* - SC Spl LA 145/2006 - SCM 2.8.07.
(2) *Kiriwante and another* v *Navaratne and another* - 1990 - 2 Sri LR 393
(3) *RasheedAli* v *Mohamed Ali* and *others* - 1981 - 2 Sri LR 29
(4) *Soong CheFoo* v *H. K. de Silva* - SC Spl LA 184/2003 - SCM 25. 11.03 K.M.
(5) *Gangodagedara* v *Mercantile Credit Ltd* - 1988 - 2 Sri LR 253
(6) *Jayawardena, Someswaran and Manthri & Company* v *Jinadasa* - 1994 - 3 Sri LR 185
(7) *Samarawickrema* v *Attorney General*- 1983 2 Sri LR 162
(8) *Shanmugavadivu* v *Kulatilaka* - 2003 - 1 Sri LR
(9) *Annamalie Chettiar* v *Manjula Karunasinghe and another* - SC 69/2003 - SCM 6.6.05
(10) *Wickramatilakav Marikkar*- (1895) 2 NLR 9
(11) *Re Chenwel*- 8 Ch D 506
(12) *Sadlarv Whiteman*
(13) *Reg v Skeen*- (1910) 1 KB 868 at 892
(14) *K. Reaindran* v *K. Velusomasundaram*- SC Spl LA 298/99 - SCM 7.2.00
(15) *N. A. Premadasa v People's Bank* - SC Spl LA 212/99 - SCM 24.2.00
(16) *Hameed* v *Majibdeen and and others* - SC Spl LA 38/01 - SCM 23.7.01
(17) *R. M. Samarasinghe* v *R. M. D. Rathnayake and others* - SC Spl LA 51/2001 - SCM 27.7.01
(18) *C. A. Haroon* v *S. K. Muzoor and another*- SC Spl LA 158/2006-SCM 24.11.2006

Sanjay Rajaratnam DSG for respondents-petitioners
Faiz Musthapha PC with Thushani Machado for petitioner-respondent

Cur.adv. vult

July 8, 2008

SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal date 10. 09. 2007. By that judgment the Court of Appeal issued a *writ of certiorari quashing* Regulation 2(3) and Regulation (b) made by the 1st respondent-petitioner and published in Gazette No. 1446/31 dated 25.05.2006 prayed by the petitioner-respondent (hereinafter referred to as the respondent). The respondents-petitioners (hereinafter referred to as petitioners) had thereafter preferred an application for Special Leave to Appeal to this Court.

When that application of the petitioners for Special Leave to Appeal came up for support for the consideration of the grant of
Special Leave, learned president's Counsel for the respondent took up a preliminary objection that the petitioners had not complied with the requirement in

Rules 8(3) and 40 of the Supreme Court Rules 1990 and therefore submitted that the application for Special Leave to appeal should be dismissed in *limine*.

The facts relevant to the preliminary objection raised by the learned President's Counsel for the respondent, as presented by
him, *albeit* brief, are as follows:

The petitioners had filed the application for Special Leave to Appeal on 22.10.2007, but the notices were not tendered on that
date. The respondent had received a copy of a motion along with the petition and affidavit filed and in the said motion it was stated
that the registered Attorney for the petitioners had sought three (3) dates for the learned Deputy Solicitor General to support the
application for Special Leave. However, according to the learned President's Counsel for the respondent, there was no notice sent to the respondent from or through the Registry of the Supreme Court.

When the connected application No.1492/2006 came up for hearing before the Court of Appeal on 30.10.2007, the State Counsel
appearing for the respondents in that application had moved that the hearing of that case in the Court of Appeal be deferred in view of the pendency of this application before the Supreme Court. Thereafter, the registered Attorney-at-Law for the respondent had perused the Record and had observed that the petitioners had failed to tender notices for service on the respondent along with the application for Special Leave as required by Rule 8(3) of the Supreme Court Rules of 1990.

On 30.10.2007, the Attorney-at-Law for the respondent filed a motion and moved this Court to reject the application for Special Leave, for the reason that the petitioners had not complied with Rule 8(3) of the Supreme Court Rules of 1990. Thereafter on 31.10.2007 notices and the annexures were tendered by the petitioners at the Registry without a motion.

Accordingly learned President's Counsel for the respondent contended that the petitioners had not complied with Rule 8(3) of
the Supreme Court Rules 1990 and relying on the decision of this Court in *Samantha Niroshana v Senarath Abeyruwan*[1]submitted that the petitioners cannot now invoke the Courts discretion in terms of Rule 40 to obtain an extension of time to comply with Rule 8(3) of the Supreme Court Rules 1990. Accordingly respondent the learned President's Counsel for the respondent contended that the said preliminary objection be upheld and the application for Special Leave to Appeal be dismissed in *limine*.

Learned Deputy Solicitor General for the petitioners conceded that the notices were tendered to the Registry of the Supreme Court, 7 (seven) working days after the Special Leave to Appeal application was filed. Learned Deputy Solicitor General further conceded that the decision in which the learned President's Counsel for the respondent was relying on, viz, *Samantha Niroshana* v *Senarath Abeyruwan* (*supra*) was correct in deciding to uphold the preliminary objection of the

respondent as the petitioners in that case had not acted reasonably and efficiently upon discovery of the defect in their application for Special Leave to Appeal and the respondents had not received notice of the Special Leave to Appeal application. The position taken by the learned Deputy Solicitor General for the petitioners therefore was that, in the circumstances of the present case, the petitioners have discharged the requirements of Rule 8(3) and thereby had fulfilled the objective of the said Rule 8(3), even though such execution may not have been in strict compliance of Rule 8(3) of the Supreme Court Rules of 1990. Learned Deputy Solicitor General submitted that he is relying on the decisions of *Kiriwanthe and another v Navaratne and another*(2)and Rasheed Ali v Mohamed Ali and others(3).

Having stated the submissions of the learned President's Counsel for the respondent and the learned Deputy Solicitor General for the petitioners, let me now turn to consider the factual position of the objection raised by the learned President's Counsel
for the respondent with reference to the provisions contained in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and the
decided cases.

As the Record of the Special Leave to Appeal application reveals, on 22.10.2007, the petitioners had lodged an application in the Supreme Court and sought for Special Leave to Appeal from the judgment of the Court of Appeal dated 10. 09. 2007. A motion had been filed by the Attorney-at-Law for the petitioners, which stated thus:

"a) My appointment as Attorney-at-Law for the 1st - 3rd respondents-petitioners above named,

b) Petition together with the affidavit of the 2nd respondent-petitioner and documents marked A1 - A11

and move that Your Lordships' Court be pleased to accept the same.

.....

Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 date

22.10.2007 is annexed hereto.

Colombo on this 22nd day of October 2007.

Attorney-at-Law for the 1st to 3rd respondentspetitioners."

On 30.10.2007, Attorney-at-Law for the respondent filed the proxy on behalf of the respondent and also filed a motion moving Court to reject the Special Leave to

Appeal application as the petitioners had not complied with Rule 8(3) of the Supreme Court Rules 1990.

Thereafter on 01.11.2007 petitioners had tendered the notices and the annexures without a motion and on the same date, the
Registry of the Supreme Court had dispatched the said notices along with the documents by registered post to the respondent.

Having considered the factual position pertaining to the preliminary objection, let me now turn to examine the provisions pertaining to Rule 8(3) of the Supreme Court 1990. Rule 8, which is contained in Part I of the Supreme Court Rules 1990, deals with Special Leave to Appeal and is in the following terms:

"The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-Law, if any, and the name, address and telephone number, if any, of the Attorney-at-Law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."

An examination of Rule 8(3) clearly specifies the necessity to tender the relevant number of notices along with the application for service on the respondents. The said Rule, nbt only specifies the need to tender notices but also describes the steps that have to be taken in tendering such notices. It is also to be borne in mind that in terms of Rule 8(3), tendering of such number of notices for service has to be done, at the time the petitioner hands over his application and it appears that the said requirement is mandatory. The purpose of Rule 8(3) is to ensure that, the respondents are notified that a Special Leave to Appeal application is lodged in the Supreme Court. The Rule clearly stipulates that such notice should be given along with the filing of the application. The need for serving notice on the respondents, is further emphasized in Rule 8(5), where it is stated that,

"The petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the petitioner shall furnish the correct address for the seiVice of notice on such respondent. The Registrar shall thereupon dispatch a fresh notice by registered post and may in addition dispatch another notice with or without copies of the annexure, by ordinary post ....."

A careful examination of this Rule quite clearly indicates that the purpose of it is to ensure that the respondents have received the notices of petitioners application lodged in this Court and in the event that the said notice not been received by the

respondents, to make provision for the Registrar to dispatch fresh notice by registered post.

Referring to Rule 8(3) of the Supreme Court Rules of 1990, learned Deputy Solicitor General for the petitioners, submitted that the objective of Rule 8(3) is to ensure that the respondent is given notice by way of registered post, prior to the Special Leave to Appeal application is supported. Learned Deputy Solicitor General also referred to the decision in *Soong Che Faa v H.K. de Silva*(4)

where S. N. Silva, C. J. referring to Rule 8(3) had observed that,

"The rules are so designed that the respondents would have adequate notice of the application. A noncompliance with rules may even result in the matter being considered in the absence of the respondents."

Learned Deputy Solicitor General had also referred to the observation made by Bandaranayake, J. in *Samantha Niroshana* v *Senarath Abeyruwan* (supra), where it was stated that,

". . . the purpose of the Supreme Court Rules is to ensure that all necessary parties are properly notified in order to give a hearing to all parties and Rule 8 specifically deals with this objective."

Learned Deputy Solicitor General for the petitioners accordingly contended that considering the circumstances in Samantha Niroshana (supra), this Court was correct in upholding "the preliminary objection of the respondent as the petitioners in that case had not acted reasonably and efficiently upon discovering the defect in their application for Special Leave to Appeal and the respondent had received no notice of the Special Leave to Appeal application. The position taken up by the Deputy Solicitor General for the petitioners therefore was that, considering the circumstances of the present case, the petitioners have fulfilled the objective and discharged the requirements of Rule 8(3), although it may not have been in strict complianceof Rule 8(3) of the SupremeCourt Rules 1990.

Accordingly, learned Deputy Solicitor General contended that in the event an applicant, 'fails to strictly, but manages to substantiately comply with a Rule, and in so doing causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application.' In support of his contention learned Deputy Solicitor General referred to the judgment to Mark Fernando, J. in Kiriwanthe and another v Navaratne and another (supra), and also to the decisions of Rasheed Ali v Mohamed Ali and others (supra), Gangodagedara v Mercantile Credit Ltd.(5)Jayawickrama, Someswaram and Manthri and Company v Jinadasa(6) and Samarawickrama v Attorney General.(7)

It is to be noted that, all the aforementioned decisions had considered the effect of non-compliance of a Rule or Rules of the Supreme Court Rules of 1978 and not of

the Supreme Court Rules of 1990. Also, as admitted by the learned Deputy Solicitor General, in most of the decisions, the provisions of the Rules were regarded as imperative in nature. For instance, in Gangodagedarav Mercantile Credit Ltd., (supra) Wijetunga, J. had held that,

" . . . I am of the view that the provisions of Rules 49 are imperative in nature and call for strict compliance. Failure to comply with such a mandatory requirement is fatal to the application."

Moreover in Rasheed Ali (supra) Soza, J. had held that,

". .. the provisions of Rule 46 are imperative and should be complied with by a party who seeks to invoke the revisionary powers of this Court."

Kiriwanthe v Navaratne (supra) decided in1990 considered the need to comply with the requirements of Supreme Court Rules of 1978. The rationale of its decision, as clearly examined and stated in Samantha Niroshana v Senarath Abeyruwan (supra), was that in certain instances, taking into consideration the surrounding circumstances, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction. Notwithstanding the above position, it is to be borne in mind that in the decision of Kiriwanthe v Navaratne (supra) this Court had not suggested automatic exercise of its discretion to excuse the noncompliance of Supreme Court Rules. The procedure that has to be followed in considering the exercise of discretion was clearly
examined by Mark Fernando, J. where it was stated that,

. . . I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute compliance is not essential, it is sufficient if there is compliance which is 'substantial' - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the Court should first have determined where the
default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction. . ."

It is thus apparent that the Supreme Court did not hold that the discretion of the Court would always be exercised to excuse a noncompliance
of the Supreme Court Rules. What the Court stated was that instead of mechanically applying its discretion, the Court would have to consider certain aspects with regard to the non-compliance in question. These steps included the following:-

a) the Court should first have determined whether the default had been satisfactorily explained and/or;

b) the default had been cured subsequently without
unreasonable delay.

If the said requirements were fulfilled, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction.

Thus it is obvious that it would be necessary to evaluate the provisions of the relevant Rule/Rules before considering the effect of any non-compliance. For this purpose it is essential that the relevant Rule/Rules be carefully examined and it is on that basis that I had stated in *Shanmugavadivu v Kulathilake(8)*and *Samantha Niroshana* v *Senarath Abeyruwan (supra)* that Kiriwanthe's case was decided on 18.07.1990 on the basis of the Supreme Court Rules of 1978 and on 13.11.1990 the amended Supreme Court Rules of 1990 had come into effect.

The Supreme Court Rules of 1990 applicable to those cases had indicated the objectivity of exercising judicial discretion, and such discretion had to be exercised in terms of those provisions.

This position was further strengthened in the decision of *Annamalie Chettier v Mangala Karunasinghe and another*,(9) where the preliminary objection on non-compliance with Rules 30(1) and 30(6) of the Supreme Court Rules of 1990 was sustained by this Court. In these circumstances, it is evident that the issue in question has to be considered only in terms of Supreme Court Rules of 1990.

Rule 8(3) of the Supreme Court Rules of 1990, as stated earlier, clearly states that,

"*The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself. . .* "

As referred to earlier, the petitioner has filed the petition, affidavit and documents marked A1 - A11 on 22.10.2007.The motion does not refer to the notices being tendered to the Registry. Instead it stated thus:

" Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 dated 22.10.2007 is annexed hereto."

It is therefore apparent that the petitioners had not tendered with the application the required number of notices to the Registry in terms of Rule 8(3) of the Supreme Court Rules 1990, but had sent copies of the motion, petition, affidavit and the documents by registered post to the respondent. As stated earlier, on 31.10.2007, the Attorney-at-Law for the respondent filed a motion moving to reject the petitioners' application and on 01.11.2007, the petitioners had tendered notices and annexure without a motion.

Learned Deputy Solicitor General for the petitioners relied on the decisions based on Supreme Court Rules of 1978, and even in terms of the provisions under the said Supreme Court Rules of 1978 the said Rules were imperative in nature and needed strict compliance and further Court required at least an explanation regarding the petitioners' failure to comply with the said Rules.

It is to be noted that the Supreme Court Rules of 1990, makes provision for a petitioner to file an application for a variation or an extension of time, if and when the need arises. In fact Rule 40 of the Supreme Court Rules of 1990 refers to Rule 8(3) and states that,

" An application for a variation or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in chambers:

a) tendering notices as required by rules 8(3) and 25(2); . . ."

It is therefore quite clear that in terms of Rule 8(3) the petitioners should have tendered notices on the day they filed the petition, viz., 22.10.2007 to the Registry for the Registrar to act in terms of Rule 8(1) to give notice forthwith to each of the respondents, by registered post. In the normal course of events, the petitioners should have complied with Rule 8(5) to verify by Attorney at the Registry that notice has not been returned undelivered and this has to be done not less than two weeks and not more than three weeks after the application had been lodged. In this application however, it ISto be noted that, on 31. 10. 2007, the respondent had filed a motion moving to reject the application of the petitioners as they have not complied with Rule 8(3) of the Supreme Court Rules 1990. By that time, not only there was non-compliance with R,ute 8(3) of the Supreme Court Rules of 1990, but the petitioners also had not taken steps to make an application in terms of Rule 40 for variation or an extension of time in tendering notices as required by Rule 8(3).

It is not disputed that the petitioners had not taken any of the aforementioned steps and it is also apparent that there is clear noncompliance with Rules 8(3) and 40 of the Supreme Court Rules of 1990.

As I had stated in *Samantha Niroshana v Senarath Abeyruwan (supra)* I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in *Wickramathilaka v Marikar*(10)referring to Jessel M.R., in Re Chenwell.(11)

"It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

It has also to be noted that the purpose and the objective of Rule 8 of the Supreme Court Rules of 1990, is to ensure that all parties are properly notified in order to give a hearing to all parties. The procedurelaid down in Rule 8 of the Supreme Court Rules, 1990 clearly stipulates the process in which action be taken by the Registrar from the time an application is lodged at the Registry of the Supreme Court. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event that there is a need for a variation or an extension of time the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990. Accordingly as I had states in *Annamalai Chettiar Muthappan Chettiar (supra) and Sa,!,antha Niroshana v Senarath Abeyruwan (supra*), an objection raised on the basis of non-compliance with a mandatory Rule such as Rule 8 of the Supreme Court Rules of 1990 cannot be considered as a mere technical objection.

It is also to be noted that, there was no dispute over the language used in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and that there was no ambiguity of its construction. In such instances it is clear that when there is only one construction that could be given to a particular provision it would be necessary to enforce such construction. Referring to instances, where clear and unequivocal language had been used Farwell, L.J. in *Sadler v Whiteman*(12)referring to Lord Campbell in *Reg. v Skeen*(13)at 892 stated that,

"Where by the use of clear and unequivocal language capable only of one construction, anything is enacted by the Legislature, we must enforce it, although, in our opinion, it may be absurd or mischievous."

Accordingly where there has been non-compliance with a mandatory Rule such as Rule 8(3), serious consideration should be given for such non-compliance as that kind of non-compliance by a party would lead to serious erosion of well established Court procedure in our Courts, maintain throughout several decades.

Having said that, the question that has to be answered is whether the non-compliance with Rule 8(3) would result in the dismissal of the application. This question was considered in *Samantha Niroshan v Senarath Abeyruwan (supra)*, where reference was made to a long line of cases of this Court, *K Reaindran v K. Velusomasunderam*,(14)*N.A. Premadasa* v *The People's Bank*,(15) *Hameed* v *Majibdeen and others*,(16) *KM. Samarasinghe v R.M.D. Rathnayake and others*,(17)*Soong Che Foo* v *Harosh K de Silva and others (supra)*, *C.A. Haroon v S.K Muzoor and others*(18)that had decided that non-compliance with Rule 8(3) would result in the dismissal ofthe application.

In the circumstances, for the reasons aforementioned, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and dismiss the petitioners application for Special Leave to appeal, for non-compliance with the Rules of the Supreme Court, 1990.

I make no order as to costs.

DISSANAYAKE, J. - I agree.

BALAPATABENDI, J. - I agree.

Preliminary objection upheld.

Application dismissed.

Vasudeva Nanayakkara v. Choksy And Others (John Keells Case) - SLR - 134, Vol 1 of 2008 [2008] LKSC 7; (2008) 1 Sri LR 134 (21 July 2008)

VASUDEVA NANAYAKKARA
v
CHOKSY AND OTHERS
(JOHN KEELLS CASE)

SUPREME COURT
S. N. SilVA, CJ.
AMERATUNGA, J.
BALAPATABENDI,J.
SC FR 209/2007
MARCH 14,27,2008
MAY 12, 26, 2008.

Constitution Article 3, 4 - Article 12 (1), 126 - 13th Amendment - Sale of shares of Lanka Marine Services Ltd - Acting without lawful authority - Public Enterprise Reform Commission Act, NO.1 of 1996 - Ostensible authority - Right to equality - Privatization - Bias - Rule of law - Locus Standi - Defence of time bar - Severability of executive action - Just and equitable relief under Article 126 - Provincial land list - Advice of Provincial Council necessary? Petroleum Products (sp. provisions) Act 63 of 2002.

The petitioner filed application in the public interest in terms of Article 126 alleging an infringement of the fundamental right to the equal protection of the law. The impugned executive action is the action primarily of the 8th respondent - P. B. Jayasundara (PBJ) who functioned as Chairman of the Public Enterprise Reform Commission (PERC) and of the Cabinet of Ministers including the Prime Minister - 3rd respondent. It is alleged that PBJ caused the sale of shares of Lanka Marine Services Ltd (lMSl) a wholly owned company of the Ceylon Petroleum Corporation (CPG) which was a profit making debt free tax paying company to John Keells Holdings (JKL) 18th respondent without prior approval of the Cabinet of Ministers in a process which is not transparent and was biased in favour of JKL. It was also alleged that he did not obtain a valuation of LMSL from the Government Valuer and relied only on a valuation secured at the discretion of a private Bank. It was further alleged that, there was an illegal state grant given to LMSL by the then President within the Port of Colombo 2 years after the sale of shares stating that it was made upon the payment of approximately Rs. 1.2 Billion by LMSL to the Government whereas no such money was paid. It was further alleged that in a collateral proceeding JKH obtained tax free status for its investment in LMSL from the Board of Investments (BOI) and that since the applicable regulation did not cover the

agreement entered into, JKH got the regulation amended and a fresh agreement entered into by the BOL It was alleged that the impugned privatization was lopsided and moved in the reverse direction of Public Enterprise Reform by converting a tax paying Public Enterprise to a tax free private enterprise which claimed a monopoly in the relevant business.

It was further alleged that after the bid of JKH was accepted the specimen of the Common User Facility (CUF) agreement was also amended by PBJ at the detest of JKH and a new clause included which provided that the Government of Sri Lanka Ports Authority (SLPA) and CPC would ensure that all bunkers would be supplied using the CUF. It was further alleged that the new clause effectively prevented an alternative supply of bunkers and created a monopoly in LMSL now owned by JKH.

Held

(1) The process of divestiture of state ownership which was initially done on an ad hoc basis in respect of enterprises that were incurring losses was formalized on 01.03.1995 and described as the Public Enterprise Reform Programme with the establishment of a Special Task Force appointed by the President. The Reform Programme was further enhanced and given legal dimension by Act NO.1 of 1996 established by the PERC. Thus Public Enterprises Reform which lay in the area of Executive discretion came strictly to the legal domain as being public process regulated by law. The functions and the objects of PERC are set out in section 4 of the Act.

Since the role of advising and assisting is vouched by section 4 in mandatory terms, it necessarily follows that the Government cannot carry out public enterprise reform including divestiture without receiving advice and assistance from PERC. Furthermore all the objects of PERC are intended primarily to benefit the people - section 5(1).

(2) The committee of officials reconciled a cautious approach of preserving the monopoly of LMSL within the Port and liberalization the sector by the grant of 3 licences for the supply of bunkers outside the Port of Colombo. The Committee which included a Director of PERC did not recommend the sale of shares of LMSL.

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The steps taken by PBJ and the PERC towards affecting a sale of shares of LMSL is not in any way mandated by the decision of the Cabinet of Ministers and is manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular.

(3) The Cabinet had not even authorized the PERC to make reconsideration as to the sale of LMSL shares. The only matter on which the Cabinet had authorized action was the liberalization of the bunkering service in the area outside the Colombo Port, which had been effectually put into cold storage by PERC. This action is not based on a lawful exercise of Executive power in terms of the PERC

Act and was contrary to the decision of the Cabinet of Ministers.

(4) All ostensible authority involves a representation by the principal as to the extent of that agents authority. No representation by the agent as to the extent of his authority can amount to a "holding out" of the principal. No public officer unless he possess some special power, can hold not on behalf the state that he or some other public officer has the right to enter into a contract in respect of the property of the state when in fact no such right exists.

(5) The 13th Amendment provided for the exercise of legislative and executive power within a province in respect of matters in the provincial land list on a system akin to the Westminster model of government. The power reposed in the President in terms of Article 33 (d) read with section 2 of the State Lands Ordinance is circumscribed by the provisions of "Appendix II" in item 18.

"Appendix 11" established an interactive legal regime in respect of state land within a Province. Whilst the ultimate power of alienation and of making a disposition remains with the President the exercise of the power would be subject to conditions in Appendix 11 being satisfied. A pre condition is that an alienation or disposition of state land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council.

(6) The rule of law postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness of prerogative or wide discretionary authority on the part of the government.

(7) The principle enunciated in Articles 3 and 4 of the Constitution is that the respective organs of government, the legislature, the executive and the judiciary are reposed power as custodians for the time being to be exercised for the people. The resources of the state are the resources of the people and the organs of state are guardians to whom the people have committed the care and preservation of these resources.

There is a positive component in the right to equality guaranteed under Article 12 (1) and where the executive being the custodian of the people's power all *ultra vires* and in derogation of the law and procedures that are intended to safeguard the resources of the state, it is in the public interest to implead such action.

(8) The defence of time bar must necessarily fail since the impugned transfer was not conducted according to law in a fair and transparent process.

Held further

(9) The petitioner has a sufficient locus *standi* to institute these proceedings in the public interest and has established an infringement bf the fundamental right guaranteed by Article 12 (1) in respect of 90% of the shares of LML.

Per Sarath N. Silva C.J.

"From the perspective of JKH I hold that the company has secured advantages and benefits through the illegal process and in specific instances by misrepresentation that have been made.

Per Sarath N. Silva C.J.

"The findings in the judgment demonstrate that the action of PBJ has not only been arbitrary and ultra vires but also biased in favour of JKH.

Per Sarath N. Silva C.J.

"Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12 (1) would result in a restoration of the status quo ante. However since the jurisdiction vested in this court in terms of Article 126 (g) is to grant relief or to make directions as it may seem just and equitable, it is open to the court to ascertain whether the implications of the impugned executive action is severable.

An APPLICATION under Article 126 of the Constitution.

Cases referred to:-

1. *Attorney-General v A. D. de Silva* - 34 NLR 529 (PC)

2. *Rawlands v A. G.* - 72 NLR 385

3. *Visvalingam v Liyanage - 1983* - 1 Sri LR 236

4. *Premachandra v Jayasundara* - 1994 - 2 Sri LR 9

5. *Bulankulama and others v Secretary Ministry of Industrial Development* - 2000 - 3 SLR 243

6. Senaratne v Chandrika Kumarasinghe - 2007 - 1 Sri LR 59.

M. A. Sumanthiran with Viran Corea for petitioner

Nihal Fernando PC with Ronald Perera and V. K. Choksy for 1st respondent

L. C,. Seneviratne PC with A. P. Niles for 3rd respondent

Viraj Premasinghe for 10th respondent

Romesh de Silva PC with Harsha Amarasekera for 18th - 21 st respondents

Y. J. W, Wijayatilleke PC ASG with Viraj Dayaratne SSC for 8th, 15th - 19th, 26th and 31st respondents

22nd respondent - Nihal Sri Amarasekera in person.

Shibly Azeez PC for 32nd - 34th added respondents.

July 21, 2008

SARATH N. SILVA P.C., C.J.

The petitioner, Vasudeva Nanayakkara, in the capacity of a national politician and a social worker has filed this application in the public interest in terms of Article 126 of the Constitution, alleging an infringement of the fundamental right to the equal protection of the law guaranteed by Article 12(1) of the Constitution. The impugned executive action as alleged by the petitioner is the action, primarily of P. B. Jayasundera, the 8th respondent who functioned at the material time as Chairman of the Public Enterprise Reform Commission (previously and presently Secretary to the Treasury) and of the then Cabinet of Ministers, including the 3rd respondent, Ranil Wickremasinghe, who was the Prime Minister. The then President is cited as the 4th respondent. It is alleged that Jayasundera caused the sale of shares of Lanka Marine Services Ltd., (LMSL) a wholly owned company of the Ceylon Petroleum Corporation (CPC), which was a profit making, debt free, tax paying company to John Keells Holdings Ltd (JKH - 18th respondent), without prior approval of the Cabinet of Ministers, in a process which was not transparent and was biased in favour of J.K.H. It is also alleged that he did not obtain a valuation of LMSL from the Government Valuer and relied only on a valuation secured at his discretion from a private bank. That, the sale price of approximately Rs. 1.2 billion pales into insignificance considering that profits of LMSL for the 4 years including the year of sale was Rs.2.45 billion. In addition an illegal State Grant was given to LMSL by the then President of an extent of 8 Acres 2 Roods, 21.44 perches within the Port of Colombo in January 2005, nearly 21/2 years after the sale of shares stating that it was made upon the payment of approximately Rs.1.2 billion by LMSL to the Government, whereas no such money was paid. It is further alleged that in a collateral proceeding JKH obtained tax free status for its investment in LMSL from the Board of Investment (BOI). That, since the applicable Regulation did not cover the Agreement entered into, JKH got the Regulation amended and a fresh Agreement entered into by the BOI. Thus it was alleged that the impugned privatization was lopsided and moved in the reverse direction of public enterprise reform by converting a tax paying Public Enterprise to a tax free private enterprise which claimed a monopoly in the relevant business.

The petitioner also relies on the Central Bank Annual Report of 2004 (P24) which states that the privatization of LMSL has not yielded the expected low prices and competition, requiring further reforms in the sector. The same view is expressed by the notice published on May 2005 (P2), by "Feeder Operators" complaining of high

"Bunker Prices" in Colombo.

The petitioner was actively supported by Nihal Amarasekera, the 22nd respondent who succeeded Jayasundera as Chairman, PERC, at a later point of time. It is clear that the bundles of documents produced in the case would not have surfaced if not for the probing scrutiny by Amarasekera. I would not cite the scathing remarks made by him of the impugned transaction since this court would be guided only by the sequence of events, relevant documents and the reasonable inferences that could be drawn from them.

The petitioner is also supported by 3 intervenient petitioners later added as 32nd, 33rd and 34th respondents. The 32nd respondent, Sri Lanka Shipping Co. Ltd., (SLSCC) bid for the shares of LMSL in collaboration with Chemoil Corporation, USA. They allege that the initial bid of JKH was made in collaboration with Fuel and Marine Marketing (FAMM) owned by the Chevron Corporation of USA. That, JKH could have got above the threshold of 70 marks to be short listed, only on the credentials of FAMM, being a market leader in Bunkering. After clearing the initial threshold, the Technical Evaluation Committee (TEC) was notified that FAMM was not pursuing the bid in collaboration with JKH and it is alleged that the TEC erred in continuing to evaluate the bid on financial capability and business strategy as an individual bid of JKH. It was submitted that with the withdrawal of FAMM, the Committee should have struck off the marks attributed on the credentials of FAMM and removed JKH from the shortlist.

It is further alleged by the petitioner and the 22nd, 32nd, 33rd and 34th respondents that after the bid of JKH was accepted the specimen of the Common User Facility (CUF) Agreement was amended by Jayasundera at the behest of JKH and a new clause 8.2 was included which provided that the Government, Sri Lanka Ports Authority (SLPA) and CPC would ensure that all bunkers would be supplied using the CUF. The catch in this clause is that the CUF is connected to the Storage Tanks located within the property granted to the privatized LMSL and the added clause effectively prevented an alternative supply of bunkers and created a monopoly in LMSL now owned by JKH. After their bid for the purchase of LMSL shares was rejected, the 32nd respondent obtained a licence in terms of section 5 of the Petroleum Products (Special Provisions) Act, NO.33 of 2002 to distribute petroleum which included the supply of bunkers. On that license these respondents commenced an off-shore operation of supplying bunkers using ships and a main tanker. LMSL owned by JKH caused SLPA to prevent this operation in terms of the said clause 8.2. There were many rounds of litigation and finally the Court of Appeal struck down the said clause 8.2 as being inconsistent with the provisions of Act, NO.33 of 2002.

It is thus seen that the petitioner and the respondents referred above challenge every step of the privatization of LMSL including steps taken after the acceptance of the bid to consolidate the gains of JKH. The gravamen of the allegation is that P. B. Jayasundera, Chairman of PERC and S. Ratnayake, Director, JKH (20th respondent) worked hand in glove to clinch the wrongful benefits to JKH. In sum, the petitioner and 22nd, 32nd, 33rd and 34th respondents adopt the conclusion of

the Committee On Public Enterprises (COPE) of Parliament which inquired into the same matter and reported to Parliament as follows:

"This transaction had been executed blatantly without Cabinet approval, with several flaws causing loss and detriment to the Government, and demonstrating it to be a questionable "fix", and is therefore ab-initio bad in law, null and voild."(Vide: Hansard of 12.01.2007-P35)

Although I cited the conclusion of the Committee as reported to Parliament, I have to state straightaway that the perspective of the inquiry before this court is different. We have to focus on the applicable law and ascertain whether the impugned executive action was an arbitrary exercise of power, serving a collateral purpose and defeating the object of the law, denying thereby to the petitioner and the People the equal protection of the law under Article 12 of the Constitution. From that perspective the initial focus would be on the Public Enterprises Reform Commission of Sri Lanka Act, NO.1 of 1996, purportedly in terms of which Jayasundera as the then chairman of the Commission took the impugned executive action.

A. PUBLIC ENTERPRISES REFORM COMMISSION OF SRI LANKA ACT, NO.1 OF 1996

The Act which sets up the Commission better known by the acronym PERC marks a watershed in the progression of governmental economic policy, from a State owned and controlled, centrally driven economy to a privately owned market driven economy. This process has been characterized at one end of the spectrum, in the extensive nationalization programme especially in the post 1956 era and the establishment of large scale State commercial enterprises to, the divestiture of State ownership and/or control. At one end the process envisaged economic stability and fixed prices and at the other, market buoyancy and competition resulting in the best product reaching the people at the lowest price. At both ends the process has been intended to benefit the People. Hence I would reject the objection raised by the contesting respondents which denies a public interest in the due execution of this Law and also denies a locus standi to the petitioner to vindicate such public interest by invoking the jurisdiction of this court in terms of Article 126(1) of the Constitution, as being misconceived and myopic.

The process of divestiture of State ownership which was initially done on an ad hoc basis in respect of Enterprises that were incurring losses was formalized on 01.03.1995 and appropriately described as the Public Enterprise Reform Programme with the establishment of a Special Task Force by the President. The Reform Programme was further enhanced and given the much needed legal dimension when Parliament enacted Act, No.1 of 1996 cited above establishing the Commission 'PERC'. Thus Public Enterprise Reform which lay in the area of Executive discretion came strictly to the legal domain as being a public process regulated by law. The functions and objects of the PERC are set out fairly and squarely in section 4 of the Act, as follows:-

'The function of the Commission shall be to advise and assist the Government on the reform of public enterprises with the following objects in view:-

(a) fostering and accelerating the economic development of the country;

(b) improving the efficiency and competitiveness of the economy;

(c) upgrading production and services with access to international markets on a competitive basis, by the acquisition of new technology and expertise;

(d) developing and broadbasing the capital market and mobilizing long term private savings;

(e) motivating the private sector;

(f) augmenting the revenues of the Government, so as to enable it to better address the social agenda; (emphasis added)

It is manifest from this provision that the role of the PERC is limited and circumscribed by law to one of advising and assisting the Government in any envisaged reform of a public enterprise including divestiture of State ownership. Since the role of advising and assisting is couched by section 4 in mandatory terms, it necessarily follows that the Government cannot carry out public enterprise reform including divestiture without first receiving the advice and assistance of the PERC.

A further aspect to be noted in the section is that all the objects of the PERC are intended primarily to benefit the People, The public element of the process is further enhanced by the specific duty cast on the PERC by section 5 (1) which reads as follows:

"to assist the Government to create public awareness of Government policies and programmes on the reform of public enterprises with a view to developing a commitment by the public, to such policies and programmes."

Thus public enterprise reform including divestiture could never descend to be a shadowy, slithering process. The Law mandates that it should be a transparent process circumscribed by an abiding public interest in ensuring its legality and propriety. It is on this basis that I reject the objection to a suit in the public interest and the denial of a *locus standi* to the petitioner as being misconceived and myopic. The objection not only ignores the significance of the impugned transaction in the broad canvas of an economic paradigm shift but also ignores the salient aspects of the Law cited above.

I would now move to examine the process of reform relevant to the impugned transaction being the sector commonly referred to as, bunkering.

B. LIBERALIZATION OF BUNKERING

The service of providing marine petroleum fuels to ships that lay in port, in anchorage or off-shore is a shipping related operation generally described as bunkering. Hub ports like Singapore enhanced their capacity to supply bunkers and were generating foreign exchange revenue of phenomenal proportions. It is accepted that the Port of Colombo with its unique and advantageous geographic location close to major West-East Shipping lanes failed to harness the huge potential in this sector. The principal inhibiting factor was cited as the monopoly vested in the Ceylon Petroleum Corporation (CPC) by Act, NO.28 of 1961 in the entire sector of the petroleum trade and industry including bunkering. This was one item of the process of nationalization in the post 1956 era, referred to above. Bunkers were supplied by the CPC through its wholly owned subsidiary LMSL using a storage facility of 12 tanks and a network of interconnecting pipelines linked to the Dolphin Berth and the South Jetty. This network is later described as the Common User Facility (CUF) and is located within the Port of Colombo.

The initial proposal for the liberalization of bunkering is contained in the Cabinet Memorandum of 24.05.2000 presented by the Minister of Shipping. It cites the high prices of bunkers supplied in Colombo and of limited supplies and recommends that the private sector be encouraged to invest and operate bunkering services. The memorandum makes no reference to a sale of shares of LMSL.

The Cabinet considered the memorandum on 22.06.2000 together with observation made by several Ministers and decided to refer the matter to a Committee of Officials for a report thereon. The officials to consist of Secretaries to Ministries of Finance, Shipping, Irrigation and Power and of PERC. The Committee Report dated 01.08.2000 was submitted to the Cabinet with a memorandum of the Minister of Shipping bearing the same date.

The recommendations of the Committee of Officials were as follows:-

"(a) To liberalize the bunkering sector and to permit a limited number of parties to operate bunker services within the territorial waters of Sri Lanka and the Ports of Sri Lanka other than the Port of Colombo;

(b) For PERC to seek offers through an open tender process for the importation and marketing of marine fuel as given in section 3 above, from investors with local equity participation and the necessary technical and financial ability and experience in Bunkering;

(c) The GOSL to charge a licence fee from the selected operators for the use of Sri Lankan territorial waters to carry out their business;

(d) To authorize the Merchant Shipping Division of the Ministry of Shipping and Shipping Development in terms of the Merchant Shipping Act, No.52 of 1971 to regulate and monitor the activities of bunker operators within Sri Lanka's territorial waters; "

(e) For PERC to initiate action accordingly and to make further recommendation

to the Cabinet regarding the process to be followed. "

It is to be noted that the Committee recommended a cautious approach of preserving the monopoly of LMSL within the Port and liberalizing the sector by the grant of 3 licences for the supply of "bunkers outside the Port of Colombo. The PERC had" to make recommendations regarding this process. It is significant that the Committee which included a Director of PERC did not recommend the sale of shares of LMSL.

The Minister of Shipping in his Memorandum dated 01.08.2000 agreed with the recommendations of the Committee of Officials subject to two observations viz:-

"In the light of this background I will make the following observations on the committee report for consideration of the Cabinet.

(a) Monopoly given to Lanka Marine Services Ltd., (LMSL) should be restricted to one year within which period privatization of LMSL should be completed.

(b) New entrants to the bunkering sector in Sri Lanka should be allowed to sell bunkers within the territorial waters of Sri Lanka which should include the immediate
vicinity of the Port of Colombo.

I seek the approval of the Cabinet of Ministers for the recommendation of the Committee of Officials, subject to the observations I have made."

The Cabinet considered the matter on 17.08.2000 and granted approval to the proposals in the memorandum and directed that action be taken by the Minister of Shipping and Shipping Development.

Thus the process of reform in the bunkering sector authorized by the Cabinet was a phased out arrangement. Initially for the PERC to invite offers for supply of bunkers outside the Port of Colombo and licenses being granted to 3 suppliers. To continue with the monopoly of LMSL to supply bunkers within the Port of Colombo for 1 year within which period the privatization of LMSL to be completed. It was envisaged that the competitive process will bring in the necessary expertise to the sector with the service being operated with due compliance with international safety and environmental standards and finally with the completion of the privatization of LMSL the entire sector being liberalized. The benefits for the Government of Sri Lanka (GOSL) are set out in paragraph 3(d) of the recommendations of the Committee Officials which reads as follows:-

'The benefits to GOSL are expected from the increase in tax revenue through higher income tax from the local companies as well as opportunities for

employment generation. In addition, GOSL would charge a license fee, for the use of Sri Lanka's territorial waters."

C. ACTION TAKEN BY THE PERC CHAIRED BY JAYASUNDERA PURPORTEDLY ON THE BASIS OF THE RECOMMENDATIONS OF THE COMMITTEE OFFICIALS AND THE OBSERVATION OF THE MINISTER AS APPROVED BY THE CABINET OF MINISTERS

The petitioner has put in the forefront of his case that any action by the PERC could only have been within the conspectus of the recommendations of the Committee and the observations of the Minister as approved by Cabinet, as set out above. Jayasundera has in paragraph 8 of the affidavit admitted the content of these
documents and of the decision of the Cabinet. Hence we have to assume that he knew fully well that the task of PERC was to make a recommendation to the Cabinet on the 3 processes that were envisaged in the following order:-

(i) the process of calling for tenders through an open tender to issue initially 3 licenses for the supply of bunkers within the territorial waters and Ports other than Colombo;

(ii) the process of privatization and the removal of the monopoly given to LMSL within a period of 1 year of the operation of this partly liberalized regime as envisaged in (i) above;

(iii) the operation of the fully liberalized regime of bunkering services after the privatization of LMSL as envisaged in (ii) above;

Admittedly, PERC did not make any recommendation to the Cabinet on any of the matters envisaged above which would have brought about an improved regime of bunkering facilities to service a growth in the shipping sector; higher foreign exchange earnings and a higher yield of tax revenue. Nor was there any change in the Cabinet decision stated above. Instead, whilst purporting to act under the said Cabinet decision PERC embarked on a course of action devised by itself of which I would now examine.

On 28.10.2001, PERC published a notification inviting proposals from private sector operators to participate in the marine fuel market in Sri Lanka within the territorial waters including the Ports. The notice also stated that there will be no limit in the number of licenses to be issued. I have to make a brief note here that this notification is contrary to the Cabinet decision. The Committee of Officials had recommended that only three licenses should be issued initially and in any event in the first year, services could be provided only outside the Port of Colombo.

More significantly the issue of licenses required a new legal regime which as pleaded in paragraph 6 of the petition by the petitioners is contained in the Petroleum Products (Special Provisions) Act, NO.33 of 2002. This averment is admitted by Jayasundera in paragraph 5 of his affidavit. The Act, NO.33 of 2002

was passed by Parliament and certified by the Speaker only on 17.12.2002. Hence the notice calling for proposals more than 1 year before the law as enacted was an exercise in futility. It appears that PERC took no action on the proposals received pursuant to the notification referred to above except to forward them to the Ministry of Power and Energy. No recommendation was made by Jayasundera as required in the Cabinet decision as to the process of granting three licences initially to operate bunkering service outside the Port of Colombo.

PERC published another notice on 08.02.2002 inviting Expression of Interests (EOI's) for the purchase of 90% shares in LMSL. EOI's were to be submitted on or before 21.02.2002. The notice stated that it is being published on behalf of the Government of Sri Lanka. It has to be noted that the Cabinet of Ministers did not in the decision referred to above authorize PERC to call for such EOI's. The proposal of the Committee of Officials (including a Director of PERC) was that PERC should make recommendations as to the grant of licenses for providing bunkering service. The observation of the Minister was that the privatization of LMSL. should be completed within 1 year of operation the partly liberalized bunkering services in terms of the licenses that will be issued. It is significant that the Minister's observation quoted by me verbatim in the preceding section does not even. refer to any action on the part of the PERC in this regard. The omission is for good reason since the process of privatization of LMSL was to follow the successful implementation of the licensing scheme with private operators supplying bunkers outside the Port of Colombo. Neither the Committee of Officials nor the Minister ever envisaged a situation where LMSL which admittedly had a monopoly is privatized without successfully operational licensing scheme which was essential to pave the way for competition, lowering of price and improved services, being the objective approved by the Cabinet of Ministers. From this perspective the course of action adopted by the PERC of dampening the liberalization process and publishing a notification with an obvious overbreadth, shorn of the necessary legal machinery, which could not have been implemented at the stage and by accelerating the privatization process of LMSL, has to be viewed in a dim light. The action which was contrary to the Cabinet decision had the effect of favouring the would be purchaser of LMSL shares who will continue in effect to have a monopoly of providing bunkering services. The inference is further supported by an amendment to the draft CUF Agreement, agreed to be Jayasundera at the behest of JKH, after the offer of JKH for purchase of LMSL shares was accepted (which would be dealt with at a later stage under the head of "Deviations which was availed of by LMSL then under the control of JKH to stave off competition in the supply of bunkers.

The petitioner and Amarasekera have made several submissions that Jayasundera has acted contrary to the Public Finance Circular No. FIN 358 (4) dated 29.11.199.. which Jayasundera himself had issued for "Enhancing the Effectiveness of the Procurement Procedure..." by the failure to constitute a Cabinet Approved Tender Board (CATB) for the purpose of making recommendations the Cabinet on the sale of LMSL shares. It was submitted that the Tender Documents viz: the EOI and Request for Proposal (RFP) should have been approved by a CAT and the TEC. In this instance only a TEC had been appointed and on the sequence of dates it was established that the EOI and RFP had been issued prior to even the

appointment of the TEC.

The requirements to appoint a CATS and a TEC a intended to ensure transparency, fairness and honesty the procurement process. Purchase and sale are two aspect of a contractual process which those volumes of guideline and circulars are intended to safeguard. Jayasundera has conveniently sought to explain the failure to appoint a CATS on the basis that it is not a practice to appoint such a Soard in respect of the sale of Government shares. If it is so, his practice is contrary to his own
circular. Se that as it may, the appointment of CATS would have afforded a mechanism to redress the bitter grievances such as those voiced by the 32nd respondent, as to a lack of transparency and of unfavourable treatment. Furthermore, it would have ensured that the Cabinet was apprised of the process of evaluation of bids and a decision being made by the Cabinet as to the manner in which the sale should be effected, without Jayasundera on his own accord purporting to "clinch the deal" with JKH.

Furthermore, if the tender documentation was prepared by a TEC and CATS, incorrect statements such as the seriously wrong statement contained in paragraph 4.4.1 of the RFP would have been avoided. In respect of the land in question this paragraph states that CPC presently holds freehold title to this land and has obtained Cabinet approval to transfer the land to LMSL. This statement is incorrect in its entirety. The petitioner has established that the land in question in extent 8 acres 2 roods and 21.4 perches is in fact a part of the Port of Colombo in terms of Order made by the Minister in terms of section 2(3) of the Sri Lanka Ports Authority Act, No.51 of 1979. The aspect of the land will be dealt with morefully at a later stage.

I conclude on the foregoing reasoning that the steps taken by Jayasundera and PERC towards effecting a sale of shares of LMSL is not in any way mandated by the decision of the Cabinet of Ministers and is manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular issued by Jayasundera himself.

Jayasundera has sought to explain the action taken by him in paragraph 10(d) of his affidavit as follows:

"as provided for. in section 5 (t) of the Public Enterprises Reform Commission Act, NO.1 of 1996, PERC was acting as the agent of the Government and as such was empowered to follow appropriate procedures in carrying out the task of liberalizing the bunkering trade;"

Section 5(t) of the PERC Act relied on by him reads follows:

"to act as the agent of the Government, in Sri Lanka or abroad, for the purposes of any matter or transaction, if so authorized"

(emphasis added)

He seems to be implying that he took steps for the sale of LMSL without prior authority of the Cabinet "in carrying out the task of liberalizing the bunkering trade". It is correct as noted above that the Cabinet of Ministers decided that PERC should make proposals for liberalizing the bunkering trade by issuing licenses to the private
sector. Jayasundera as revealed in the preceding analysis in fact put this process of 'liberalizing' in cold storage and moved at express speed in the opposite direction of privatizing LMSL with the monopoly intact. In that respect he has acted contrary to section 5(t) relied on by him by failing to act in the manner he was authorized to do and by engaging in a process which was diametrically opposed to the policy as laid down in the Cabinet decision.

D. VALUATION OF LMSL SHARES

Valuation of LMSL had been done by the Chief Valuer as at 02.07.93. Jayasundera wrote to the Chief Valuer on 06.02.2002 requesting an updated version of the valuation. The Chief Valuer replied him by letter dated 07.05.2002 stating that the valuation of assets is almost complete and can be finalised within a week and that the business valuation was not started since his officers are entitled to an incentive payment as approved by the Cabinet. He requested Jayasundera to confirm the payment as approved by the Cabinet. Significantly, Jayasundera did not reply this letter. Instead, by letter dated 15.05.2002 a business valuation of LMSL was requested from the DFCC Bank to be given before 28.05.2002. A sum of Rs. 750,000/- plus GST and NSL were paid by Jayasundera to DFCC Bank without demur. A question immediately arises as to how a public officer who was reluctant to pay an incentive allowance to another public officer could be so generous to a private bank. The only reason given by Jayasundera for not pursing the matter with the Chief Valuer is that "it would not have been feasible to have expected a business valuation to be done by the Chief Valuer within a short period of time" (paragraph 12k of his affidavit). Even the DFCC bank appears to have been rushed through by PERC to furnish the valuation. Question looms large as to whose deadline Jayasundera was trying to keep. The Cabinet had not even authorized PERC to make a recommendation as to the sale of LMSL shares. The only matter on which the Cabinet had authorized action was the liberalization of the bunkering service in the area outside the Colombo Port, which had been effectively put into cold storage by PERC as demonstrated above. Hence his hasty action was certainly not based on a lawful exercise of executive power in terms of the PERC Act and was contrary to the decision of the Cabinet of Ministers.

Even assuming that Jayasundera wanted to make an unsolicited recommendation to the Cabinet as regards the sale of LMSL shares, the proper course would have been to secure a valuation from the Chief Valuer which had been previously requested and would have been ready within a week in regard to the assets of LMSL. He avoided getting this valuation by refraining from making a commitment to pay the Chief Valuer the incentive allowance which the latter was entitled to in terms of Cabinet decision. Having successfully stalled that process, he selected a private bank on his own and paid the full fee that was sought. This is completely contrary to the basic tenets of public sector procurement. The business

valuation he sought was conceived by him alone. Based on the business value given by the DFCC, Jayasundera fixed floor price for bids of 90% of LMSL shares at Rs 1.2 Million. The severe criticism of the valuation and the floor price fixed is based on the financial performance of LMSL within 4 years of the privatization. According to the Annual Report profits of LMSL for the year 2005/2006 (figures being as follows:

2002/2003 - 508,735,000

2003/2004 - 267,802,000

2004/2005 - 575,035,000

2005/2006 - 1,106,992,000

2,458,564,00)

Thus, it is pointed out by the petitioner and Amarasekera that within 4 years more than double the amount that had been spent on the purchase of shares was recovered by way of profits from the business of LMSL. That alone gives credence to the criticism of petitioner and of Amarasekera that the basis of valuation and the process of sale was seriously flawed.

The method used by DFCC was the discount of future cash flow projected to a period of 15 years. Amarasekera in his submissions demonstrated that this is an erroneous basis of valuation considering the nature of the business activity, especially if the high component of real estate (more than 8 Acres of land in the Port of Colombo) is to be taken into account. Real estate could never be valued in the manner it was sought to be done. The valuation of real estate could have come from the assets value done by the Chief Valuer which Jayasundera carefully avoided obtaining. The aspect of significance is that LMSL would continue to enjoy a monopoly in the bunkering sector due to the delay in the process of liberalization which has been dealt with exhaustively in the preceding section of the judgment. Jayasundera in fact paved the way for the continuation of the monopoly by adding clause 8.2 to the CUF Agreement after the offer of JKH was accepted.

The petitioner in paragraph 22 of the petition quoted paragraph 12 of the Report of the Committee on Public Enterprises (COPE) which highlights both matters referred above. The said paragraph 12 quoted in the petition is as follows:

"Consequently, being confronted with the above monopoly clause, DFCC Bank reneged on their "business valuation" of LMSL of Rs. 1,200,000,000/- and confirmed in writing that on the basis of a "monopoly" their "business valuation" is Rs.2,400,000,000/-, confirming that had they been required to give a "net assets valuation" they would have engaged the services of a professional real estate valuer for the land 8A. 2R. 21,44P'"

The representative of the DFCC who filed an affidavit in Court has refrained from giving any specific answer to the averment in paragraph 22 of the petition. In the circumstances it is unnecessary to consider the written submissions tendered on behalf of the DFCC seeking to justify the valuation. Jayasundera's conduct in the matter of obtaining the valuation is basically not authorized by the cabinet, is characterized by inexplicable haste; erratic; apparently designed to suit his own objectives; contrary to all accepted procedures and furthest removed from a lawful exercise of power under the PERC Act of tendering well considered advice and a recommendation to the Cabinet.

E. EVALUATION BY THE TEC AND THE SHORTLISTING OF BIDDERS

A 'TEC' was appointed by C. Ratwatte, the then Secretary to the Treasury entirely on the recommendation of Jayasundera. A characteristic feature of the entire process is that Ratwatte has approved and signed every paper that had been put to him by Jayasundera, promptly and without any question being raised.

The TEC met on 8th and 27th March 2002 to review the 17 EOI's submitted. A two tiered marking scheme was adopted. 60 marks being attributed to financial capability on the basis of net assets of the bidders and 40 marks were attributed to experience in bunkering and other credentials in that sector. Bidders receiving over 70 marks were short listed to submit proposals.

JKH submitted the EOI in collaboration with Fuel and Maritime Marketing (FAMM) owned by the Chevron Corporation of the USA. The 32nd Added respondent being a party that was rejected submitted a bid in collaboration with the Chevron Corporation of the USA. Both EOIs were short listed - together with 4 others. The case of the 32nd Added respondent is that JKH would have received the full 60 marks for financial capability but since JKH did not have experience in the bunkering sector, it could not have cleared the threshold of 70 marks if not for the collaboration of FAMM which was undoubtedly a market leader in the sector. The TEC met on 06.06.2002 to review the proposals of the six short listed bidders. On that day it is recorded by the TEC that FAMM would not bid for the shares along with JKH but may enter into a technical consultancy agreement. The submission is that at that stage JKH should have been removed from the shortlist since it would have necessarily fallen below the threshold of 70 marks. The 32nd Added respondent alleges discriminatory treatment since the TEC continued to evaluate the bid of JKH as an individual bid whereas its bid was rejected on the basis that the collaborator Chemoil Corporation sought a monopoly for 8 years, since a monopoly was not possible within the terms that were offered. Submission of the 32nd Added respondent is borne out by the summary of the EOI's being Annex 1 to the TEC Report. The EOI of JKH is summarized with FAMM as the lead collaborator. Item 10 reads as follows:

Name: FAMM/John Keells Holdings Ltd.,

Submission of Information: Form A - Yes
Form B - Yes

Principal business activity: Marketing of fuel oil & marine lubricants

Access to refinery: Yes

Tanker company: Yes

Location of bunkering operations: Americas, Europe, UAE, Asia, incl. Singapore, Thailand.

According to the mark sheet annexed FAMM/JKH combination got the maximum marks of 100 on the formidable credentials of FAMM in the bunkering sector highlighted in the evaluation cited above. Admittedly JKH on its own could not have laid claim to any of those credentials.

The criticism of the petitioner and Amarasekera as to the failure of Jayasundera to get a CATS appointed gathers strength, since there was no other body other than Jayasundera himself to check on the work of the TEC. The following passage of the Report of the TEC show that it has been guided entirely by Jayasundera:

"The TEG met on 6th June 2002, to review the proposals received in terms of the RFP by the due date of 28 May 2002, to shortlist the parties who would be allowed to place financial bids on the Golombo Stock Exchange."

The entirety of the envisaged process of shortlisted parties being allowed to place financial bids on the Colombo Stock Exchange was obviously devised and followed by Jayasundera on his own as the later events reveal, since the matter of sale of shares had not even been placed before the Cabinet as at that stage and there was admittedly no CATB.

The criticism of the 32nd Added respondent that JKH only made use of the credentials of FAMM to clear the initial threshold and that collaboration with FAMM, was never genuinely intended gains strength from a document that emerges from an entirely different quarter. The petitioner has at a later stage in the case obtained documents marked P36 and P37 from the BOI as to an application for investment relief submitted by Ratnayake on behalf of JKH. On 20.03.2002 being 7 days before the meeting of the TEC referred to above in which the EOI's were reviewed, Ratnayake submitted an application in terms of section 17 of the BOI Law for tax relief in respect of a "new investment'. In column 1(a) of the application form as to "Particulars of Collaborators" only the name of John Keells Holdings and the address at 130 Glennie Street, Colombo 2 is specified. Significantly, there is no reference to any other collaborator or to any foreign investment. More, significantly the particulars of the proposed investment carries all the details of LMSL without the name. The address of the place where the investment is going to be made is given as 69 Walls Lane, Colombo 15, which is the address of LMSL. The extent of the land required for the investment is given as 8 Acres 2 Roods 21.4 Perches being precisely the extent of the land within the Port of Colombo which features so significantly in the case. 12 Tanks, 40 years old being the facilities used by LMSL

are also included. The application made by Ratnayake on behalf of JKH is premised on a suppression of the truth, in that it is nowhere stated that what was intended is an acquisition of the business of LMSL. It is falsely made out to be a new investment to qualify for investment relief. The omission to refer to the collaboration of FAMM, which was most significant from the perspective of the BOI, clearly establishes the allegation of the 32nd Added respondent that the inclusion of FAMM in the EOI submitted at the same time was only a passing show to get past the threshold of 70 marks.

Another aspect to be considered is the basis on which Ratnayake of JKH was so confident that its EOI containing the misrepresentation of collaboration with FAMM, would clear all the hurdles and be able to "clinch the deal" including the land of 8 Acres, before the EOI was even shortlisted. Was it optimistic guesswork? Or, as alleged by the petitioner and Amarasekera, the entire deal was arranged between Jayasundera and Ratnayake? The subsequent events will shed light as to which alternative is more probable.

To continue the narrative of events with regard to the BOI application. By letter dated 11.07.2002 the BOI notified JKH that the application for investment relief has been approved and that there will be no income tax for a period of 3 years. Thereafter income tax would be 10% for the 4th and 5th year and 15% thereafter. The irony of the process as pointed out by Amarasekera is that LMSL owned by the Ceylon Petroleum Corporation was a tax paying enterprise. In the year 2000/2001 it made a profit of Rs. 318 Million and paid Rs. 163 Million as income tax. The criticism of Amarasekera that a profit making tax paying public enterprise became a tax free private enterprise as a result of the impugned exercise is well established. Whereas the object of the process of liberalization according to the Cabinet Memorandum which approved was to increase the volume of bunkering and thereby and increase the revenue yield to the State.

The date of the 801 letter granting tax exemption being 11.07.2002 may have some significance since on the very next day - 12.07.2002, Jayasundera rushed a letter to Ratnayake that the JKH bid was accepted and that "it is proposed to conclude the transaction". Ratnayake replied on the same day 12.07.2002 stating that they are willing to conclude the transaction. There is indeed, amazing speed, in concluding a transaction as to the sale of a public asset which also included 8 Acres of land in the Port of Colombo. Allthis was done when the proposed process of sale had not been even considered by the Cabinet. The Cabinet considered the process, a month later on 14.08.2002.

To conclude the narrative of events as regards the BOI approval, although approval was granted by letter dated 11.07.2002, it would not have in effect given tax relief to JKH since only a new investment as opposed to an acquisition of an existing business would qualify for such relief. The applicable Regulation was thereafter amended by Gazette bearing No. 1256/22 dated 01.10.2002 to include an investment formed by an acquisition of assets of an existing enterprise. The amendment is "tailor made" to fit the acquisition of assets of LMSL by JKH. Which

inference is fully supported by the prompt letter dated 04.10.2002 sent by Ratnayake to BOI requesting an amendment of the Agreement that had already been entered into on the basis of the amendment to the Regulation. All the amendments to the Agreement suggested by Ratnayake were incorporated by BOI ensuring the tax relief referred to above for the investment. This process to say the least makes a mockery of the Rule of Law and the equal protection of the law. If the law can be bent and amended to suit an individual purpose and to confer a benefit to any party that was not due under the existing law, the hallowed principle of equality before the law, will be denuded of its essential and abiding meaning.

I have to now revert to the events leading to the acceptance of the bid and consideration of the deviations that favour JKH as alleged by the petitioner and Ratnayake.

F. EVENTS LEADING TO THE ACCEPTANCE OF THE BID AND THE ALLEGED DEVIATIONS THAT FAVOUR JKH

A Pre Bid Conference was convened by Jayasundera on 30.04.2002 and held at the PERC office. Representatives of the CPC, SLPA, Colombo Stock Exchange and of parties who submitted EOI's were present. It is clear that the meeting was convened well before the report of the TEC was completed. The TEC Report is undated but it refers to a meeting on 06.06.2002. It appears that without finalizing the report and signing it, the parties who were shortlisted were notified that they could submit proposals on the basis of the RFP furnished by PERC. The absence of any guidelines laid down by the Cabinet and of a CATB appears to have enabled Jayasundera to devise a procedure of his choice being a course of action far removed from the power vested in the PERC under the law referred to above being to advise and assist the Government. Be that as it may when parties come for the Pre Bid Conference no one knew of the basis on which the EOI's were evaluated for thee plain reason that there was no Report of TEC as at that date.

The minutes of the conference have been recorded and circulated amongst all parties present. Whatever be the regularity of the procedure adopted, what was notified to the parties have a degree of sanctity and parties would necessarily have been guided by it in making their proposals. Three matters arise for consideration in view of the specific allegations that have been made of subsequent deviations that favour JKH. These matters are as follows:

DEVIATION (i)

Paragraph 1 of the minutes specifically states that LMSL will not have a monopoly on the import and sale of bunkers subsequent to the sale of LMSL shares. Paragraph 1.5 states that the present CPA Act provides for the Minister to authorize the import and sale of bunkers;

Thus the clear message given to the bidders is that after the sale the monopoly will be dismantled with licenses being granted to others.

I have demonstrated above that the Cabinet had directed the reverse of the process, being a partial dismantling of the monopoly and a sale of LMSL shares within 1 year thereof.

Further, it is clear from the sequence of events set out above under the head of "Liberalization of Bunkering" that the PERC headed by Jayasundera did not take steps towards liberalization as required by the Cabinet and on the contrary the process was effectively put in cold storage. Hence Jayasundera who knew fully well that PERC had not taken steps to even recommend a liberalized regime to the Cabinet and at the least for sometime to come there would be no competition in the sector, failed to apprise the bidders of the true picture and conveyed an incorrect impression. Whereas, if in effect the monopoly was going to continue for a limited period of time the bidders may have had a basis to enhance their bids. Hence Jayasundera's action was adverse to the interests of the State in securing a better price. He failed to take into account the specific decision of the Cabinet that the monopoly would at the least would continue to the Port of Colombo for one year.

The more serious allegation against Jayasundera on that account is that after the JKH bid was accepted he agreed to a suggestion of Ratnayake made in letter dated 31.07.2002 that provision be included in the draft CUF Agreement which had been issued with the RFP, that all bunkers handled and transported within the Port of Colombo will have use the Common User Facility (CUF). Accordingly the CUF was amended including as clause 8.2, the assurance sought by Ratnayake as an undertaking of the Government and SLPA. The layout of the Pipeline Network shows that the Bunkering Jetty (South Jetty) and the Dolphin Berth are linked to the tanks used by LMSL. Hence the requirement in clause 8.2 would necessarily result in any party supplying bunkers in the Port of Colombo having to use of tanks of LMSL. There is merit in the submission of the Added 32nd respondent that since different grades of fuel are used in supplying bunkers the other competitors would thereby be necessarily precluded from supplying bunkers in the Port of Colombo. LMSL under the management of JKH got the SLPA to enforce clause 8.2 against the Added 32nd respondent when the latter on the basis of a license granted in terms of the Petroleum Products (Special Provisions) Act No. 63 of 2002 began an off-shore operation to supply bunkers. LMSL sought injunctive relief from Court to restrain this operation and followed up by filing a writ application in the Court of Appeal. Finally, the Court of Appeal held that the said clause 8.2 was invalid as being inconsistent with Act No. 53 of 2002. President's Counsel for the 18 to 21 respondents (LMSL/JKH and Directors) submitted that nothing flows from the inclusion of 8.2 and that there was no monopoly after the privatization in view of the judgments of the respective courts. I find it difficult to agree with the submission. What is drawn in issue in this case is the executive action of including clause 8.2. The fact that judicial action set right the wrongful executive action cannot be availed of by the party who secured the wrongful executive action in its favour and went to the extent of enforcing the wrongful executive action in Court.

At the pre bid meeting Jayasundera clearly indicated that there would be no monopoly and that other licenses would be issued. He acted contrary to the proclaimed position in two ways. Firstly he refrained from acting on the specific

decision of the Cabinet made on the recommendation of the Committee of Officials including a Director of PERC, that PERC should make recommendations as to the issuance of licenses to liberalize the bunkering trade. Thereby he brought about a situation of a defacto monopoly by dampening the competitive regime which the Cabinet envisaged. Secondly, he readily and without any consultation agreed to the inclusion of clause 8.2 in the CUF departing from the draft previously issued, being a provision obviously intended to install a monopoly. Jayasundera's function under the PERC Law cited above was only to advise and assist the Government and not to commit the Government to an undertaking which is completely contrary to the previous decision of the Cabinet.

Jayasundera has in paragraph 18 (d) of his affidavit admitted the subsequent inclusion clause 8.2 and seeks to justify his action on the basis that it was done.

"in order to maintain a level playing field among all bunker operators. "

I have to observe in respect of this quaint defence that his perception of a "level playing field" appears to be one with a single player. He indirectly assured to the continuance of the monopoly, being a course completely contrary to the position set up in the forefront of the Pre Bid Conference.

As regards the role of JKH in respect of the admitted 'Deviation' by including clause 8.2, the overall submission of President's Counsel is that its action was entirely bona fide and the award was made since it was the only bidder who furnished the undertaking to pay 10% of the bid price. That, it is not the burden of JKH as the buyer to satisfy itself whether Jayasundera was duly empowered or authorized to enter into the impugned transaction and / or to make Deviations in the manner he has done. The gravamen of the submission is that the transaction is a sale and JKH made a request for the inclusion of clause 8.2 in furtherance of its commercial interests and Jayasundera who had ostensible authority agreed to it and that the transaction cannot be impleaded on this account. Counsel thereby supports the plea of bona fides with the legality of the executive action in issue.

The argument seems to be that when there is a yielding hand there is nothing illegal to take something more. I possibly cannot accept either of the propositions of Counsel.

JKH knew fully well that this was not a mere sale, but a sale of shares owned by a Public Corporation in an extremely lucrative venture. That, transparency and action being taken according to law should necessarily underpin the validity of the transaction. The declared basis at the Pre Bid Conference attended by Ratnayake representing JKH was that there will be no monopoly after the sale and that other suppliers of bunkers would be issued licenses. This premise would necessarily have inhibited bidders from quoting a higher price. In any event the object of the Cabinet was not to secure a higher price by preserving the monopoly. It was, as noted above is to enhance competition, to lower bunker prices, improve facilities and thereby increase the revenue yield to the State. Having come in on this openly declared premise, no sooner the bid was accepted by Jayasundera, Ratnayake

moved quickly to get the former committed to an inclusion of clause 8.2. The obvious purpose of getting clause 8.2 included was to drive away competitors as manifested by the subsequent conduct of JKH of procuring the SLPA to take action against the 32nd respondent and thereafter by directly instituting legal proceedings against the latter. Hence I cannot agree with the submission of bona fides.

The next aspect to be considered is the authority of Jayasundera to make the Deviation in question. Although the issue is dealt with here, the reasoning would apply in respect of all aspects of the impugned transaction.

The question whether a public officer can act in excess of his statutory authority and enter into any agreement or arrangement and whether such agreement or arrangement would be binding on the State on a plea based on the ostensible authority of the public officer has been fully considered and settled more than half a century ago. It appears that with the passage of time the basic proposition of law in this regard has been forgotten. In the case of Attorney - General v A. D. de Silva(1) the Privy Council considered the question whether in a situation where the Principal Collector of Customs sold certain articles of the State without any statutory or actual authority, the contract could be enforced against the State on the the basis that the officer had ostensible authority. The following dicta of the Privy Council appropriately deal with the proposition - now advanced by Counsel offf JKH.

"Next comes the question whether the Principal Collector of Customs had ostensible authority, such as would bind the Crown, to enter into the contract sued on. All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists. Their Lordships think therefore that nothing done by the Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Principal Collector had the right to enter into a contract to sell the goods which are the subject matter of this action." (emphasis added)

Later in the Judgement (at p. 537) Their Lordship dealt with a situation where a public officer is acting in terms of a statute and observed that the authority would then be "rigidly fixed" by the limits of the statute. That a "representation" by the Public officer would be binding on the State only if there is a specific provision to that effect in the Statute and the reading in, of such a provision by way of interpretation would be an undue extension of a Statute.

The question of the resultant hardship to a purchaser in a sale, purportedly effected by a public officer has been specifically examined by Their Lordships as follows:

"It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has

authority to enter into the sale is placed upon him. This undoubtedly is true. But where as in the case of the Customs Ordinance the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. This is illustrated in the case under consideration. The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual."

The final sentence of the passage is relevant to the examination of the issue from the perspective of Public Law at a later stage in the judgment.

The judgment in A. D. de Silva's case was followed by the Supreme Court in the case of Rowlands v Attorney-GeneraA2). In that case the Court considered the question whether the principle of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance. The Court held as follows (at page 410.)

"Now in the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual. There is clear authority to this effect in American law but there would appear to be a dearth of authority in English law. In our law however there is now clear authority to this effect."

The Supreme Court cited the preceding dicta in A. D. de Silva's case as the authority for this proposition.

The Court also observed that in a contract involving a larger sum of money the authority to bind the State lay in the Cabinet as a whole (p. 405) and not on a single member who acts on his own responsibility. That the Minister should have got approval of the Cabinet or gone "before the House" (Parliament).

A useful observation has also been made at page 409 as follows:

"... It is well recognized that although there are no legal restrictions on the contents of Government contracts, the Government generally contracts only on the basis of certain fixed standard terms and conditions.."

This is also relevant to the Public Law perspective as evolved in subsequent decisions of this Court referred to later.

For the reasons stated above I cannot accept the submission of Counsel for JKH (18th to 20th respondents) based on bona fides. It is clear that these respondents got an advantage over other competitors through the yielding hand of Jayasundera. The ostensible authority of Jayasundera cannot be a shield for these respondents

to safeguard what they secured in an illegal, arbitrary and biased exercise of executive power.

DEVIATION (ii)

The next Deviation alleged is in respect of the land in extent 8Acres 2 Roods 21.44 perches being an area generally referred to as the "Bloemendhal Oil Depot" I have noted above under the head of "Action Taken By PERC" that the statement contained in paragraph 4.4.1 of the RFP that the CPC presently holds freed hold title to the land and has obtained Cabinet approval to transfer it to LMSL, is incorrect. The land in fact comes within the limits of Port of Colombo, as specified in the Order dated 24.03.1986 made by the then Minister of National Security in terms of section 2(3) of the Sri Lanka Ports Authority Act No. 51 of 1979. The Petitioner has produced the Gazette containing the order marked P33 the contents of which are not disputed.

If the petitioner could have laid hand on this order, the officials of PERC could with reasonable diligence have done so. All parties submitting proposals were specifically required to carry out their own due diligence without relying on the representations in RFP. Hence JKH cannot rely on the incorrect statement contained in
paragraph 4.4.1 of the RFP. Be that as it may it is common ground that LMSL being a Company did not own this property and had no legal claim to it whatsoever.

Paragraph 5 of the minutes of Pre-bid Conference reads as follows:

"The time frame for the transfer of assets to LMSL from CPC:

a. All movables - prior to closing date

b. Land - within oneyear of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMS:

The petitioner has quoted this section of the minute verbatim in paragraph 25(c) of the petition and Jayasundera had to answer as to what he intended notify the bidders by 07.05.2002 as to the terms of the transfer and the payment to be made. As noted above, by this date the Cabinet has not even been notified of any sale of LMSL shares let alone a transfer of 8 Acres of land within the Port of Colombo. The Cabinet had not authorized Jayasundera of PERC to do anything in this regard. A question looms large as to the basis on which Jayasundera intended to give this vital information regarding the land within 7 days. Jayasundera has stated in paragraph 27(b) and (c) of his affidavit which reads as follows:

"(b) The transfer of title of the said land was not to be free of "valuable consideration" because the value of the said land was taken into account in arriving at the business valuation of LMSL.

(c) the issue of transferring title of the said land was discussed at the Pre-Bid conference since matters such as the manner of transfer, the instrument to be executed etc., had to be finalized. "

In respect of what he has stated in paragraph (b) above it is to be noted that he did not inform the bidders that the value of the land has been taken into account in arriving at the business valuation of LMSL. On the other hand he could not have possibly given this information since the business valuation was requested from the DFCC by him only on 15.05.2002, and the valuation report is dated 10.06.2002, whereas the pre-bid conference was on 30.04.2002.

In paragraph 71 of his affidavit Ratnayaka has stated that a pre bid clarification letter dated 10.05.2002 was issued to all bidders by PERC in which it was expressly stated that there will be no additional payment to be made with regard to the transfer of the land. He has produced this letter marked Z18. It is significant that although Ratnayake has stated that all bidders were thus notified, Z18 is addressed only to him by name. It is not in the format in which the minutes of the Pre bid Conference were communicated which contained all the names of those who attended the conference. The letter Z18 is typed on the PERC letter head has been signed by the Director General. It merely states "... please find attached additional clarification sought at the Pre-bid Conference." The attached sheet of paper is not even on a letter head of PERC. It does not contain any list of names of persons who attended the Conference. The document which contains only typed script without any writing or even a signature is titled;

"Pre Bid Conference further clarification"

I do not wish to burden this Judgment by reproducing its contents but suffice it to state that it contains important price sensitive information. Significantly paragraph 5 which relates to the land reads as follows:

"CPC will transfer title of the property at Bloemendhal Road within the period of one year. There will be no additional payments to be made to CPC in this regard. CPC will transfer title of the movable assets including the barges prior to the sale of LMSL."

Although the covering letter has been signed by the Director General it is clear that it has been sent on Jayasundera's instructions because he has subsequently acted on this representation that there would be no separate payment for the 8 Acre land within the Port of Colombo. Jayasundera had no mandate whatsoever from the Cabinet or anyone else to make an astounding representation that title to 8 Acres of State land would be transferred without any payment, in such a casual manner, on a sheet of paper that does not bear even a signature. When State land is bequeathed on a Grant or Lease at a nominal price or gratituously, it is described as a "special grant or lease." Section 6(1) of the State Lands Ordinance empowers the President to make such a special grant or lease only for any "charitable, educational, philanthropic, religious or scientific purpose." Even the power reposed in the President would now be subject to the 13th Amendment to the Constitution

(referred to later). Thus Jayasundera making this representation was arrogating to himself a power that even the President did not have. Even assuming wrongly that the land belonged to the CPC, such representation should have been made at the Pre-bid Conference which was attended by the Chief Legal Officer of the CPC. It is clear that Jayasundera did not seek instructions from the CPC after the Pre Bid Conference on 30.04.2002 and before the date of Z18 being 10.05.2002.

I have to now revert briefly to certain matters dealt with previously under the heading of "Valuation of LMSL". The Chief Valuer who was requested to do a valuation wrote to Jayasundera on 07.05.2002 stating that the assets valuation was nearly ready and requested confirmation of the incentive payment authorized by the Cabinet for the business valuation. It was noted in the preceding analysis that Jayasundera effectively prevented the Chief Valuer from submitting a valuation by not making a commitment to make the incentive payment. Having thus stalled the Chief Valuer he caused Z18 to be sent to JKH on 10.05.2002 stating that there would be no separate payment for the land. Thereafter, on 15.05.2002 he requested the business valuation from DFCC Bank. Thus it is clear that the business valuation by DFCC Bank is a contrivance adopted by Jayasundera to avoid a separate assets valuation and a business valuation being done by the Chief Valuer.

I would now deal with the documented sequence of events only from the perspective of the land. After having made a award in favour of JKH in an exchange of letters dated 12.07.2002 between Jayasundera and Ratnayake, well before the matter was even considered by the Cabinet, the PERC set about in getting the relevant agreements ready for signature. The Agreements were executed on 20.08.2002 one day prior to the decision of the Cabinet being confirmed. They are:

i) CUF Agreement [P19 (a)]

ii) The Share Sales and Purchase Agreement [P19(c)]

iii) A notarial Agreement to transfer the Land (P27)

Jayasundera and the Director General of PERC have signed as witnesses for all State parties to the Agreements. The Secretary to the Treasury has signed on behalf of the Government of Sri Lanka. The CPC is described as the Vendor and the SLPA is only a party to the CUF Agreement. Jayasundera has admitted that these
Agreements were prepared by PERC in anticipation of the Cabinet decision. What is significant from the aspect now being considered is the notarially executed Agreement to transfer the land. Clearly this kind of Agreement was neither referred to in the RFP nor at the Pre-bid Conference. It appears to flow from the exclusive communication to JKH (Z18) referred to earlier. The proposal to the Cabinet referred to later does not make any reference to the Government being a party to an Agreement to transfer land.

Jayasundera in his affidavit (paragraph 27(g) and (k) takes responsibility for this Agreement and adduces four reasons to justify his action. They are

a) that the "land was to form part of the assets of LMSL";
b) the value of the land was taken into account in arriving at the business value of LMSL;
c) that there was no necessity to obtain specific approval of the Cabinet since that was "implicit" in the Cabinet Memorandum that was approved;
d) that Agreement No.538 (P27) was entered into "in order to give effect to the undertaking to transfer title of the said land"

An examination of the reasons given by Jayasundera in the context of the documented sequence of events demonstrates that they centre around his own role in this regard. The statement that land "was to form part of the assets" is a nebulous statement. Land is immovable property with clearly defined legal means of acquiring ownership. The question is whether at the material time land was in law an asset of LMSL. Admittedly it was not. It has been a part of the Port of Colombo. The incorrect statement in paragraph 4.4.1 of RFP that CPC holds freehold title to the land and obtained Cabinet approval to transfer the land to LMSL referred to above, was only in the imagination of Jayasundera and the PERC.

Walker And Sons & Company Ltd. v. Gurusinghe - SLR - 37, Vol 1 of 2008 [2008] LKSC 4; (2008) 1 Sri LR 37 (19 October 2008)

WALKER AND SONS & COMPANY LTD.
v
GURUSINGHE

SUPREME COURT
SHIRANI BANDARANAYAKE,J.
MARSOOF,J.
BALAPATABENDI,J.
SC(APPL) 61 OF 2005
HCA 305/2003
LT 4/G/23590/99
FEBRUARY 27, 2008
APRIL 2, 3, 29, 2008

Resignation - Services constructively terminated? Use of term 'resignation' by an employee - Does it by itself preclude him from claiming relief on the footing of a constructive termination? - What is constructive termination?

Held:

(1) The employee informed the appellant employer that due to the non availability of the resources at the new place of work he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation. The appellant had taken immediate steps to demote him to his previous position, and had also taken steps to call for explanation for his non attendance at meetings. In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a 'constructive termination' by the employer, which puts an end to the contract.

(2) The mere use of the term resignation by an employee does not by itself preclude him from claiming relief on the footing of a 'constructive termination' by the employer.

(3) After receiving the 'resignation' letter the employer appellant had taken steps to demote the respondent to his previous position. The employer appellant also took steps to call for explanation for his non attendance at meetings - thus confirming the fact that the employer had not accepted the resignation tendered by the employee respondent - it is abundantly clear that the appellant's action against the respondent amounts to 'constructive termination'.

APPEAL from the judgment of the High Court of Matara

Wasantha Gunasekara for respondent-appellant-appellant.
Rohan Shabandu with *Athula Perera* for applicant- respondent-appellant.

Cur. adv. vult.

October 19, 2008

SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of the Southern Province dated 30.03.2005. By that judgment, the learned judge of the High Court affirmed the order of the Labour Tribunal dated 04.08.2003, by which the Labour Tribunal had held that the services of the workman-applicant-respondent- respondent (hereinafter referred to as the respondent) had been constructively terminated by the respondent-employer-appellant (hereinafter referred to as the appellant) and awarded him a sum of Rs. 264,000/- as compensation for the loss of employment. The appellant appealed to the High Court of the Southern Province, where special leave to appeal was granted to the Supreme Court. Since, no questions of law had been specified by the High Court, both learned Counsel had agreed on 20.02.2006 that the appeal could be argued on the following question:

"Whether the Labour Tribunal and the High Court erred in law in considering that there was a wrongful termination of service by the employer, considering the documents and the evidence that is adduced in the case"

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

The respondent had joined the appellant Company as a supervisor on 26.06.1985 (A1). In terms of the terms and conditions of his employment, his age of retirement was 55 years. Thereafter the respondent was promoted to the post of Training Assistant Engineer (Mechanical) with effect from 01.06.1993 (A2). Later on 30.08.1995 the respondent was promoted to the position of Assistant Engineer (A3) and by document marked A4, he was promoted to the position of engineer of the appellant Company with effect from 01.03.1999. Since July 1985, the respondent had been serving in the appellant Company, for a continuous period of over 13 years.

The promotion granted to the respondent in March 1999, was conditional as he had to serve a period of six (6) months on probation, and it was also common ground that, the appellant Company by its letter dated 23.03.1999 (A4A), had assigned additional duties to the respondent, which were as follows:

a. Continue to improve the level of activity at the branch ensuring that the turn over does not fall below the figures over the past six (6) months;

b. Endeavour to re-commence revenue work for repairs to plantation machinery at a value, not less than Rs. 250,000/- per month; and

c. Co-ordinate with the Branch Accountant in the collection of dues to the Company in respect of invoices raised in pursuance of work carried out in (a) and (b) above.

During this period the respondent had to work in the office at Galle Fort, which was admittedly a large well equipped Garage. After his new appointment, the said Garage was sold and the machinery and the equipment were taken to a place at Mihiripenna. The respondent after the receipt of the notice, assigning additional duties (A4A) , had tendered his resignation by his letter dated 07.07.1999, to be with effect from 31.08.1999 stating that he is unable to accede to the terms and conditions of his new appointment (A6). By their letter of 09.07.1999, the appellant, whilst reverting the respondent to his former position as Assistant Engineer Galle Branch on the salary allocated to Assistant
Engineer's post, informed the respondent that they are awaiting his confirmation of his resignation.

The respondent by his letter dated 02.08.1999 had informed the appellant that they have terminated his services, constructively, and that he would be instituting proceedings in the Labour Tribunal.

The Labour Tribunal had decided that the appellant had terminated his services constructively and had ordered to pay him Rs. 264,000/- being two years salary taking into account Rs. 11.000/- as his monthly salary, for the loss of his employment.

The learned Judge of the High Court had affirmed the order of the Labour Tribunal. Accordingly, both the Labour Tribunal and the High Court had come to the conclusion that the respondent's employment had been constructively terminated by the appellant.

It is not disputed that the respondent, as stated earlier, was promoted to the post of Engineer of the Galle Branch by letter dated 23.03.1999 with effect from 01.03.1999. It is also not disputed that by a further communication, the respondent was informed of the additional duties assigned to the respondent.

In his evidence, the respondent had stated that after he was promoted to the post of Engineer, the Garage, which was the biggest of that kind in the Southern Province, was sold and the estabUshment was re-located at Mihiripenna. The respondent's position was that the new location at Mihiripenna was a small house that was taken on lease and that the machinery and equipment were not re-located and installed. The new place was not fitted with three phase electricity, which was essential to run the heavy equipment machinery and sufficient number of workmen were not assigned to him. In the circumstances, although the appellant Company had been manufacturing Roll Breakers, Tea Rollers and all equipment necessary for the Tea trade when the garage was located in Galle, it was not possible to manufacture any of the above, after moving to Mihiripenna. The resulting position

was that it was not possible to achieve the targets set out in the document, which listed out the additional duties (A4A) as none of the Estate Superintendents had given work to the appellant Company since they lacked the necessary infrastructure.

In fact the respondent has expressed his difficulties in achieving the expected goals due to the insufficient infrastructure facilities. In his letter dated 07.07.1999, (A6) he had stated thus:

".....

Notice of Resignation

"I wish to bring to your notice that I cannot accede to your terms and conditions and the expectations of my new appointment as a Covenanted Staff Engineer at Galle Branch with the available Company infrastructure.

The available resources for Galle Branch Engineering Division is not sufficient to implement any mode of operation and also we do not get any concession from any other divisions which could deteriorate the present level of operation. *(sic)*

Hence, I am compelled to notify my resignation in advance complying with A.G.M (P & L)'s Circular No. 1/99 : WMSWF : SS : MK dated 22.01.1999 to utilize my entitle leave with the appropriate condition prior to the resignation. *(sic)*

I intend to resign from the services from 31.08.1999. However the confirmation would be as per letter of appointment.

I would like to make this opportunity to appreciate superiors who are devoted to develop our establishment."

In response to the respondent's said letter of resignation (A6), the Assistant General Manager/Personnel and Legal, had informed the respondent that since the respondent is unable to accept the terms and conditions stipulated in the letter of appointment placing him in the new post, that the appellant has no alternative other than reverting the respondent to his former position. Accordingly the respondent was reverted to his former position as Assistant Engineer, Galle Branch on the salary drawn by an Assistant Engineer. The said letter had further stated that the respondent's 'intention to resign from the services of Walker Sons and Co. Ltd.' was noted and that they were awaiting his confirmation of his resignation (A5 and A5A). The said letter (P5) was dated 09.07.1999. On the same date the Assistant General Manager/Personnel and Legal had written to the respondent calling for explanation to be sent within seven days from 09.07.1999 (R3).The said letter was in the following terms:

"It is noted that you have failed to participate at the Monthly Management Meeting held on 06.07.99 although you were informed to attend.

You were thereafter, requested to appear before the management at a Special Meeting held on 08.07.99 at

10.30 a.m. along with Mrs. Anwar - Accountant and AGM/Galle Branch.

Your failure to participate in the above Meetings appears to be a gross violation of the disciplinary rules and regulations of the Company and misconduct on your part.

Therefore please send me your explanation on or before the lapse of seven (07) days from today as to why you failed to participate in the above mentioned 02 meetings."

It is in this context, that we will have to examine as to whether the respondent had resigned from his employment or whether his services were constructively terminated by the appellant.

Considering the factual position, which was referred to earlier, it is to be borne in mind that after the receipt of the letter specifying the additional duties, the respondent had tendered his resignation since it was difficult for him to fulfill those with the available infrastructure facilities. Thereafter the appellant had informed the respondent that he would have to confirm his resignation. Notwithstanding the above, the appellant took steps to demote the respondent and to call for explanation for his non-participation at a monthly Management Meeting held on 06.07.1999 and a Special Management Meeting held on 08.07.1999. Both these action were taken, it is to be noted well after the respondent had sent his letter or resignation, on 07.07.1999.

The Labour Tribunal had considered all the circumstances referred to above in coming to the conclusion that the appellant had constructively terminated the service of the respondent, which decision was affirmed by the learned judge of the High Court.

Describing the instances and as to what amounts to constructive termination, would not be a simple question to give a brief answer. However, the doctrine of constructive termination, in its conceptual from has been identified in the following terms (The Contract of Employment. S. R. de Silva, The Employers' Fede- ration of Ceylon, monograph No.4, pg.158):

The difficult question arises in connection with what amounts to a constructive termination of employment ..., In conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a constructive termination by the employer, which puts an to the contract.

In his examination of the doctrine of constructive termination, S.R. de Silva (supra) had set out examples that clearly illustrates its
meaning. According to his examination:

If an employer refuses to pay an employee his salary in circumstances which make such refusal illegal, the employee can treat the employer's refusal as a constructive termination of the contract or again, *the employer may seek to unilaterally vary the contract on a fundamental matter, e.g. demote him. In such cases the employee often purports to resign from the service of the employer for the reason that the latter has compelled him to do so. Such a resignation is in law a constructive termination by the employer and does not preclude the employee from claiming relief before a Labour Tribunal on the basis that there has been a termination by the employer. The mere use of the term 'resignation' by an employee does not by itself preclude him from claiming relief on the footing of a constructive termination by the employer"* (emphasis
added).

When the respondent informed the appellant that due to the non availability of the resources for the Engineering Division of the Galle Branch that he would not be in a position to accede to the additional duties that were assigned to him and therefore he is tendering his resignation, the appellant had taken steps immediately to demote the respondent to his previous position. Notwithstanding the above, as stated earlier, the appellant also took steps to call for explanation from the respondent for his nonattendance at meetings, thereby confirming the fact the they had not accepted the resignation tendered by the respondent by his letter dated 07.07.1999 (A6).

In such circumstances, on a consideration of all the material 220 adduced in this case, it is abundantly clear that the appellant's action against the respondent amounts to constructive termination of the respondent's service. Accordingly, I answer the question on which this appeal was heard, in the negative.

For the reasons aforesaid, this appeal is dismissed and the judgment of the High Court dated 30.03.2005 is affirmed. The appellant will pay the respondent a sum of Rs. 25,000/- as costs.

MARSOOF, J. - I agree.
BALAPATABENDI, J. - I agree..

Appeal dismissed.