

**WIJERATNE AND ANOTHER**  
**v.**  
**THE PEOPLE'S BANK AND ANOTHER**

SUPREME COURT

SHARVANANDA, J., WANASUNDERA, J., COLIN-THOME, J.,

SOZA, J. AND RANASINGHE, J.

S.C. – 63/83 & 65/83

JANUARY 9, 10, 11 AND 12, 1984.

*Applications under Article 126 seeking relief for alleged breach of fundamental rights – Articles 4(c) and 12 of the Constitution – Alleged discrimination and deprivation of promotional prospects by People's Bank – Is it infringement by executive or administrative action? Maintainability.*

The People's Bank reorganised its security services so as to place the petitioners in Class B of the Inspectors Grade although at the relevant period they were drawing a salary higher than Class A of the Inspectors Grade. Two applications were filed under Article 126 of the Constitution alleging discrimination and deprivation of promotional prospects and infringement thereby of fundamental rights to equality contrary to Article 12 and Article 4(a) and (d) of the Constitution.

The petitioners contended that the Co-operative movement in Sri Lanka was organised as a part of executive or administrative action and the People's Bank was an agency created by the State to further or promote the Co-operative movement.

Hence the Bank was an organ of Government and/or an administrative agency of the State.

On a preliminary objection that the application was not maintainable as the action of the People's Bank was not executive or administrative action-

**Held**

The jurisdiction of the Supreme Court to grant relief under Article 126 of the Constitution is limited to infringements of fundamental rights by executive or administrative action.

The petitioners' service has no connection with the relationship of the People's Bank and the Co-operative movement and it is not necessary to consider the legal character of this relationship. A public corporation can for certain purposes serve as an agent or surrogate of the State. It all depends on the nature of the relationship.

whether it is performing a governmental function or not. It may happen that certain of its functions may be governmental, whilst the others are not. When a public corporation is performing its non-governmental functions its action does not have the attributes of State action or "executive or administrative action".

It is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is a governmental agency or instrumentality. Consideration of any single factor or the various factors *seriatim* will not suffice but the Court will have to consider the cumulative effect of all the factors to arrive at a decision.

The main role of the People's Bank is that of a commercial Bank. There is no nexus between the State and the banking activities of the People's Bank. The State is not involved in the commercial activities of the Bank. The commercial activities of the Bank cannot qualify as State action.

The petitioners are employed by the Bank in connection with its commercial activities. The employment of the petitioners in the Bank cannot be stamped as State employment. There is no State action involved in the People's Bank re-organising its security services and formulating its own scheme of recruitment to carry on its banking activity. In the circumstances even if there is substance in the allegation of the petitioners that there was discrimination in the matter of their appointment, their grievances cannot form the subject-matter of an application to the Supreme Court for relief under Article 126 of the Constitution where the alleged infringement is not by executive or administrative action.

#### Cases referred to

- (1) *Wijetunga v. Insurance Corporation of Sri Lanka* (1982) 1 S.L.R. 1.
- (2) *Trendtex Trading Corporation v. Central Bank* (1977) 1 All E.R. 881, 894.
- (3) *Pfizer v. Minister of Health* (1963) 3 All E.R. 779, 785.
- (4) *New York v. United States* (1945) 326 U.S. Reports 572.
- (5) *Ramana v. I.A. Authority of India* A.I.R. (1979) S.C. 1628.
- (6) *Jackson v. Metropolitan Edition Co.* (1974) 419 U.S. 365.

APPLICATIONS under Article 126 of the Constitution.

*Nimal Senanayake, S.A., with Faiz Mustapha, Miss S.M. Senaratne, Miss A.B. Dissanayake, Saliya Mathew, L.E. Samarasinghe and Miss Theleopa* for petitioners.

*Dr. J.A.L. Cooray with K. Kanag-Iswaran and M.B. Peramuna* for 1st respondent (S.C. 63/83).

*Mark Fernando* for 1st respondent (S.C. 65/83).

*K.M.M.B. Kulatunga, S.A., Solicitor-General with Sunil de Silva, Deputy Solicitor-General and A. Kasturiarachchi, S.C.* for Attorney-General.

January 24, 1984.

**SHARVANANDA, J.**

The petitioners above named are security officers of the People's Bank, the 1st respondent above named. The duties performed by these officers consist in providing security for cash transport for all bank vehicles when transporting cash and other security during twenty-four hours of the day and in doing such assignment as instructed by the Bank. Under the Bank's reorganisation of security service the petitioners had been placed in the category of Class B inspectors of the security service, though at the relevant time they had been drawing a salary higher than Class A inspectors of the service. They complain that the purpose and result of placing them in Class B inspectors grade is to deprive them of the opportunity of promotion to Superintendent's grade open to the other officers in the Inspectors' grade, who were drawing a lower salary. They state that the action of the People's Bank constitutes an infringement of their fundamental rights to equality and contrary to Article 12 and Article 4(c) & (d) of the Constitution of the Democratic Socialist Republic of Sri Lanka. By their applications they have applied to this Court for relief under Article 126.

The People's Bank has denied the petitioners' allegation of discrimination and has sought to justify their scheme of security service consisting of several gradation of officers. At the commencement of the hearing of the applications which were taken up together, counsel for the People's Bank took the preliminary objection that the applications under Article 126 of the Constitution cannot be maintained as there had been no infringement of petitioners' alleged fundamental rights by "executive or administrative action". This court decided to hear argument on the preliminary objection which went to the root of the inquiry.

The question emerges whether the action of the People's Bank in placing the petitioners in category B Inspectors' Grade of service although they were drawing a salary higher than Class A Inspectors savours of "executive or administrative action". The jurisdiction of the Supreme Court to entertain and grant relief under Article 126 is limited to infringements of fundamental rights by "executive or administrative action" only. If the infringement does not stem from "executive or administrative action" the Supreme Court has no

jurisdiction under Article 126 to entertain or grant the expeditious relief provided by Article 126 to the applicant. If "executive or administrative action" is not the causa causans of any infringement of fundamental rights assured by the Constitution, the remedy will have, as was conceded by all parties, to be pursued by way of an ordinary action in the competent civil court.

In support of his preliminary objection counsel for the respondent relied heavily on the judgement of this court in the case of *Wijetunga v. Insurance Corporation of Sri Lanka* (1) where on a review of all relevant authorities I held that an employee of the Insurance Corporation of Sri Lanka was not entitled to maintain his application under Article 126 of the Constitution for the alleged infringement by the Corporation of his fundamental right of freedom of speech and expression and freedom to join a trade union, guaranteed to him by Articles 14(1)(a) and 14(1)(d) of the Constitution, on the ground that the action of the Corporation did not constitute "executive or administrative action", in respect of which only the jurisdiction vested in the Supreme Court by Article 126 of the Constitution could be invoked by an aggrieved person. In that judgement I have examined fairly exhaustively the connotation and significance of the term "executive or administrative action". Counsel for the petitioners has not urged any convincing argument or contention which persuades me to review the tests framed by me to identify "executive or administrative action". On the other hand re-examination of the problem has confirmed the correctness of the above judgement in S.C. 87/82.

The cardinal question as to whether the People's Bank is properly to be regarded as merely an instrument subservient to the State or in truth, is a commercial bank not identifiable with the State has to be decided by looking into the function and control of the bank. As Lord Denning stated in *Trendtex Trading Corporation v. Central Bank* (2). "I would look to all evidence to see whether the organisation was under government control and exercises governmental functions". Hence whether the People's Bank is to be accorded the status of a department of Government, and an "alter ego" or organ of the Government or not must depend on its Constitution, its powers and duties and its activities.

The People's Bank is a statutory Corporation. It was established as a body corporate having perpetual succession and a common seal and called the People's Bank by Act No.29 of 1961. It provides that the People's Bank may sue and be sued in such name. Section 4 of the Act states that the purpose of the bank " shall be to develop the co-operative movement of Ceylon, rural banking and agricultural credit by furnishing financial and other assistance to co-operative societies, approved societies, Cultivation Committees and other persons " .

Section 5 provides that in carrying out its purposes the Bank may exercise all or any of the following powers :-

"(a) to grant subject to the provisions of sub-section (2).-

- (i) short-term, medium-term and long-term loans and other accommodation to co-operative societies, approved societies and Cultivation Committees ;
- (ii) short-term, medium-term and long-term loans to co-operative societies, approved societies, Cultivation Committees and individuals for constructing, repairing or renovating buildings ;
- (iii) short-term, medium-term and long-term loans and other accommodation to any person who intends to carry on or is carrying on any agricultural, industrial or business undertaking which, in the opinion of the Board of Directors of the Bank, is a small-scale undertaking ; and
- (iv) short-term loans to persons resident in rural areas for the purchase of articles necessary for their personal or domestic requirements ;

(b) to carry on and transact, subject to such modifications and exceptions as may be prescribed, the kinds of business similar to those carried on and transacted by the Bank of Ceylon under the Bank of Ceylon Ordinance ;

(According to section 71 read with the First Schedule of that Ordinance the Bank was authorised to carry on, inter alia, the business of banking).

(c) to carry on the business of a pawnbroker subject to such conditions as may be prescribed ;

- (d) to provide technical assistance to any person to whom the Bank grants any loan or overdraft, and to undertake or sponsor the training of persons in assessing the value of land and the credit worthiness of borrowers, in assaying gold, in banking and in finance ;
- (e) to acquire, hold, take or give or lease or hire, mortgage, pledge and sell or otherwise dispose of any immovable or movable property ;
- (f) to invest the idle funds of the Bank in such securities as the Board of Directors of the Bank may consider appropriate ;
- (g) to employ such officers and servants as may be necessary for carrying out the work of the Bank ;
- (h) to make rules in respect of the conditions of service and disciplinary control of the officers and servants of the Bank ;
- (i) to establish provident funds and pension funds for, and schemes for the benefit of such officers and servants, and to make contributions to such funds and schemes from the funds of the Bank ;
- (j) to borrow funds for the purpose of the business of the Bank and to give security for any loans or overdrafts obtained ;
- (k) to enter into contracts ; and
- (l) to do all such other things as are connected with or incidental to the exercise of the aforesaid powers."

Section 7 provides –

- (1) The general supervision, control of administration of the affairs and business of the Bank shall be vested in the Board of Directors of the Bank ;
- (2) The Board may exercise all or any of the powers of the Bank.

Section 8 of the Act, as amended by Act No. 61/80 provides that the Board shall consist of ten directors appointed by the Minister, two of whom shall be nominated by the Minister in charge of the subject of Co-operatives.

Section 8 as amended by Act No. 25/78 enables the Minister to remove a Director from office without assigning any reason thereof. Section 10 as amended by Act No. 25/78 empowers the Minister to appoint a Chairman of the Board from among the directors and that he could terminate the appointment of the Chairman without assigning any reason.

Section 12 as amended by Act No. 61/80 states that the authorised capital of the bank " shall be 1000 million rupees divided into 20 million shares of Rs.50 each. "

Section 15 mandates the Government to –

(a) grant to the Bank out of the Consolidated Funds of Ceylon–

- (i) a sum of five hundred thousand rupees out of which the preliminary expenses connected with the establishment of the Bank, other than any expenses relating to the construction of buildings, shall be defrayed and any balance of which after such preliminary expenses are defrayed shall be disposed of as provided by subsection (4) of section 22 (viz. by crediting to the Special Reserve of the Bank).
- (ii) two million rupees which shall be disposed of as provided by subsection (2) and subsection (5) of section 22 (viz ; by crediting to the Special Reserve of the Bank).
- (iii) such sum as may be authorised by resolution of the House of Representatives to be granted out of the Consolidated Fund of Ceylon for the entitlement of the bad and doubtful debts in excess of the assets of any co-operative bank which is dissolved under the provisions of this Act ; and

(b) lend to the Bank such sums as may be authorised by resolution passed by the House of Representatives to be lent to the Bank out of the Consolidated Fund of Ceylon for the granting of long-term or medium-term loans by the Bank.

(2) Every sum lent out of the Consolidated Fund of Ceylon to the Bank under paragraph (b) of subsection (i) shall be repaid by the Bank in accordance with such terms and conditions as may be determined by the Minister with the concurrence of the Minister of Finance."

Section 21 provides that the Minister of Finance shall guarantee the repayment of any sum due to the Bank on any loan, overdraft or other accommodation granted by the Bank with the approval of the Minister and the repayment of any sum due on debentures issued, under this Act.

Section 23 provides for the dissolution of the Co-operative Federal Bank of Ceylon Ltd., and for the assets and liabilities of the co-operative Federal Bank Ltd., to be the assets and liabilities of the Bank.

Section 25 says –

- (a) no co-operative society shall, unless exempted in writing by the Commissioner of Co-operative Development, deposit its funds in or maintain any current or deposit account with any commercial bank other than the Bank ;
- (b) No co-operative society shall, except with the written approval of the Commissioner of Co-operative Development, obtain a medium-term or long-term loan from any commercial bank other than the Bank.

Section 32 states that –

- (1) There shall be a General Manager of the Bank who shall be the Bank's chief executive officer and who shall conduct the business of the Bank under the general supervision and control of the Board. . . .

Section 34 states –

- (1) The accounts of the Bank for each financial year shall be submitted to the Auditor-General for audit. . . .

Section 36 vested in the General Manager of the Bank or any accountant or any other officer of the Bank authorised by the General Manager, the power to examine the books and accounts of any co-operative society to which and of any other person to whom a loan has been granted by the Bank.

Section 37 provides for recommendation to the Commissioner of Co-operative Development by the Board for action to be taken to dissolve and liquidate a co-operative society against which the General Manager has reported adversely.



By section 41, as amended by section 57 of the Act No. 18 of 1965 the Bank become liable for payment of income tax.

Section 42(a) which is a new section enacted by the People's Bank (Amendment) Act No. 61/80 provides –

“ the Minister may from time to time give general or special directions in writing to the Board as to the performance of the duties and the exercise of powers of the Bank and it shall be the duty of the Board to comply with such directions ”.

Section 71 of the Finance Act No.11/63 as amended by Law No.16/73 authorises the Bank to acquire in whole or any part any agricultural, residence or business premises, if the Bank was satisfied that these premises were–

- (a) sold in execution of a mortgage decree ;
- (b) transferred by the owner of the premises to any other person in satisfaction of a debt or by way of conditional transfer.

Counsel for the petitioner pointed to the inter-connection of the activities of the Bank and the Co-operative Movement and submitted that the Bank was established principally for the purpose of developing the Co-operative Movement in Sri Lanka and for providing financial assistance to co-operative societies and other institutions and for undertaking performance of the objectives of the Co-operative Federal Bank of Ceylon Ltd. He also contended that the Co-operative Movement in Sri Lanka was from its inception organised as a part of “ executive and administrative ” action in Sri Lanka and that the Bank was an agency to further or promote the co-operative movement in Sri Lanka and that hence the Bank was an organ of Government and/or administrative agency of the State.

A co-operative society is a voluntary organisation of private persons in a group to work on an equal footing for the promotion of their economic interest. It aims at a common end which is of benefit to all members of the society. It works on the principle of mutual help. The intention of the Co-operative Movement is to secure for men of small means the same advantages which a wealthier person buying, selling or borrowing on a bigger scale and with substantial property to support his credit, can enjoy in his independent dealings. Its main object is the promotion of the economic interest

of its members in accordance with co-operative principles. On this view of the Co-operative Movement it is a matter of State policy to encourage the financing of co-operative societies and in implementation of that policy to give State aid by way of financial facilities and funds. In this background it cannot be said that by giving such State aid, the State participates in the activities of the Co-operative Movement or societies and involves itself in the affairs of the society. However laudable the State policy be co-operative societies who are the beneficiaries of such policy do not thereby become departments of State and their action cannot be characterised as State action.

It is however not necessary in the circumstances of this case to go into the question of legal character of the relationship of the People's Bank and the Co-operative Movement in Sri Lanka as the petitioners' service as Security Officers of the Bank has no connections to that relationship.

When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State, only when exercising these powers or performing these functions.

A public corporation can for certain purposes serve as an agent or surrogate of the State. It all depends on the nature of its functions, whether it is performing a governmental function or not. It may happen that certain of its functions may be governmental, whilst the others may not. When a public corporation is performing its non-governmental functions its action does not have the attributes of State action or "executive or administrative action". When the Bank performs its functions of redemption or acquisition of land, under Section 71 of the Finance Act No. 11/63, it may be urged with certain cogency that such action of the Bank constitutes "executive or administrative action". But in this case, the petitioners were not employed in the service of the Bank for the performance of duties connected with the exercise by the Bank of its powers under the said section 71.

It is quite apparent from the material before us that the major role of the 1st respondent is in the commercial sphere and that its main role is that of a commercial bank. Such commercial activities of the Bank cannot qualify as State actions. Having regard to the duties

performed by the petitioners it appears that the petitioners are employed by the Bank in connection with their commercial activities. In that perspective their employment in the Bank cannot be stamped as State employment. There is no nexus between the State and the banking activities of the 1st respondent for such action of the Bank to be treated as that of the State. The State is not involved in the commercial activities of the 1st respondent.

State action comprehends official action of all government officers. The more difficult problem arises when the label is sought to be affixed to conduct of private individuals or groups with whom Government is somehow "involved" or who allegedly exercise government authority. In cases where the State's only significant involvement is through financial support or limited regulation of the private entity it may be well to inquire whether the State has so thoroughly insinuated itself into the operations of the enterprise.

Government which represents the executive authority of the State may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions.

In the early days when the Government had limited traditional functions it could carry out these functions through civil servants consisting of natural persons. But with the concept of welfare State superseding that of a police State it was found that the civil service was not sufficient to handle the new services, which required initiative and expertise for their effective administration. The public corporations were thus conceived to operate the new public enterprises. Parliament thus came to create autonomous corporations. Government was thus able to handle the new problems through the medium of public Corporations which, subject to certain limitations with regard to carrying of Government policy, were free to carry out their functions in their own way. Unlike a department of Government these corporations were not trammelled by the all pervasive control of the Government. The measure of control exercised by the Government over these corporations may vary from corporation to corporation according to exigencies of each case. It is in this background that the question arises as how to determine whether a particular corporation is acting as instrumentality or agency of the Government for its action to be labelled "executive or administrative action".

When a corporation is wholly controlled by Government not only in its policy making but also in execution of its functions it would be an instrumentality or agency of the State. On the other hand where the Directors of the Corporation though appointed by the government with a direction to carry out governmental policies are otherwise free from the fetters of governmental control in the discharge of their functions, the corporation cannot be treated as instrumentality or agency of the State. It is not possible to formulate an all inclusive or exhaustive test to determine whether the corporation can be identified with the government. Mere finding of some control by the State would not be determinative of the question. The existence of deep and pervasive State control may afford an indication that a corporation is a State agency.

Then again when a corporation is endowed by the State with powers or functions governmental in nature it may become an agency or instrumentality of the State when exercising those powers or performing those functions. With the development of the welfare State it has become difficult to define what functions are governmental and what are not. Governmental purposes include the traditional activities of government, for example, defence, foreign affairs, maintenance of law and order and administration of justice. Since Victorian times there has been a vast extension of the powers and purposes of government in all democratic countries. Indeed, it is difficult in modern complex societies readily to discern any activity which could not constitute a purpose or function of government. Wilmer, L.J. pointed out in *Pfizer v. Minister of Health* (3) that since mid-Victorian times there has been a revolution in political thought and " a totally different conception prevails today as to what is and what is not within the functions of Government ". Douglas, J. observed to the same effect in *New York v. United States* (4). "A State's projects is as much a legitimate governmental activity where it is traditional or akin to private enterprise or conducted for profit ". If the functions of the corporations are of public importance and closely related to governmental functions it would be a relevant factor in categorising the corporation as an instrumentality or agency of the Government. The public nature of the functions, if impregnated with governmental character or tied with the government may render the corporation an agency of the government.

It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of the government. Bhagawathi, J. in his very lucid judgement in *Ramana v. I.A. Authority of India* (5), summarised some of those factors "whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State-protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions".

He further observed that this particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relation between the corporation and government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency. Consideration of any single factor may not suffice, a court will have to consider the cumulative effect of these various factors to arrive at its decision. "It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each as being individually insufficient to support a finding of State action. It is the aggregate that is controlling"—per Douglas, J. in *Jackson v. Metropolitan Edition Co.* (6). It is the cumulative effect of all the relevant factors that determines the measure of State responsibility.

Bearing the above considerations in mind, I cannot find any State action involved in the People's Bank reorganising its security services and formulating its own scheme of recruitment to carry on its banking activity. The petitioners are employed in connexion with the commercial activity of the Bank. In the circumstances even if there is substance in their allegation of discrimination in the matter of their appointment, in the absence of executive or administrative

action, their grievance cannot form the subject-matter of an application to this Court for relief under Article 126 of the Constitution. Their application to this Court is misconceived. Accordingly, I uphold the preliminary objection of the 1st respondent and dismiss each of the applications—S.C. No. 63/83 and S.C. No. 65/83 with half costs.

WANASUNDERA, J.—I agree.

COLIN-THOME, J.—I agree.

SOZA, J.—I agree.

RANASINGHE, J.—I agree.

*Preliminary objection upheld and applications dismissed.*

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