ROBERTS AND ANOTHER

v.

RATNAYAKE AND OTHERS

SUPREME COURT.
RANASINGHE, J., TAMBIAH, J. AND L. H. DE ALWIS, J.
S.C. APPLICATION No. 41/85.
OCTOBER 7, 14, 16, 17, 18, 23, 24, 29 AND 30, 1985.
NOVEMBER 4, 5, 6 AND 7, 1985.

Fundamental Rights – Can a violation of rights arising out of contract constitute an infringement of fundamental rights? – Article 12 of the Constitution – Equality – Discrimination.

The second petitioner, the Sri Lankan wife of the 1st petitioner a foreigner, held tenancies of 3 stalls and two bare land leases from the Kandy Municipal Council at the Jathika Pola, Tomlin Park, Kandy where she carried on several businesses including that

of a cafe. The petitioners complain they have been the victims of a relentless and unceasing series of attempts to deprive the 2nd petitioner of her tenancies and destroy her business by improper and illegal acts by the 1st to 3rd respondents acting in collusion, and that the respondents by terminating the 2nd petitioner's contracts of tenancies and leases on the grounds of unauthorised structural alterations and use of stall premises for residence, have violated their fundamental right of equality guaranteed to them under Article 12 of the Constitution.

Held (Tambiah, J. dissenting):

(1) In order to invoke Article 12 of the Constitution on the ground of unequal treatment and discrimination the second petitioner must show that she has been treated differently from other persons similarly circumstanced without any rational basis and that such differential treatment was unjustifiable. The two persons who the petitioners alleged were differently treated cannot be said to have been similarly situate.

(2) In any event Article 12 of the Constitution cannot be availed of by the petitioners as the tenancies had been lawfully terminated for a breach of the agreements. The termination of the contracts of tenancy had not been done under and by virtue of any statutory provision empowering such termination but solely on the basis of a violation of a term in the agreement entered into between the Council and the 2nd petitioner. The rights and obligations of the parties here fall to be determined by the ordinary law of contract and Article 12 cannot be invoked.

Cases referred to:

(1) *Bal Krishan Vaid v. The State of Himachal Pradesh and Others* – A.I.R. 1975 *Himachal Pradesh 10, 34.*

(2) *M/s. Radhakrishna Agarwal and Others v. The State of Bihar and Others* – A.I.R. *1977 S.C. 1496, 1500, 1501, 1502 and 1523.*

(3) *Wijetunge v. Insurance Corporation of Ceylon* – [1982] 1 S.L.R. 1.

(4) *Wijeratne and Another v. People's Bank and Another* – [1984] 1 S.L.R. 1.

(5) *Perera v. University Grants Commission* – S.C. No. 57/80-S.C. Minutes of *4.9.1980; Fundamental Rights Decisions of the Supreme Court Vol. 1., p. 103.*

(6) *D. F. O. South Kheri and Others v. Ram Sanehi Singh* – A.I.R. 1973 S.C. 205.

(7) *K. N. Guruswamy v. State of Mysore* – 1955 1 S.C.R. 305; A.I.R. 1954 S.C. *592.*

(8) *M/s. Shree Krishna Gyanoday Sugar Ltd. and Another v. The State of Bihar and Another* – A.I.R. 1975 Patna 123.

(9) *Ram Chandra Rai v. State of Madhya Pradesh* – A.I.R. 1971 O.C. 128.

(10) *Erusian Equipment and Chemicals Ltd's Case* – A.I.R. 1975 S.C. 266.

(11) *Umakant Saran v. State of Bihar* – A.I.R. 1973 S.C. 964.

(12) *Lekhraj Sathram Das v. N. H. Shah* – A.I.R. 1966 S.C. 334.

(13) *B. K. Sinha v. State of Bihar* – A.I.R. 1974 Patna 230.

(14) *Morarjee v. Union of India–A.I.R. 1966 S.C. 1044.*

(15) *Elmore Perera v. Major Montague Jayawickrema and Others –[1985] 1 S.L.R. 285, 323.*

(16) *State of Orissa v. Dr. (Miss) Binapani Dei–A.I.R. 1967 S.C. 1269.*

(17) *Sitla Prasad v. Saidullah and Others–A.I.R. 1975 Allahabad 344.*

(18) *Union of India v. M/s. Anglo-Afghan Agencies–A.I.R 1968 S.C. 718.*

(19) *C. K. Achutan v. State of Kerala–A.I.R 1959 SC 490.*

APPLICATION for infringement of the Fundamental Right of equality.

R. K. W. Goonesekera with *Wijaya Wickremaratne* and *K. Jayasinghe* for the 1st and 3rd respondents.

Gomin Dayasiri with *Cecil Jayasinghe* and *Mrs. C. Amerasekera* for the 2nd respondent.

Sarath Silva, Deputy Solicitor-General as *amicus curiae*

Petitioners in person.

January 15, 1986.

RANASINGHE, J.

I have had the advantage of reading, in draft, the judgment of my brother, L. H. de Alwis, J., and I agree that the petitioners' application cannot succeed. The facts and circumstances relevant to a consideration of the petitioners' application have been set out at length in the said judgment. I agree with the views expressed in the said judgment upon the several questions which arise for consideration.

As the principal question of law–whether the act which is relied upon as constituting a violation of the Fundamental Right, is in law, controlled by the provisions of Article 12(1) of the Constitution or by only the law of contracts–upon which the application of the 2nd petitioner must, in our opinion, fail, is not only an important question of law, but is also one that does not seem to have arisen for consideration earlier by this Court, I propose to set down briefly my own approach to this question.

It has been contended that the 2nd petitioner's application must, in any event, fail for the reason that the violation complained of is, if at all, of rights arising out of contract, and does not constitute an

infringement of the Fundamental Right claimed by the 2nd petitioner; that the State and its agencies, when they act in the contractual field, do not come within, and cannot be controlled by the provisions of Article 12 of the Constitution; that once such an agency enters, in accordance with the law, into a contract with a citizen, such agency does not exercise any special statutory powers and is not subject to any special obligations other than those set out in the agreement so entered into, and is placed in the same footing as any ordinary party to a contract; that the infringement, if any, upon which the claim is founded in this case, is not a violation by the respondents of any statutory duty or obligation cast upon them by the "law" of the land.

This objection which was first formulated by learned Deputy Solicitor-General, who appeared as amicus curiae, was also supported by learned counsel appearing for the respondents. Reliance for this contention was placed heavily upon two Indian authorities, one a decision of the Himachal Pradesh High Court; the other of the Supreme Court of India: *Bal Krishan Vaid v. The State of Himachal Pradesh and Others* (1), *M/s. Radhakrishna Agarwal and Others v. The State of Bihar and Others* (2).

The facts and circumstances in the case decided by the Himachal Pradesh High Court were: In February 1974 the Himachal Pradesh Government auctioned the reaches of the bed of the river Siul to private contractors for the supply of sand, stone and bajri required for the construction of a project undertaken by the Central Government; the petitioner was one of the successful bidders; and, on 15.3.74, a deed of agreement for a period of one year, in form "K", was executed between the petitioner and the Himachal Pradesh Government; the petitioner thereupon entered into possession of his reach of the river bed; disputes soon arose between the petitioner and the Project in regard to the payment to be made for the material supplied by the petitioner, who contended that he too should be paid at the same rate as the other contractors were paid by the Project for such material; in June 1974, the petitioner received a notice purporting to be under clause 30 of the aforesaid agreement, intimating the intention of the Government to terminate the contract upon the expiration of a period of 30 days from the date of such notice; the relevant part of the said clause 30 provided that a contract may be terminated by the Government if it considered that it is in the "public interest" to so terminate it, by giving one month's notice; neither the Mines and Minerals (Regulation and Development) Act 1957, which provided for

the grant of prospecting licences and mining leases, nor the Himachal Pradesh Minor Minerals (Concession) Revised Rules of 1971, which had been framed in pursuance of the rule making power granted by sec. 15(1) of the Act, contained any specific provision empowering the Government to terminate a contract in the "public interest"; such a provision was contained only in the aforesaid agreement which had been entered into in form "K", a form which was prescribed by rule 33 of the aforesaid Rules; the petitioner then came before the High Court praying for a writ to quash the order made by the Himachal Pradesh Government terminating the aforesaid contract entered into by the Government with the petitioner.

Several preliminary objections were raised by the respondents. The two objections which are of direct relevance to those arising before this Court in this case are; that the remedy by way of writ is not in any event available in respect of the alleged breach, for the reason that what was claimed as the authority for the termination was only a right founded in contract and not a power issuing from a statute; that the claim of discrimination in that similar contracts held by other contractors in respect of contiguous reaches of the same river bed have not been terminated–made under the provisions of Article 14 of the Constitution (which corresponds to Article 12 of our Constitution) against the Government must also fail for the reason that the petitioner's claim arises out of a breach of contract.

In dealing with the first of the aforementioned two objections the High Court formulated the question to be considered as being; whether the term or condition upon which the grievance is founded have legal force because it is a provision of the statute or only because it is a clause of the contract? Having considered several relevant decisions of the Indian Courts, the High Court upheld the objection in this way:

> "In the case before us, the grievance is that there is a violation of clause 30 of the agreement inasmuch as the termination of the petitioner's contract had not been effected in the public interest. The provisions for such termination is to be found only in the agreement. It is not a provision of the Act or Rules. It is urged by the petitioner that when Rule 33 refers to the agreement being in form "K" it thereby makes all the provisions of the agreement a part of the Rules. It seems to me that the mere reference to form "K" in Rule 33, does not clothe the provisions of form "K" with statutory

operation. The provisions in the agreement become operative when the parties subscribe their signatures to the agreement: Rule 33 does not bring them into operation. To be more specific, the Rules do not mention that the contract can be terminated by the Government in the public interest. Authority for the termination of a contract on that ground is to be found in the contract alone. It is a right founded in contract, it is not a power issuing from the statute..... the petitioner's complaint arises out of an alleged breach of contract and as no writ can issue in respect of it, we must decline to enter into that complaint."

The second objection too was disposed of in favour of the respondents as follows:

"Finally, we are left with the contention that the petitioner has been the victim of discrimination inasmuch as no such action has been taken in respect of the contracts of Vinood Kumar Sud and Umesh Kumar covering the two contiguous reaches. To my mind, this contention must also fail on the finding that the complaint of the petitioner arises out of a breach of contract. The petitioner's case in regard to discrimination is based on Article 14 of the Constitution. To invoke Article 14, it must be shown that the State has acted in the context of law. When the Government is party to a contract, and it exercises a right by virtue of such contract, it is a matter falling within the sphere of contract. If the Government, having entered into contracts with different persons, arbitrarily terminates the contracts of one person only its action must necessarily be referred to its contractual capacity from which the contract and the impugned action flows. Had the discrimination been applied in the course of granting a contract..... the discriminatory action of the Government would be referable to its statutory authority, because the statute empowers the Government to enter into such contracts. But once the contract has been concluded between the Government and an individual any action taken by the Government in the application of a term or condition of the contract must be attributed to the capacity of the Government as a contracting party When the Government passes from the stage of granting a contract to the stage of exercising rights under it, it passes from the domain of statutory power into the realm of contract..... In my opinion Article 14 of the Constitution cannot be invoked by the petitioner."

In the second of the two authorities referred to above, viz. *Agrawal's case (supra)*, the petitioners moved the High Court of Patna for writs to quash ordrs made by the Patna. State Government – revising in 1974 the rate of royalty payable by the petitioners under a lease of 1970, and thereafter cancelling the lease by a letter dated 15.3.1975 – on the basis that the revision, during the pendency of the lease to collect and exploit sal seeds from a forest area, of the royalty payable by the petitioners was illegal. It was contended on behalf of the petitioners that their applications raised constitutional questions relating to the exercise of executive powers of the State Government, and that the State, acting in its executive capacity through its Government or its officers, even in the contractual field cannot escape the obligations imposed upon it by Part III of the Constitution, and in particular Article 14 (corresponding to Article 12(1) of our Constitution) which guarantees both equality before, and equal protection of the laws. The submission made on behalf of the State Government, on the other hand, was; that, once the State enters into contracts with citizens, the State neither enjoys special benefits and privileges nor is subject to special burdens and disadvantages, and both the State and the citizen are equally subjected to the law of contract; the government authorities acting in the field of contract cannot be controlled by Article 14; that, once the State enters into the contractual sphere after the requirements of form contained in the Constitution have been complied with, the State takes its place, in the eye of the law, side by side with ordinary parties and litigants and should be placed on the same footing as an ordinary litigant; and that the powers of the High Court, under Article 226, cannot be invoked whenever there is a dispute as to whether the contract has been breached or not.

In dealing with the argument advanced on behalf of the petitioners the Court observed; that the contention that the State Government had some special obligation attached to it would have seemed more plausible if it could be shown that the State or its agents had practised some discrimination against the petitioners at the very threshold or at the time of entry into the field of contract so as to exclude them from consideration when compared with others on any unreasonable or unsustainable ground struck by Article 14 of the Constitution; that at that stage the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in its exercise of its

constitutional powers; that, after the State or its agents have entered into the field of ordinary contract, the relations, however, are no longer governed by the constitutinoal provisions but by the legally valid contract which determines rights and obligations of the parties inter se; that no question arises of violation of Article 14 or of any other constitutional provision when the State or its agents purporting to act within this field perform any act; that, in the sphere of contract, they can claim only rights conferred upon them by contract, unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract. Having expressed itself thus, the Court then concluded that, in the case under consideration, the contract does not contain any statutory terms or obligations, and that no statutory power or obligation, which could attract the application on Article 14 of the Constitution, is involved in that case; and that, therefore, the case was not such in which powers under Article 226 of the Constitution could be invoked. The Court also considered the contention – that even when a State or its agents or officers deal with a citizen whilst acting in the exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of 'certain legal and public duties' – not to be a sound proposition at all.

The decision in *Himachal Pradesh High Court*, referred to above, which had been delivered 1974, does not seem to have been cited in *Agarwal's case (supra)* . Even so, in both cases the approach to the question under consideration has been similar; and the reasoning has also been strikingly similar.

All persons are, in terms of Article 12(1) of the Constitution, equal before the "law", and are also entitled to the equal protection of the "law". Article 170 defines "law" to mean "any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution", and to include also "an Order in Council". The extended meaning given to the term "law" in sub Article (1) and (7) of Article 15 does not apply to the word "law" contained in sub-Article 12, which would have only the meaning given to it by Article 170. The "law" the equality before which and the equal protection of which is guaranteed by the Constitution to the citizens of the Republic, can and must therefore, be only a statutory provision contained either in an Act of Parliament, or in any legal enactment passed by any legislature prior to the promulgation of the Constitution.

It also includes an Order-in-Council brought into operation before the commencement of the Constitution. A by-law made in pursuance of a statutory provision and which, upon notification in the Gazette of its confirmation by Parliament, becomes as valid and effectual as if it were enacted in the main enactment will also be a provision contained in an enactment passed by the supreme legislature of this Island. Any act done, therefore, in pursuance of a term or condition, set out in a contract entered into between a citizen and the State, would not, ordinarily, come within the term "law" so set out in the said Article; and a breach or violation of any such term or condition would not attract to it the provisions of Article 12(1). An act, done in pursuance of a term or condition contained in such a contract and which said act is said to be a violation, could found a complaint of an infringement of the right embodied in Article 12(1) only where such term or condition has a statutory origin, or has, at least, what has been referred to in another connection, a "statutory flavour". It is only where the State has acted in the context, and in the sphere of "law", as defined in Article 170, that any invocation of Article 12(1) could be entertained.

On a consideration of the principles set out in the judgments referred to above, and the provisions of both Articles 12(1) and 170 of the Constitution, the principles that govern the question, which calls for determination, are, in my opinion; that the "law", equality before which and the equal protection of which is guaranteed by Article 12(1) of the Constitution, constitutes only those statutory provisions contained in Acts of Parliament, and in any enactment passed by any Legislature of this Island at any time before the Constitution was promulgated in September 1978, including all Orders-in-Council promulgated before the Constitution came into operation, and also those by-laws which, as set out earlier, are also as valid and effectual as if enacted in the main statute; that, where the State enters into a contract with a citizen in pursuance of any statutory power, the State, or such State agency is, at the "threshold stage", or the stage at which such contract is being entered into, bound by the operation of the provisions of Article 12(1) of the Constitution: that, once such an agreement is validly entered into, all parties to such agreement – the State, the State agency, and the citizen – are all ordinarily bound only by the terms and conditions set out in such agreement; that, if, however, there exists a statutory provision which, whether included, expressly or impliedly, as a term or condition of such agreement or not, confers some special powers even in the field of contract, then

such provision affects the rights and obligations of the parties under such agreement; that, if the term or condition, which creates rights or obligations of the parties under the agreement, has legal force only because it is incorporated in such agreement, then any violation even by the State amounts only to a breach of contract, even where such term or condition has been incorporated because a statutory provision requires it to be so incorporated; that where the rights and obligations of parties to such agreement have to be determined according to the ordinary law of contract, then even the State has to be treated in the same way as any other ordinary party to a legally binding contract; that where the rights and obligations of the parties to such contract fall to be determined by the ordinary law of contract, then the provisions of Article 12(1) of the Constitution have no application, and cannot be invoked.

The act of the respondents, which is being impugned by the petitioners as constituting a violation of the Fundamental Right of the 2nd petitioner set out in Article 12(1) is the termination of the agreement P106, P110 and P114, dated 8.7.83 entered into between the 2nd petitioner and the 1st and 3rd respondents on behalf of the Municipal Council of Kandy, by the notice, P426, dated 12.3.85. No complaint of any violation of any Fundamental Right at the "threshold stage" – viz: at or before the entering into of the said Agreement P106 – has been made.

Part IV of the Agreement P106 states that the tenant (the 2nd petitioner) specifically agrees "that the Council shall, for any breach of any of the terms and conditions here contained apart from other rights hereinbefore contained have the right to terminate the tenancy by giving a month's notice and take action for ejectment and expulsion of the tenant as provided by the Municipal Councils Ordinance or any other law". "Other rights" conferred upon the Council by the preceding provisions of P106, in regard to any breach of any of the terms and conditions contained in P106, by the tenant (the 2nd petitioner) are to be found in paragraph (2) of Part III of P106 which provides that; in the event of the tenant falling into arrears of rent, or of any breach, non-observance, non-performance by the tenant of the terms, conditions, stipulations and conditions contained in the said agreement, the tenancy shall cease as if it had expired by effluxion of time and it shall be lawful for the Council to re-enter the said premises and remove the tenant therefrom as provided by the Municipal Councils Ordinance.

Sec. 155 of the Municipal Council Ordinance empowers a Municipal Council to provide public markets within the Municipality, and to charge rents for the use of shops and stalls within such markets. A Municipal Council is given the power by sec. 157 to let to tenants on lease or otherwise any public market or any part of such market. Power is also conferred upon a Municipal Council, by the provisions of sec. 156 (*c*) to determine any lease or tenure, which a person, who is convicted of a breach of a by-law made under the Municipal Council, has in a stall or shop within such public market. The only express provision, under which a Municipal Council could terminate the tenancy of a stall holder in a public market, is to be found in sub-section (*c*) of sec. 156. Termination under this provision, however, is limited to leases or tenures of such persons as come within sub-sec.(*a*) of the selfsame section 156. The provision of the said sub-sec. (*c*) of sec. 156 will apply to all contracts of tenancy entered into by a Municipal Council in respect of a stall in a public market situate within the Municipality, whether or not such provisions are included in any such contract. A conviction, as set out in sub-sec. (1) of sec. 156, is a condition precedent to the taking of the step provided for by sub-sec. (*c*) of the said section. In the absence of a conviction, as is required by the said sub-section (*a*), and the resultant non-availability of the provisions of the sub-section (*c*), there is no other provision in the Municipal Councils Ordinance, itself under and by virtue of which a Municipal Council could terminate the tenancy of a person who has been let into occupation of a stall in such market.

Sec. 268 of the Municipal Councils Ordinance empowers a Municipal Council to make by-laws, and sets out the procedure to be followed in that behalf. It is only a by-law made in the manner set out in sub-sec.(1) of the said section, which will, upon notification in the Gazette of its confirmation by Parliament, become as valid and effectual as if it were enacted in the Municipal Councils Ordinance itself.

The petitioners contend that the by-laws of the Kandy Municipal Council, which were in force at the times material to these proceedings, are those set out in the document P429. According to P429 the by-laws contained therein were approved by the relevant committee of the Kandy Municipal Council in March 1982. The respondents, however, submit that the by-laws set out in P429, though proposed by the Council have not come into operation as they

have neither been approved by the Minister, nor confirmed by Parliament. There is no express evidence before this Court that the confirmation of the by-laws contained in P429 has been, as required by sub-sec. (2) of sec. 268 of the Municipal Councils Ordinance, notified in the Gazette. There is also no such evidence of their having even been confirmed by Parliament as required by sub-sec.(1) of the said sec. 268. Nor has the attention of this Court been drawn to any such Gazette notification of which judicial notice could be taken. The respondents maintain that the relevant by-laws are those dated 21.06.1974, and published in Part IV of the Gazette dated 19 07.1974, copies of which were tendered to Court at the hearing of this application on behalf of the respondents. In this state of the evidence on this matter, I agree that this Court will have to proceed on the basis that the by-laws of the Kandy Municipal Council, which were valid and in operation both in July 1983, when the agreements, P106, P110 and P114, were entered into, and in March 1985, when the notice P426 was sent to the 2nd Petitioner, were the by-laws, dated 19.06.1974 and published in the Gazette dated 19.07.1974.

The notice of termination, P426, sets out two acts of the petitioners which are said to constitute violations of the tenancy agreements: the effecting of structural alterations to the stall buildings, and the use and occupation of the said stall buildings as "residential premises". The "making of any alterations..... structurally or otherwise" without the prior approval of the 3rd respondent is forbidden by clause 12 of the tenancy agreements. In the by-laws of 1974 such unauthorised alterations are prohibited only by by-law No 40. This by-law, however applies only to the Kandy Central Market. It does not apply to the other public markets established by the Kandy Municipal Council. Thus the only provision, under and by virtue of which a monthly tenancy, such as P106, could be terminated by the Municipal Council on the ground that the tenant has made unauthorised alterations to a stall let out to the tenant, is Part IV of the agreement entered into between them.

The facts and circumstances relating to the nature and the making of the structural alterations by the petitioners have been set out in the judgement of L. H. de Alwis, J.

In this view of the matter, I am of opinion: that the termination of the said contracts of tenancy, on the ground of unauthorized structural alterations made in contravention of clause 12 of such tenancy agreements, has been done not under and by virtue of any statutory

provision empowering a termination upon such ground; that such termination has been done solely on the basis of a violation of a term of the agreement entered into between the Council and the 2nd Petitioner; that, therefore, the said act of termination, upon the said ground, is in no way controlled by the provisions of Article 12(1) of the Constitution; that the said act is in no way "hit" by the provisions of the said Article 12(1).

The foregoing conclusion is, in my opinion, sufficient to dispose of the application of the 2nd petitioner.

After this judgment was prepared, my brother Tambiah, J., made available to me that portion of his judgment dealing with the question of law considered by me. I, however, regret I am unable to agree with his view of the matter.

TAMBIAH, J.

The petitioners are husband and wife. He is a citizen of the United States of America; she is a citizen of this country. They say that in 1980, when they were in America, they came across a publication distributed in the USA by the Sri Lanka Government which described the many incentives and inducements the Sri Lankan Government offered to attract American citizens to invest here. They had been saving dollars in order to invest in a small business in the States. After reading the publication they began considering investing their savings in Sri Lanka. They also had talks with the Commercial Attache of the Sri Lankan Embassy in Washington. In 1981, they came to Sri Lanka and spent three weeks evaluating investment opportunities. They returned to the States, not having reached a decision. They were sent further publications by the Sri Lankan Embassy, had further discussions with the Commerical Attache, and taking into account the fact that the 2nd petitioner, as citizen, could own property here and do business in her own name plus the incentives, tax holidays etc. offered under the programme of the Foreign Investment Advisory Committee (FIAC) for joint ventures, they decided to come back to this country. They returned to Sri Lanka in 1983. As the 2nd petitioner's father is a retired planter in Kandy and having regard to the scenic beauty and the cooler climate of Kandy, they decided to base themselves in Kandy. An export orientated project to process Sri Lankan potatoes into packeted western-style potato crisps, in which he is the foreign collaborator and his wife the local collaborator, is a FIAC approved

project. The formation of the Company was being handled by Ernst & Whinney, Chartered Accountants, Kandy, and they hoped to commence production in November 1984.

The petitioners saw an advertisement in the newspaper placed by the Kandy Municipal Council offering commercial premises on tender, at the Jathika Pola, Tomlin Park, Victotia Drive, Kandy. The advertisement stated that the premises could be used for any trade, except selling beef or fish. They inspected the premises, and according to them, the shops in the Jathika Pola were closed down, virtually deserted and in a rather dirty and run down condition. The only attractions were, it is alongside the Kandy Lake, in a quiet location away from the Kandy town and had ample space for parking vehicles. They thought that with renovations and improvements, the premises could be improved and made usable in many ways.

They decided to tender. As the conditions of tender stipulated that only Sri Lankan citizens could tender, the 2nd petitioner tendered for stalls 16, 17 and 18 on 22.6.1983. Her tenders were accepted, she being the highest bidder. She entered into 3 separate agreements with the Municipal Council, Kandy.

In terms of the agreements, the 2nd petitioner rented all three stalls on a monthly tenancy for a period until the stalls are voluntarily handed over or the tenant is legally ejected. The tenancies were to commence from 01.7.1983. The terms and conditions of the tenancies are, inter alia –

(1) the tenant had to pay a monthly rental, a once and for all payment in twelve monthly instalments and a deposit against arrears of rent, loss and damage that may be caused to the premises by the tenant,

(2) the tenant shall not make any alterations whether structurally or otherwise without the prior written approval of the Commissioner,

(3) the tenant shall not permit any person, other than the servants registered by the Council, to remain in or occupy the stall, except with the prior written sanction of the Commissioner,

(4) the tenant shall not assign or sub-let or part with possession of the stall,

(5) the tenant shall not contravene any of the by-laws of the Council relating to Public Markets,

(6) the tenant and his employees shall remain in the stall only during the hours 6.00 a.m. to 9.00 p.m.,

(7) the Council shall have the right to terminate the tenancy by giving a month's notice and take action for ejectment of the tenant as provided by the Municipal Councils Ordinance or any other law.

The 2nd petitioner took the tenancy of stall No. 16 to run a Honda Rent-A-Cycle Agency on a monthly rental of Rs. 150, paid Rs. 26,150 as once and for all payment together with interest at 20% and Rs. 7686.25 as deposit. Stall No. 17 was taken by her to run a Cafe on a monthly rental of Rs. 150, and she paid Rs. 31,150 as once and for all payment and Rs. 11,811.25 as deposit. Stall No. 18 was taken by her to run a Tours & Travels Agency on a monthly rental of Rs. 150, and she paid Rs. 41,150 as once and for all payment and Rs. 9,061.25 as deposit. She went into occupation of the three stalls on 15.7.83. The petitioners say that they had invested Rs. 350,000 of their savings into their businesses. At the time the 2nd petitioner took possession, she made some renovations and this, she says, she made on the verbal understanding that interior renovations and redecorations that did not involve exterior walls or parts of the main building were permitted at her discretion. She put ceilings, panelling etc., and also constructed two doorways on the inner walls to enable her and her staff to move from one stall to another. The three stalls were adjoining and each had only front doors.

On 18.7.83, the 2nd petitioner wrote to the Municipal Commissioner, the 3rd respondent, seeking permission to use two concrete slab areas in front of stall No. 17, 20 feet in extent, on a monthly rental of Rs. 100. She was prepared to pay an year's advance. Her idea was to place some tables and chairs for use of customers and to beautify the area around the slabs with flower plants. The 3rd respondent was agreeable, provided she paid Rs. 250 monthly per site and erected no structures. She agreed to the terms. Later, the Municipal Veterinary Surgeon, the 2nd respondent, acting for the 3rd respondent, wrote to her granting permission to erect structures with an understanding that she would demolish and remove the structures without any compensation, when so directed by the Council. She, accordingly, constructed a light weight roof over the concrete slabs and has been paying rent at Rs. 500 per month for use

of the two slabs. This was an additional source of income to the Council. The petitioners say they put in additional concrete and that they transformed these areas into a beautiful garden overlooking the Kandy Lake by putting several thousand rupees worth of potted plants and flowers. Learned attorney for the 1st and 3rd respondents concedes that the legal relation between the 2nd petitioner and the Council was that of landlord and tenant and that a monthly tenancy was established in regard to the two slabs. From July 1983 to July 1984 the 2nd petitoner operated her businesses peacefully and without experiencing any problems from the Council.

On 10th July, 1984, the petitioners wrote to the 1st respondent, the Mayor, whether they could exchange stall No. 17 with a vacant stall, No. 1, next to one of the slabs. A copy of this letter was sent to the Commissioner. The 1st respondent denies having received this letter, though he admits having received several other letters written by the petitioners. They wrote again on 14th August, 1984, to the 1st respondent referring to their earlier letter of 10th July and stated, inter alia, that they "were surprised to learn that a new tenant at Jathika Pola had secured temporary use of stall No. 1 during the Perahera by payment of only Rs. 100", that "he had tendered for a different stall than the one he is occupying, then proceeded to illegally occupy a stall belonging to the Oils & Fats Corporation". The letter ended "since our recent request to exchange stalls was denied, we must ask that these policies be applied in an equal and fair manner; all we ask is fair and equal treatment".

The tenant referred to is one Laxman Pethiyagoda. His tenders for stalls Nos. 5 and 13 were accepted. He entered into similar agreements as the 2nd petitioner. The agreements contained identical terms and conditions, except that the quantum of monthly rental, once and for all payment and deposit were different. His two tenancies commenced on 1st July, 1984, and he too commenced a restaurant business.

The Oils & Fats Corporation was the tenant of stall No. 4 and its tenancy commenced on 1st July, 1979. Its agreement with the Council contained identical terms and conditions. It had only to pay a monthly rental and a deposit.

According to the petitioners, in early August, 1984, Pethiyagoda told the 2nd petitioner that as the Mayor had rented him stall No. 1, he had the right to use one of the bare land tenancies since it adjoined

stall No. 1 and when she had replied that she had a valid tenancy for over a year, he replied that he would have this area, if he wanted. About mid-August, the petitioners were told by their employees that Mrs. Pethiyagoda had told them that she and her husband were well connected at the Municipality and would have the tenancy taken away and given to them. They had also learnt from the Municipal Accountant and from the Commissioner that the Mayor was going to take away the left front slab area and give it to Pethiyagoda. Their attempts to meet the 1st respondent at his office, were without success, so they went to his house on the evening of 18th September 1984. They confronted the 1st respondent with what they had heard from the Accountant and the Commissioner and the 1st respondent said that he had already issued the orders and there was nothing further to discuss.

The 1st petitioner, then, wrote the letter of 19th September, 1984, to the 1st respondent. The letter opens "Last night, after visiting you at your home, my wife was in tears. We are absolutely distressed by the total lack of fairness or justice in your recent dealings with complaints my wife has made about irregularity at Jathika Pola". It reiterated what Mrs. Pethiyagoda told the 2nd petitioner and her employees and that Pethiyagoda was in illegal occupation of a shop for which he had not tendered. The letter proceeded to state that they were shocked to learn that Mr. and Mrs. Pethiyagoda were his close relatives and in the past few weeks had enjoyed his hospitality and that he had issued an order to terminate one of the 2nd petititioner's two bare land tenancies; that though the Commissioner informed them that this order had not yet gone through official channels, the Accountant has been aware of this for over a month. The letter alleged that at the New Cultural Centre, Kandy, he had given the restaurant to be run by a close friend of his, without calling for tenders. An answer was demanded whether Pethiyagoda in fact had paid Rs. 110,000 which he tendered for his tenancies and whether he executed agreements. The letter ended "I am not afraid to speak out. Sri Lanka is a democracy, and a free country, and you are an elected public servant. You are in a position of public trust, and you should be accountable for your actions". In their petition filed in this Court, Pethiyagoda has been described as a "cousin" of the 1st respondent. Copies of this letter of 19th September, were sent to the President, the Prime Minister and all Councillors.

The 1st respondent does not deny the visit on 18th September, nor the receipt of letter dated 19th September. To this letter, no reply was sent. In this affidavit filed in this Court, the 1st respondent denied that Pethiyagoda was his "cousin" and that he even knew him before 1984. He also denied the allegation of nepotism, favouritism, maladministration etc.

According to the 1st respondent, in August 1984, complaints were made by the petitioners that Pethiyagoda was illegally carrying on business in stall No. 4; Pethiyagoda also made complaints against the petitioners. The 2nd respondent was appointed to inquire into the complaints. He has produced the complaint dated 11.9.84 to the 1st respondent by Pethiyagoda where the latter has listed nine complaints against the petitioners and the 7th complaint reads "Robert is engaged in a laundry cleaning business where the washed dirty water from the washing machines flows into the side of the front street in Sangaraja Mawatha and then to the Lake. The result of this has polluted the atmosphere with obnoxious smells, existence of harmful bacteria and dead fish in the Lake".

The 2nd petitioner's complaint dated 15.09.84 to the 1st respondent lists several grievances. The primary complaint is against a British tourist who was residing with the Pethiyagodas and had been responsible for an offensive letter published in the 'Observer' which had permanently damaged the petitioners' reputation. They were considering withdrawing from any further investment in Kandy and if they did so decide, whether the Council would permit them to sell their businesses at Jathika Pola so that they could recover their investments. The complaint stated, inter alia, that this British tourist, along with the Pethiyagodas, has been illegally occupying a stall at the Pola. It also referred to a thorough search of the shops in early September by the inspectors from the Municipality on a false allegation that they were selling beer in the premises.

A written request by the 2nd petitioner to have her husband and her lawyer present at the inquiry was turned down by the 2nd respondent. The inquiry was held on 25.09.84. The report dated 16.10.84, containing the findings of the 2nd respondent has been produced. It states–

"Arising from this inquiry certain irregularities committed by both parties have been brought to light. Mrs. Robert has converted stall No. 17 into a laundry without permission of Council. Mr. L. Pethiyagoda was given lease of stall Nos. 5 & 13. Without any

authority he has changed his stall No. 13 with stall No. 4 with the consent of the Manager of the Oils & Fats Corporation. Neither party has obtained any approval for this transfer."

He recommended the following actions:

(1) action to be taken against the 2nd petitioner for converting stall No. 17 into a laundry in addition to a cafe. The views of the Council lawyer to be taken to cancel her licence for violating the lease agreement,

(2) action to be taken against Mr. Pethiyagoda for changing stall No. 13 to stall No. 4 witout the sanction of the Council. The views of the Council lawyer to be obtained to cancel the lease for violating the lease agreement,

(3) action to be taken against the Manager of the Oils & Fats Corporation for changing their stall without the sanction of the Council,

(4) withdraw all concessions given to the 2nd petitioner as regards occupation of space at the entrance to the Pola. All temporary structures to be demolished and the two areas to remain as open space.

At the inquiry, before the 2nd respondent, the 2nd petitioner made a statement which was recorded. She says she signed her statement. The 2nd respondent had promised on 25.9.84 to post to her a copy of the statement she made. As she needed this for the purpose of an inquiry to be held by the Ministry of Local Government, she telephoned the 2nd respondent on 18.12.84 and asked for a copy of her statement, which he promised to give the next day. She was surprised as her statement had been typed by a stenographer on 25.9.84 and the Council had a photocopy machine. On 19.12.84, she sent an employee and collected a copy of her statement from the 2nd respondent's office. Pinned behind the copy that the 2nd respondent has signed as being a true copy of her statement, was a second different version of the statement, with parts cut off for retyping. She says that some things had been added to the final version and it has been completely edited and falsified.

Both versions contain the statements:

"She was continuously harassing us indicating that she will some day ruin our establishment and that she would have my concrete slab near stall No. 1 next month. I tried to meet the Mayor at the office, but he was in a hurry so that night we went to see the Mayor at his house and discussed the problem".

What is found in the 2nd statement and has been scored off and omitted in the 1st statement are the words "and he was going to take the slab and might". It is the 2nd petitioner's position that the words "he was going to take away the slab and give it to his cousin" have been omitted in the final version.

The 2nd respondent admits the request made on 18.12.84 for a copy of statement, but denies he altered her statement. He also denies that the 2nd petitioner signed her statement. The errors in the uncorrected copy, he states, occurred due to the faulty English of the typist which he corrected.

The 2nd petitioner also states that the findings of the 2nd respondent had not been made known to her up to the time of her petitioning this Court. On 11.01.1985, the Assistant Commissioner of Local Government in the presence of the petitioners requested from the 2nd respondent the file relating to the inquiry and the latter's reply was that it was at his home and he would bring same, after lunch. No such file was brought in the afternoon and it is the petitioner's position that the 2nd respondent made the remark "If this donkey (1st petitioner) talks too much, I will hit him". The 2nd respondent has denied these assertions relating to the file and the alleged remark.

It is unnecessary to come to a finding on either of these matters Suffice it is to say this. The 2nd respondent recommended drastic action be taken against the 2nd petitioner for running an unauthorised laundry and dry-cleaning service. There is not a word in either of the statements about this service. A finding has been arrived at, without a single question being put to her about the alleged transgression. The allegation by Pethiyagoda was that the dirty water from the washing machines was polluting the atmosphere and the waters of the Kandy Lake. She also had a legal tenancy for the two slabs, erected an authorised structure and has been paying Rs. 500 since July 1983. Why the recommendation to withdraw this tenancy and to demolish the structure?

The 3rd respondent states that following the report of the 2nd respondent, show cause letters were sent to the 2nd petitioner, Pethiyagoda and the Corporation. The letter dated 19.11.84 to the 2nd petitioner alleged that she had converted stall No. 17 to a laundry without the Council's permission and in violation of the tenancy agreement and required her to show cause within one week as to why her tenancy should not be terminated. A similar letter was sent to Pethiyagoda alleging that he had exchanged stall No. 13 with stall No. 4 without the Council's permission and in violation of the agreement.

The 2nd petitioner wrote to the 3rd respondent on 20.11.84 and requested 30 days to enable her to retain lawyers to reply to the show cause letter. The 3rd respondent, in his reply dated 27.11.84, granted her 14 days from 27/11 to answer the said letter. Thereafter there was correspondence between Messrs Julius & Creasy, attorneys-at-law, acting for the 2nd petitioner and the 3rd respondent, on this matter.

In reply to the show cause notice, Pethiyagoda, on 1.1.85 wrote to the 3rd respondent admitting his fault of exchanging stalls without Council's approval, and stated he was unaware of the by-laws and asked for pardon.

It would appear that no further action was taken on the show cause letters against either Pethiyagoda or the 2nd petitioner; against the latter for the reason that the Council had been collecting licence fees from her for running the business of a laundry.

It is the 1st respondent's position that the Council appointed a Special Committee to further inquire into this matter with special regard to the allegations made against him by the 2nd petitioner. The Committee sat on six occasions–4.1.85, 16.1.85, 21.1.85, 11.2.85, 18.2.85 and on 22.2.85. Both Pethiyagoda and the officer-in-charge of stall No. 4 (Oils & Fats Corporation) appeared before the Committee, admitted the exchange of stalls in violation of their agreements, and agreed to revert back to their original stalls. Subsequent to this assurance, a joint letter was sent by them to the Chairman of the Committee requesting permission to remain in their exchanged stalls. In its report dated 27.2.85, the Committee turned down this request as it "violated the terms of the tenancy agreements, and if permitted, it would create a bad precedent, in that, the other stall holders too would resort to similar methods of circumventing

municipal laws". The report recommended that the two stall holders be asked to revert back to their original stalls immediately and thereafter action be taken for contravening the provisions of the agreement.

Before the Committee, the 2nd petitioner stated that she would only appear, if her husband was permitted to be present. This request was refused. The 2nd petitioner, then, left the Committee of Inquiry, did not give evidence and the inquiry against her proceeded in her absence.

As against the 2nd petitioner, the Committee observed that the collection of licence fees did not absolve her from fulfilling the provisions of the agreement and the by-laws. As she had run a laundry without Council's authority, the report recommended that steps be taken to enforce the law immediately. The Committee also recommended that as she had erected an unauthorised structure in the open space, when the condition on which this open space was allotted to her was that no structure was to be put up in the open space, action be taken immediately to demolish this unauthorised structure. This recommendation is clearly wrong as in fact permission was granted to her to do so.

On the last day of sitting, namely, on 22.2.85, the Superintendent of Works (Secretary to the Planning Committee) who was summoned to give evidence with regard to the unauthorised structure, stated that he visited the Jathika Pola that morning and had observed the two doorways. The Committee observed that this was a structural alteration of the building without Council's authority, and recommended that appropriate action be taken in terms of the by-laws and in terms of the agreement.

The two doorways formed part of the original renovations which the 2nd petitioner effected in 1983. In her letter dated 15.9.84 to the 1st respondent, she referred to a false allegation made against her by someone that she was selling beer at the Jathika Pola and how the Inspectors from the Council searched her shops, cupboards, etc., in early September, 1984. Surely, they must have passed through these very door ways.

The 1st respondent, in his affidavit, states that–

"the report was unanimously adopted by the Council. In view of the recommendation of the Committee that action be taken against the 2nd petitioner and Pethiyagoda for violating the terms of the

agreements they entered into with the Council, the 2nd petitioner was informed that the Council was terminating the tenancies of stalls Nos. 16, 17 and 18."

The termination notice is dated 12.3.85. The report of the Special Committee was first referred to the Finance Committee of the Council and on 18.3.85, the Finance Committee recommended that the Report be accepted and it be referred to the Council. At its monthly meeting on 26.3.85, the Council accepted the recommendation of the Finance Committee. So, the termination notice had been sent before the Finance Committee's recommendation and before the report was adopted by the Council.

In his first affidavit, the 3rd respondent states that following the report of the Special Committee and on the instructions of the Council, he sent the letter dated 12.3.85 terminating the tenancies of the 2nd petitioner. The letter states that she had effected, without authority, structural alterations to the stalls Nos. 16, 17 and 18 and was using same as residential premises in violation of the terms of the tenancy agreement. She was asked to quit and vacate the premises and hand over possession on or before 30.4.85, failing which, legal steps would be taken to eject her. The 3rd respondent also states that having seen an advertisement in the Sunday Observer dated 17.2.85 inserted by the 2nd petitioner for the sale of her businesses, he wrote to her on 21.2.85 informing her that she did not have the right to assign, sublet or part with the stalls; as the advertisement was repeated on 17.3.85, he wrote to her on 22.3.85 to remove the structures on the bare land. But, the letter itself contains no reason for the demolition order.

In his 2nd affidavit, the 3rd respondent states that security guards were originally placed as a temporary measure until the stalls were leased out, and when the stalls were taken, the Council resolved that the security guards be removed; that on 8.3.85 the petitioners wrote to the 1st respondent with a copy to him, stating that their family, their employees and private security personnel would be residing on the premises; that "the petitioners have confirmed not only that they have made structural alterations to the stalls but that with the aid of these alterations they were using the stalls for residential purposes, in flagrant violation of the terms of the agreements and Municipal regulations. In consequence, I wrote the letter dated 12.3.85 terminating the tenancies of the three stalls."

The Minutes of the Council meeting on 29.8.84, state that the Council adopted the recommendation of the Finance Committee, which in turn adopted the recommendation of the Health Committee that "as all the stalls have been leased out, it is not necessary for the Council to have security officers there, and the lessees should be advised, if it is necessary, to have their own security measures for their stalls."

In his final affidavit, the 3rd respondent states that a petition dated 7.3.85 signed by several traders at the Jathika Pola was sent to him stating that the petitioners and their family and servants were permanently residing in the stalls; that he received a report dated 18. 2. 85 addressed to the Deputy Municipal Commissioner, by the Superintendent of Works, stating that the stalls had been inter-connected without permission; that he received a report dated 12.3.85 addressed to the 2nd respondent by the acting Superintendent of Markets, stating that he visited the stalls on 5.3.85 and observed that the inner partitioning of the walls had been removed and the family was in occupation of the stalls.

Learned attorneys for the respondents agree that there was no removal of the inner partitioning walls; the petitioners had only constructed two doorways on the inner walls.

The 1st trader to sign the joint petition was Pethiyagoda. Though this petition is dated 7.3.85 the date stamp bears the date 13.03.85, the top left hand corner bears an endorsement and initials and the same date, which is one day after the date of the termination notice. The last notation on the reverse is dated 14.03.85 and states that the matter is being referred to the legal officer of the Council. The report of the Superintendent of Works is dated 18.02.85, but the Special Committee states in its report that the Superintendent of Works had visited the stalls only on 22.02.85 and had observed the two openings on the inner walls. So, the report bears a date which is 4 days before his discovery. The report of the Superintendent of Markets addressed to the 2nd respondent at the bottom bears the date 12.03.85 and also a hand-written notation which appears to be that of the 2nd respondent dated 13.3.85. The termination letter gave the petitioners no opportunity to explain or show cause.

This letter terminating the 3 tenancies was followed by another letter dated 22.03.85 written by the 3rd respondent to the 2nd petitioner which stated that permission to use the two concrete slabs

is withdrawn and requiring the 2nd petitioner to vacate within 14 days of receipt of the letter. No reasons were given for this order. Learned attorney for the 1st and 3rd respondents conceded that the 2nd petitioner had a monthly tenancy in regard to this bare land, and was paying Rs. 500 as monthly rental. If so, the 2nd petitioner was entitled to a month's notice, terminating this tenancy. The termination was, therefore, unlawful.

On the question of residence, the petitioners' position is as follows:– On 19.09.84, the petitioners wrote to the 1st respondent, *inter alia*, making allegations of corruption, nepotism and maladministration at the Jathika Pola, and also pointing out the illegal occupation of a stall by Mr. Pethiyagoda, a "cousin" of the Mayor. Within a few days of posting this letter, a large gang of thugs attacked the 2nd petitioner's property and damaged it. The two security guards provided to the Jatika Pola nightly by the Municipality were able to drive the thugs away and prevented more serious damage. Within a week of this, the nightly security guards were withdrawn by the 1st respondent without notice to any of the tenants. A joint petition dated 10.10.84 signed by all the tenants, barring Mr. Pethiygoda, was sent to the 3rd respondent protesting against the withdrawal of the security guards. Within four days of the withdrawal of the guards, on 13.10.84, there was a second attack by 8 thugs causing severe damage to the roof and injury to one of the employees. This was brought to the notice of the 3rd respondent, the Police and all Councillors by their letter dated 13.10.84. There was no response to these letters; not even Police help. On 08.03.85, the petitioners wrote to 1st respondent, setting out the above facts and added–

> "The latest serious incident of violence by thugs at the Jathika Pola occurred on 13.02.85. One of our employees were severely injured and admitted to hospital with bleeding injuries, severe head injuries and leg injuries. We are today informing the Kandy Police Department, The President, Prime Minister, The American Ambassador to Sri Lanka, and officials of the U.S. Embassy that until some final solution to these problems can be found, our entire family will personally remain on the premises each night, in addition to a number of employees and private security personnel. We have installed an electric alarm system, and we will personally direct the security henceforth with the intent of apprehending these thugs and holding them for the Police when the next incident occurs."

Copies of this letter were also sent to the 3rd respondent and all Councillors. The 3rd respondent, in his 2nd affidavit admits that the petitioners have reported to the Police the attacks on their property which took place in September, October, 1984, and February 1985. Even the report by the Superintendent of markets states:

> "Both accepted the fact that they spend the nights there because the Council has withdrawn the security men. Further, he said he brought this fact to the notice of the Municipal Commissioner."

The fact that the Urban Development Authority reimbursed the 2nd petitioner for expenses incurred for providing her own security, shows that the duty was cast on the Council to provide security at the Jathika Pola.

The 3rd respondent's position is that he ordered removal of the structures on the bare land to prevent the 2nd petitioner parting with the stalls. The petitioners have produced the letter dated 11.02.85 written by Mr. Paskaralingam, Secretary, Ministry of Local Government, Housing and Construction, to the 1st petitioner in which he states–

> "You may please find buyers for your wife's shops in the Jathika Pola and write to me their names and addresses in order to get the Kandy Municipal Council to transfer the tenancy."

It is the petitioners' position that it was in pursuance of this letter that they advertised in the Newspapers for the sale of their businesses. They have also annexed to one of their affidavits a tape-recorded conversation between the 1st petitioner and the 3rd respondent. A ruling whether this evidence is admissible or not does not arise, as learned attorney for the 1st and 3rd respondents admits the conversation between the two. In this recorded conversation the 3rd respondent states that he tried to help the petitioners to find a buyer. When the 1st petitioner expressed fears that buyers might be frightened to buy their businesses as the stalls belong to the Council, the 3rd respondent said–

> "If you can find a buyer and inform Mr. Paskaralingam, Paskaralingam will get in contact with him, and he will direct the Municipality, right, give this to so and so, and get him into agreements. That would be the end of it."

When the 1st petitioner asked the 3rd respondent "If any one has any questions, could they call you quietly, and you can assure them," the answer was "Yes, I think I should". In the light of this conversation, the reason given by the 3rd respondent for the demolition is untenable. I find it difficult to understand the submission of learned attorney for the 1st and 3rd respondents that the 3rd respondent in his private capacity, as a friend, was trying to help the petitioners to sell their businesses, but the demolition order was issued by him in his official capacity, as Commissioner.

Having regard to the events and their sequence. I cannot resist but make the observation that the 1st, 2nd and 3rd respondents, acting in concert, were relentlessly searching for reasons to have the 2nd petitioner out of the Public Market at the Jathika Pola. One reason for the termination of the tenancies of the 3 stalls, namely, the unauthorised 2 doorways, was as old as the 2nd petitioner's tenancies; the other reason, namely, residence in the stalls, was supplied by the petitioners themselves on a platter and this was pounced upon as a ground of termination. Termination was speedily and hastily done, with no opportunity afforded to the 2nd petitioner to explain and show cause. It was a valuable investment. The termination of the tenancies lacks bona fides.

The petitioners have produced the 1982 by-laws of the Kandy Municipal Council applicable to all Public Markets. By-law 4(*c*) states that no tenant shall without the written permission of the Council permit any person, other than a servant whose name is specified in the licence or permit and whose name is registered at the Municipal Council Office, to use or occupy any part of the stall shop etc. By-law 5 prohibits the tenant from using or occupying any portion of a public market other than the stall, shop, etc., he is authorised to use or occupy under his licence or permit. By-law 6(1) states that no person other than the tenant to whom a stall, shop etc., has been issued by the Commissioner, shall use or occupy any portion of the Public Market. By-law 18(*f*) prohibits the act of sleeping within the premises of a public market. By-law 28(1) empowers the Council to terminate any tenancy upon a conviction of the holder of the licence or permit for a breach of any of these by-laws. By-law 53 states that it shall be lawful for the Council to terminate any tenancy in respect of any shop, stall etc. for a breach of by-laws 4, 7 and 19 of these by-laws. By-law 56 states that any person who contravenes a by-law shall be guilty of

an offence and shall upon conviction be liable to a fine. By-law 37 only applies to a shop or stall in the Central Market and prohibits extensions or alterations, etc. in a shop or stall or space without the written permission of the Commissioner.

The petitioners' complaint is that both Mr. Pethiyagoda, and the Ceylon Oils & Fats Corporation, admittedly, had violated by-laws 4(*c*), 5 and 6(*i*); a violation of by-law 4(*c*) warranted a termination of their tenancies; though letters terminating their tenancies were sent, they were not acted upon and in fact they were allowed to revert to their respective stall Nos. 13 and 4. But, in the case of the 2nd petitioner, a violation of by-law 18(*f*) only warranted a lesser punishment, namely, an imposition of a fine, after conviction; yet, her tenancies were terminated.

The petitioners' case is, that the petitioners, Mr. Pethiyagoda and the Ceylon Oils & Fats Corporation belong to a class of similarly situated persons, namely, Municipal Tenants in the same Public Market Complex; the by-laws have been applied in an unequal manner, favouring one party and not favouring the other party; there has been a selective enforcement of the by-laws against the petitioners and a non-enforcement of the same against the other two and this constituted a violation of the fundamental right of equal protection of the law, guaranteed to them by Article 12(1) of the Constitution.

The petitioners appeared before us in person to support their application. The 1st petitioner spoke for himself and on behalf of his wife as well.

The 1st petitioner is not a party to the tenancy agreements or to the tenancy relating to the two bare lands. In fact, the tender conditions stipulate that tenderers should be citizens of Sri Lanka. There is no legal nexus between him and the Kandy Municipal Council. He, therefore, cannot complain of a breach of his fundamental right under Article 12(1).

Two questions arise for our consideration:

(1) Is there an infringement of the fundamental right of the 2nd petitioner under Article 12(1) and

(2) Do the acts complained of constitute executive or administrative action in terms of Articles 17 and 126 of the Constitution?

I shall deal with the 2nd question first.

Learned attorney for the 1st and 3rd respondents, who raised this matter as an objection, in limine, submitted that having regard to the various provisions of the Municipal Council Ordinance, when the two tests laid down in *Wijetunge v. Insurance Corporation of Ceylon* (3) and *Wijeratne and Another v. People's Bank and Another* (4) namely, the functional test and the governmental control test, are applied, a Municipal Council cannot be regarded as a State organ or agency. Learned Deputy Solicitor-General who was invited as amicus curiae to assist this Court on this matter, on the other hand, submitted that a Municipal Council exercises and performs governmental functions and judged by the functional test, it is to be regarded as an organ of the State.

I am inclined to agree with the submission of the learned Deputy Solicitor-General.

The Constitution does not define "executive or administrative action". The Indian Constitution, however, in Article 12 has defined 'State' to include "the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India, or under the control of the Government of India".

In *Perera v. University Grants Commission* (5) the petitioner challenged the validity of the rule of selection adopted by the University Grants Commission for admission to the University, as infringing her fundamental right to equality of opportunity guaranteed to her by Article 12(1) of the Constitution. An objection, in limine, was taken that the alleged grievances of the petitioner did not come within the purview of Article 126 of the Constitution and that its act of selection to Universities did not savour of executive or administrative action capable of affecting fundamental rights as envisaged in Article 126 of the Constitution. Sharvananda, J., overruling the preliminary objection, observed:

"Constitutional guarantees of fundamental rights are directed against the State and its organs. The wrongful act of an individual, unsupported by State authority, is simply a private wrong. In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions. It refers to

exertion of State power in all its forms. Education is one of the most important functions of the State today. The University Act has assigned the execution of a very important governmental function to the 1st respondent. In the circumstances, it is idle to contend that the respondent is not an organ or delegate of the government and that its action in the matter of admission of students to the Universities under it does not have the character of executive or administrative action within the meaning of Article 126 of the Constitution."

In the *Insurance Corporation of Ceylon case (supra)* an employee of the Corporation complained that by reason of his trade union activity the Corporation had taken disciplinary action and by this action had violated his fundamental rights of freedom of speech and expression including publication and of his freedom to join a trade union, assured to him by Article 14(1)(*a*) and 14(1)(*d*) of the Constitution. The Corporation took objection, in limine, that its action did not savour of "executive or administrative action" which alone attracts Articles 17 and 126.

Sharvananda, A. C J., upheld the preliminary objection and observed:

"One must see whether the Corporation is under Government control or exercises governmental functions. The preamble to the Act states, inter alia, that it is an Act to provide for the establishment of an Insurance Corporation, for carrying on exclusively the business of life insurance and carrying on in addition insurance business of every other description. S. 5 provides for the functions of the Corporation. It states that the Corporation shall carry on insurance business of every description. It carries on a commercial activity. Its very name has a commercial ring. Its powers do not identify it with the Government and in some respects preclude identification with the Government. The Corporation carries on business on its own account and not on behalf of the State. Under the scheme of commercial nationalisation statutory corporations have been set up as separate legal entities to run the nationalised industries on a commercial basis on their own account and not on behalf of the Government. It was created to perform and does not perform any such essential service to the community as the Petroleum Corporation. It is a legal entity created to carry on a commercial activity, namely, Insurance. It does not purport to carry on this business on behalf of the State and the extent of the control

exercised by the Minister over its operation is not so far reaching and is insufficient to make it the servant or agent of the State. Whether we apply the functional test or the governmental control test, the Insurance Corporation cannot be identified with the Government. It cannot be regarded as its 'alter ego' or organ of State. Hence its action cannot be designated 'executive or administrative action' which only attracts Articles 17 and 126 of the Constitution."

The Supreme Court was of the view that on the "functional test", the Insurance Corporation carries on a "a commercial activity" which was not a governmental function; on the "governmental control test", the extent of the control was insufficient to make it an organ or a servant or agent of the State.

In the *People's Bank case (supra),* the petitioners who were security officers complained that the action of the Bank in placing them 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, constituted an infringement of their fundamental rights to equality and was contrary to Article 12 and Article 4(*c*) and (*d*) of the Constitution. The Bank took the preliminary objection that there had been no infringement of petitioners' alleged fundamental rights by "executive or administrative action". The preliminary objection was upheld.

Sharvananda, J. said:

"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.

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.

The petitioners are employed in connection 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."

When this Island was a Colony, it had a highly centralised form of Government and the Central Government exercised functions, which in other countries are usually exercised by local authorities. The responsibility for the government of the Island was vested in the governor, and he was responsible for building roads, bridges, canals, for irrigation works and railways. He established the health service and erected hospitals and clinics and medical officers and sanitary assistants were paid by him. The provinces were administered from Colombo through Government Agents who were representatives of the Central Government for the collection of revenue and for the exercise of central functions. It is for the purpose of decentralising the central government functions that local authorities were established.

In 1865, Municipal Councils were established for Colombo, Kandy and Galle. In 1910, the Municipal Councils Ordinance was passed. The Municipal Councils Ordinance No. 29 of 1947 was passed to amend and consolidate the law relating to Municipal Councils. S. 2 empowers the Minister by order published in the Gazette to declare any area to be a Municipality, to define the limits of the Municipality so declared and to assign a name and designation to the Municipal Council to be constituted for the Municipality so declared. S. 4 states that the Municipal Council shall be the local authority charged with the regulation, control and administration of all matters relating to public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and the amenities. The Municipal Council has power, inter alia, to establish and maintain the following public services—water supply, lighting of streets, public places and public buildings, the supply of electric light or power, markets, public baths, bathing places, laundries and places for washing animals, and any other form of public service (s. 40(1)(*u*)). A Municipal Council has the

duty of maintaining all public and private streets, to establish and maintain any public utility service which it is authorised to maintain under the Ordinance and generally to promote public health, welfare and convenience, and the development of sanitation and amenities of the Municipality (s.46). S.277, as amended by Law No.24 of 1977, empowers the Minister, in certain circumstances, to remove the Mayor from office, or remove all the Councillors from office or dissolve the Municipal Council, and the President may appoint a Special Commissioner to exercise the powers, duties and functions conferred or imposed upon the Council or the Mayor by the Ordinance.

These provisions show that the area to be created is a Municipality and the entity to be established within the Municipality is a Municipal Council, and the Council is charged or entrusted with functions, which otherwise, the Central Government would have continued to perform. And, in the event of the removal of the Mayor or the dissolution of the Council, the Special Commissioner would perform these functions on behalf of the Central Government. That is, the Central Government would perform these functions. The governmental functions have been decentralised and have been delegated to the Municipal Council to perform. There is, then, no doubt that a Municipal Council performs governmental functions.

A Municipal Council is not set up to carry on a "commercial activity." Article 27(4) of the Constitution states thst the "State shall strengthen and broaden the democratic structure of government and the democratic rights of the people by decentralising the administration and by affording all possible opportunities to the people to participate at every level in national life and in government". That is, the State is pledged to broaden the democratic structure of government by decentralising its functions. Sections 5 and 8 of the Municipal Councils Ordinance states that a Municipal Council shall consist of Councillors who are elected at an election. No doubt, Part XIV of the Ordinance provides for Central control; ss. 218 to 226 provide for the auditing of accounts of the Municipal Council by the Auditor-General, for the audit report to be sent to the Minister, and for surcharges to be made by the Auditor-General; s.190 requires the Mayor to forward to the Commissioner of Local Government a statement of receipts and disbursements; s.191 requires the Municipal Council to obtain the sanction of the Minister for borrowing monies. S.277, as amended, provides for the removal of Mayor or the dissolution of the Council for incompetency etc. These provisions are suggestive of some degree of

governmental control. But, it seems to me that there a Public Authority is charged or entrusted with governmental functions, the "governmental control test" is inappropriate and inapplicable. In the *University Grants Commission case (supra),* I find that the Court was only concerned with the fact that an important governmental function, namely, education had been assigned to the Commission, and only the functional test was applied.

A Municipal Council, without question, performs governmental functions and the actions of the Municipal Council would be "executive or administrative action" within the meaning of Article 126. The objection, in limine, therefore fails.

As regards the 1st question, learned Deputy Solicitor-General referred to the notice of termination dated 12.3.85 sent to the 2nd petitioner, which alleged that she had effected structural alterations to the market stalls and occupied the same as residential premises in violation of the tenancy agreement dated 8th July, 1983. He pointed out that in terms of the agreement, for breach of any of the terms and conditions, the Council had the right to terminate the tenancy by giving a month's notice. His submission was that at the threshold stage of granting or entering into the contract, if the Council had discriminated as between persons similarly situated, Article 12(1) could be invoked; but once the contract has been concluded, the rights and liabilities of the parties inter se are governed by the contract and no question of violation of Article 12(1) arises. He cited the cases of *Bal Krishan Vaid v. The State of Himachal Pradesh and Others (supra)* and *M/s. Radhakrishna Agarwal and Others v. State of Bihar & Others (supra).* Learned attorney for the 1st and 3rd respondents associated himself with this submission.

In *D.F.O. South Kheri & Others v. Ram Sanehi Singh* (6) at an auction held by the Forest Officer, the respondent purchased the right to cut timber for the period 01.11.65 to 31.10.66 from a certain forest. The Divisional Forest Officer made order that the sleepers against the tally dated 29.10.66 in the allotment of 1965-66 season do stand cancelled, since they were cut in the month of November 1966 and be re-inspected against the allotment for 1966-67 season. The timber was actually removed by the respondent with the sanction of the Forest authorities. The respondent moved the High Court for a writ restraining the Divisional Forest Officer and other Forest Officers from giving effect to the order of cancellation, to have the said order

quashed on certiorari and for other incidental reliefs. A single Judge dismissed the petition holding that the D.F.O had acted in the exercise of authority conferred upon him by the terms of the contract and that the remedy of the respondent was to claim relief in a regular suit for enforcement of the agreement or for damages and not in a petition under Article 226 of the Constitution. In appeal, a Divisional Bench of the High Court reversed the order and held that the order made by the D.F.O. in the exercise of statutory authority was liable to be quashed, because it was made on irrelevant considerations. Affirming this order, Shah J. said (p. 206):

> "Counsel for the appellants contends that since the dispute arose out of the terms of the contract and the Divisional Forest Officer under the terms of the contract had authority to modify any action taken by a subordinate forest authority, the remedy of the respondent was to institute an action in the civil court and that the writ petition was not maintainable. But in the present case the order is passed by a public authority modifying the order or proceeding of a subordinate forest authority. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in *K. N. Guruswamy's case,* (7) there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

In *M/s. Shree Krishna Gyanoday Sugar Ltd. and Another v. The State of Bihar & Another* (8) the State Government, in the exercise of powers conferred under s.22(1) of the Bihar & Orissa Excise Act, 1915, which empowered the Government to grant to any person the exclusive privilege of supplying country spirit to Government Warehouses, invited tenders and the tenders of the petitioner and another were accepted and the acceptance was communicated to both. The petitioner supplied country spirit during certain periods on the assurance of the Excise Commissioner and belief that he would be paid at least 42 paise per L.P. litre, but the State failed to fulfil its assurance. He sought a mandamus to direct the Excise Commissioner to pay him the difference between 42 paise and 33 paise which had

already been paid to him, and it was allowed. For the State it was argued that even if the petitioner had a right to claim the said sum, the forum for the said claim was the Civil Court and not this Court for exercise of its powers under Articles 226 and 227 of the Constitution.

Nagedra Prasad Sing, J. said (pp. 128, 130):

"But, it is difficult to accept the contention raised on behalf of the State that, when the State Government in exercise of its powers under section 22 of the Act, grants the exclusive privilege to any person on certain conditions under sub-section (1) of s. 22 and a licence is received by that person under sub-section (2) of that section it amounts to a contract made in exercise of the executive power of the State Government within the meaning of Art. 299 of the Constitution. In my opinion, the State Government, in such circumstances, grants the exclusive privilege to a particular person for manufacturing, or supplying or selling articles covered by the Act in exercise of its statutory function under section 22 of the Act.

The argument of the learned Advocate-General that the claim of the petitioner is merely contractual which could be enforced only in the Civil Courts is also without any substance, since it has already been held that, while granting the privilege to the petitioner, the respondent State had exercised a statutory power conferred under the Act, and, as such, it cannot be equated with those contracts which are entered into between the State Government and a citizen in exercise of its executive powers.

In this connection I may refer to a case of the Supreme Court in *The D.F.O. South Kheri v. Ram Sanehi Singh (supra)*, where their Lordship had occasion to consider the effect of an order passed by a Divisional Forest Officer cancelling an order of his subordinate forest authority depriving the respondent in that case of his valuable rights. Their Lordships, while affirming the judgment of the High Court taking the view that the Divisional Forest Officer had no jurisdiction to rescind the order passed by his subordinate officer, who was duly authorised to pass the said order, observed as follows:

'But in the present case the order is passed by a public authority modifying the order or proceeding of a subordinate forest authority. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful

action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in *K. N. Guruswamy's case (supra)* there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.'

I am also supported by an observation of the Supreme Court in *Ram Chandra Rai v. State of Madhya Pradesh,* (9) where, while depreciating summary dismissal of a writ application in connection with a licence issued by the Excise Department, it was observed:-

'The High Court summarily rejected the petition observing that the supply of liquor to the appellant was under a contract with the Government and if the Government had committed a breach of the contract the remedy is elsewhere. It cannot, without further investigation, be said that the rights and obligations arising under a licence issued under a statutory authority are purely contractual.

In *Bal Krishan Vaid's case (supra),* the Central Government undertook a Hydrel Project and as sand, stone etc., were needed for construction, it entered into an agreement with the Himachal Pradesh Government to extract the required material from the bed of the river Siul. The Mines and Minerals (Regulation and Development) Act, 1957, provided for the granting of prospecting licences and mining leases. Rule 53 framed under the Act required the successful bidder to execute a deed in Form 'K'.The State Government held a public auction to lease out the reaches of the river bed and leaseswere awarded to the petitioner and two others. The petitioner executed a deed of agreement in Form 'K'. Clause 30 of the Agreement stipulated that a contract may be terminated by the Government if considered by it to be in the public interest by giving one month's notice. The petitioner received a notice terminating this contract. The petitioner assailed the validity of the notice by a writ petition addressed to the High Court under Article 226 of the Constitution, and, inter alia, complained that the State Government was guilty of discriminating against the petitioner in asmuch as similar contracts held by other contractors in respect of contiguous reaches of the same river bed have not been terminated and the Government has thereby violated Article 14 of the Constitution. Dealing with this contention Pathak, C.J. said (p. 34):

"Finally, we are left with the contention that the petitioner has been the victim of discrimination inasmuch as no such action has been taken in respect of the contracts of Vinod Kumar Sud and Umesh Kumar covering the two contiguous reaches. To my mind, this contention must also fail on the finding that the complaint of the petitioner arises out of a breach of contract. The petitioner's case in regard to discrimination is based on Article 14 of the Constitution. To invoke Article 14, it must be shown that the State has acted in the context of law. When the Government is party to a contract, and it exercises a right by virtue of such contract it is a matter falling within the sphere of contract. If the Government, having entered into contracts with different persons, arbitrarily terminates the contract of one person only, its action must necessarily be referred to its contractual capacity from which the contract and the impugned action flows. Had the discrimination been applied in the course of granting a contract, as was the case in *K. N. Guruswamy v. State of Mysore (supra)* the discriminatory action of the Government would be referable to its statutory authority, because the statute empowers the Government to enter into such contracts. But once the contract has been concluded between the Government and an individual any action taken by the Government in the application of a term or condition of the contract must be attributed to the capacity of the Government as a contracting party. When the Government passes from the stage of granting a contract to the stage of exercising rights under it, it passes from the domain of statutory power into the realm of contract. And as was observed by the Supreme Court in *C. K. Achutan v. State of Kerala* (19), '..... a contract which is held from the Government stands on no different footing from a contract held from a private party.' In my opinion, Article 14 of the Constitution cannot be invoked by the petitioner."

In *Agarwal's case (supra)* the State Government leased out some forest land to the appellants to collect and exploit sal seeds for 15 years on payment of royalty at a certain rate. The lease provided for an increase of royalty every three years in consultation with the lessee, and also the cancellation of the lease. The State Government revised the rate of royalty payable by appellants and thereafter cancelled the lease. The appellants challenged the order of revision of rate and cancellation of lease as illegal by writ proceedings under Article 226. For the appellants it was contended that the lease had been entered

into in the exercise of executive power of the State under Article 298 of the Constitution which stated that the executive power of the Union and of each State shall extend to, inter alia, the making of contracts for any purpose; such executive power was subject to the provision of fundamental rights; by the increase of royalty and by the cancellation of the lease, Article 14 had been violated. Article 14 states that the "State shall not deny to any person equality before the law or equal protection of the laws within the territory of India." For the State it was argued that governmental authorities when acting in the contractual field, could not be controlled by Article 14. The High Court rejected the appellants' contention but granted a certificate for appeal to the Supreme Court. The appeal was dismissed.

Beg, C.J. said (pp.1500, 1501, 1502 and 1503)–

"It is thus clear that the *Erusian Equipment & Chemicals Ltd's case (supra)* (10) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only .....

The Patna High Court had very rightly divided the types of cases in which breaches of alleged obligation by the State or its agents can be set up into three types. These were stated as follows:–

'(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved, and the State is in exercise of a statutory power under a certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.'

It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of *Umakant Saran v. State of Bihar* (11), and *Lekhraj Sathram Das v. N. H. Shah* (12), and *B. K. Sinha v. State of Bihar* (13), that no writ or order can issue under Article 226 of the Constitution in such cases 'to compel the authorities to remedy a breach of contract pure and simple.' Learned Solicitor-General, appearing for the State, contended that there could be no aspect of Article 14 of the constitution involved in a case where no comparison of the facts and circumstances of a particular petitioner's case with those of other persons said to be similarly situated is involved. In such a case, he submitted, there was no possibility of inferring a discrimination ..... In the case before us, allegations on which a violation of Article 14 could be based are neither properly made nor established. Even if the appellants could be said tohave raised any aspect of Article 14 and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been urged before the High Court. Before any adjudication on the question whether Article 14 could possibly be said to have been violated, as between persons governed by similar contracts, they must be properly put in issue and established ..... On the allegations and affidavit evidence before us, we cannot, reach such a conclusion."

Bal Krishan Vaid's case (supra) was not even referred to in *Agarwal's case (supra)*. Strictly, that case belongs to the 2nd type of cases set out in *Agarwal's case (supra)* for, the lease agreement was entered into in the exercise of a statutory power conferred under the Mines and Minerals (Regulation and Development) Act, 1957.

Seervai in his Constitutional Law of India (2nd Ed Vol. 3 at pp. 1852 and 1853) dealing with the judgment in *Agarwal's case (supra)* says:

> "It is submitted that the proposition that Art. 14 was not attracted may be correct on the facts of the case, but it is too wide, for in certain situations it would be incorrect. If a Government enters into leases of similar and equal plots of land for a rent fixed under the lease, but to be increased periodically in consultation with the lessee, the increase made by Government being binding on the lessee, it is clear that Government cannot increase the rent differently for each of the said plots without violating Art. 14. In Agarwal's case, the Solicitor-General stated that the question of Art. 14 would arise only if increase of the petitioner's rent was being compared with the rent of other lessees. The Supreme Court expressed some doubt whether Art. 14 would be attracted but stated that there was no case made out for the application of Art. 14. It is submitted that if a law cannot confer arbitrary power on Government, to enter into leases and increase the rents of similar plots arbitrarily at its discretion, neither can Government discriminate by executive action between lessees occupying the same position, by favouring some and disfavouring other lessees. Art. 14 forbids all arbitrary action."

The cases of *D. F. O. South Kheri (supra)* and of *Gyanoday Sugar Ltd. (supra)* belong to the 2nd category mentioned in *Agarwal's case (supra)*.

It seems to me that the case before us should be placed in the second category referred to in *Agarwal's case (supra)*, namely, where the contract entered into is in the exercise of a statutory power conferred by some Act or Rules framed thereunder and what is alleged is a breach on the part of the State or State organ.

A Municipal Council is empowered by s. 157 to let to tenants on lease or otherwise any public market or any part thereof; it may also determine any lease or tenure of shop, stall or other place within the market (s. 156 (*c*)). It is in the exercise of power conferred by s. 157 that tenders for stalls in the Jathika Pola were called for. The tenders of the 2nd petitioner, Mr. Pethiyagoda, and of the Ceylon Oils and Fats Corporation were accepted and similar agreements were entered into between the Municipal Council and these parties. The agreements

were entered into in pursuance of a statutory power, and are ultimately traceable to statutory power. The actions challenged by the 2nd petitioner were of a public body invested with statutory power. So, it seems to me that not only at the threshold stage of entering into the contract, but even at the point of termination, there cannot be discrimination between Municipal tenants having similar contracts. Even after the contract of tenancy is entered into, as between tenants occupying the same position, the contract cannot be applied to one person in one way and to another person in a different way. That is exactly what has happened in this case.

Before the Special Committee, both Pethiyagoda and the officer-in-charge of the Oils and Fats Corporation admitted that they had exchanged stalls 4 and 13 without the permission of the Council. Despite their joint request to remain in the exchanged stalls, the Committee recommended that they be asked to revert back to their original stalls immediately, and thereafter appropriate action be taken for contravening the provisions of the agreement. The 2nd petitioner, according to the report, was faulted in regard to three matters and the Committee recommended that appropriate action be taken in terms of the by-laws and the agreement. The 3rd respondent, then, sent the letter dated 12.3.85 to the 2nd petitioner terminating her three tenancies. The 2nd petitioner says that on 30.3.85 she telephoned the 3rd respondent and asked that she be allowed to close up the two doorways and apologise. This would have involved only a day's work by one workman and an expense of about Rs. 500. The 3rd respondent's reply was that there was no point in writing and apologising and her position was hopeless and that they retain the best lawyer in the country.

As regards Pethiyagoda and the Corporation, letters terminating their tenancies were sent only on 17.4.85. This was two days after the petitioners filed their petition in this Court, which was on 15.4.85. No follow up action was taken on the termination notices, but instead, they were allowed to revert to their original stalls and continue their tenancies. This was admitted by the instructing attorney for the 1st and 3rd repondents in Court.

Learned attorney for the 1st and 3rd respondents submitted that under the tenancy agreement, the termination clause gave a discretion to the Council to terminate the tenancy or not; that a discretion was given to it to differentiate as regards meting of punishment depending

on the seriousness of the violations; that while the Council regarded the breaches by the 2nd petitioner as serious, it did not view breaches by Pethiyagoda and the Corporation in the same light and that there can be discrimination in meting out punishment. I cannot agree.

The Special Committee dealing with the request of Pethiyagoda and the Corporation to remain in their exchanged stalls observed that it was–

> "not in favour of this request as they have violated the terms and conditions of the tenancy agreement, and if permitted, it would create a bad precedent, in that, the other stall holders too would resort to similar methods of circumventing the Municipal laws."

It recommended that they revert to their original stalls immediately and that action be taken for breaching the terms of the agreement.

The petitioners produced the by-laws of the Council which were approved by the Law and General Purposes Committee on 11.3.82, 12.3.82 and 18.3.82 as the operative by-laws. Learned attorney for the 1st and 3rd respondents stated that these by-laws have not been confirmed by Parliament and gazetted. He produced the 1974 by-laws which were gazetted as the operative ones. According to the 1974 by-laws, the holder of licence aan 'only occupy the qhop, stall etc. which he is authorised to occupy (by-law 5). Sleeping within the premises of the public market after it is closed is prohibited (by-law 17 (*d*)). The prohibition of 'alterations in shop or stall without the Commissioner's written sanction only applies to the Kandy Central Market (by-law 40). The Council is empowered to cancel a licence, if the holder does not comply with any of the by-laws (by-law 29 (2)). Both Pethiyagoda and the Corporation have violated their contracts parting with possession of their respective stalls–and by-law 5.

The 2nd petitioner, went into residence of her stalls, after informing the 1st respondent, for a specific purpose to protect her property and to supervise her own security arrangements. The two doorways were constructed as far back as 1983 and unauthorised alteration in a shop or stall is not even a violation of the by-law. By sleeping on the premises and in constructing the two doorways, she too has violated her agreement and by-law 17 (*d*).

In terms of the 1982 by-laws, a tenant cannot, without the Council's permission, permit any person to occupy or use any part of the stall, shop etc, other than a servant whose name is specified in the licence and whose name is registered at the Municipal Office (by-law 4

(*c*)). The holder of a licence can only occupy the shop or stall which he is authorised to occupy under the licence (by-law 5). A tenancy becomes liable to be terminated for a breach of by-law 4(*c*); sleeping is prohibited (by-law 18) and upon a conviction for a breach of this by-law, a tenancy becomes liable to be cancelled (by-law 28). The prohibition of unauthorised alteration applies only to the Central Market (by-law 37).

Though this set of by-laws have not been confirmed and gazetted, they reveal the thinking of the Councillors as to what transgressions are serious and what are not. A tenant permitting unauthorised occupation of his stall invites a cancellation of his tenancy, while the penalty for sleeping in the stalls is a fine (by-law 56) and a cancellation of a tenancy can only be upon conviction. The by-law dealing with unauthorised alteration, was not meant for stalls at the Jathika Pola.

True, in the matter of termination of tenancies, the agreement has given discretionary power to the Council. But, the discretionary power given to a public authority is essentially different from that given to private persons. A man making his will has unfettered and absolute discretion to give his property to a cat or a cathedral; a private creditor is free to choose which of his debtors he must release or a landlord can elect to evict one tenant and not another, for the same default; but, it is wholly inappropriate to apublic authority. The notion of absolute and unfettered discretion can have no application in Public Law. Discretionary power is conferred on a public authority upon trust and in order that it may use them for public good. In the exercise of the discretionary power, it must act fairly, reasonably and without discrimination. (See, *Wade* on *Administrative Law, 4th Edn.*, pp. 340, 341 and *De Smith* on *Judicial Review of Administrative Action, 4th Edn.*, pp. 238, 279, 327, 346).

Here are three municipal tenants having similar contracts of tenancy with the Kandy Municipal Council in respect of stalls in the same Public Market. All three have violated some of the provisions of the contracts. Cancellation of the tenancy was not obligatory; it was discretionary. But, the discretion must be exercised similarly as between persons similarly situated and without discrimination. Pethiyagoda and the Corporation, though their tenancies have been terminated, have been allowed to revert to their original stalls and continue their tenancies; the 2nd petitioner, on the other hand, has had her three tenancies terminated, without any option given to her to close up the two doorways and to cease residing in the stalls and

thereafter to continue as tenant. The discretion has been unequally used. The other two have received favoured treatment. The 2nd petitioner is entitled to the same treatment and to be given the same chances as the other two tenants. There has been violation of the 2nd petitioner's fundamental right of equal protection of the law, under Article 12(1) of the Constitution.

In her petition, she has asked that this Court declare the order dated 12.3.85 terminating her tenancies of premises Nos. 16, 17, 18, the order dated 22.3.85 terminating the two bare land tenancies and the order dated 22.3.85 ordering the demolition of the structure over the two bare lands null and void, as they have violated her fundamental right under Article 12(1), and for damages.

Learned attorney for the 1st and 3rd respondents concedes that in regard to the two bare lands, the legal relation between Council and the 2nd petitioner was that of a landlord and tenant and that it was a monthly tenancy. If so, the letter dated 22.3.85 terminating the bare lands tenancy requiring the 2nd petitioner to vacate them within 14 days of receipt of the letter is clearly bad. Further, no reason has been assigned for the termination of this tenancy. But, this does not help the 2nd petitioner's case as it has not been shown that as between tenants having similar contracts, she has been discriminated against.

Nor can she complain against the demolition order as it was a condition of her tenancy that she would demolish and remove the structure, without payment of any compensation, when directed by the Council to do so.

Both the 1st and the 3rd respondents have raised the objection in their affidavits that the acts complained of are acts of the Municipal Council, that the proper party against whom relief, if any, can be claimed is the Municipal Council of Kandy, and as the petitioners have not made the Municipal Council of Kandy a party, they cannot proceed with their application. Before the hearing, the petitioners moved to add the Municipal Council as a respondent. This was objected to by learned attorney for the 1st and 3rd respondents and the petitioners withdrew their application to add the Council as a respondent. Learned Deputy Solicitor-General submitted that this Court has the power to add a party, but as the petitioners have withdrawn their application, they will have to face the consequences; that this Court will not make an order against the Municipal Council without hearing it.

The three tenancy agreements were between the Municipal Council of Kandy, and the 2nd petitioner. S. 34(2) requires the seal of the Council to be affixed to any contract on behalf of the Council in the presence of the Mayor or Deputy Mayor and the Commissioner who shall sign their names to such contract. The seal has been affixed to each of the contracts and they have been signed by the 1st and 3rd respondents.

No relief is claimed by the 2nd petitioner against the Municipal Council. She has not asked that she be restored to the tenancies. The reliefs are directed against the three respondents. S. 14 of the Municipal Councils Ordinance, as amended by Law No. 24 of 1977, states that the Mayor shall be the chief executive officer of the Council and all executive acts and responsibilities which are by this Ordinance or by any other written law directed or empowered to be done or discharged by the Council may, unless the contrary intention appears from the context, be done or discharged by the Mayor. S. 170, as amended, states that the Municipal Commissioner shall, next to the Mayor, be the Chief Executive Officer of the Council and in the event of the vacation of office by both the Mayor and Deputy Mayor, during the period between vacation of office of the Deputy Mayor and election of a new Mayor, the Commissioner may perform and discharge all functions and duties conferred or imposed on the Mayor. The 2nd respondent is the officer responsible for the hygienic and sanitary conditions in, inter alia, Public Markets.

They have all filed affidavits and set out their respective positions. The 1st respondent has filed two affidavits with annexures. The 2nd respondent one with annexures and the 3rd respondent three affidavits with annexures. What more could the Municipal Council have said? Not only has the Municipal Council been fully represented but its interests are sufficiently safeguarded by the presence of the three respondents on the record. It is not necessary that the Municipal Council, Kandy, should be impleaded. I grant the 2nd petitioner the declaration that the impugned order dated 12.3.85 has violated her fundamental right of equal protection of the law assured to her under Article 12 (1) and is, therefore, void.

On the question of damages, the Chairman of the Urban Development Authority wrote to the 1st respondent the letter dated 02.4.85 and informed him that the UDA had decided to acquire the assets of the 2nd petitioner at Stalls Nos. 16, 17 and 18 at the Jathika Pola Market and pay her any relevant compensation; that as

from 03.04.85, the UDA will be in possession of the stalls. The UDA paid Rs. 190,000 to the 2nd petitioner and the 2nd petitioner left the premises on 11.7.85. This amount was made up as follows: Rs. 133,410 being reimbursement for tender payments and other payments to the Council; Rs. 26,000 being reimbursement for payments to Mecco Services Ltd., Kandy, for security service provided; Rs. 2,450 for tube lights; Rs. 1,500 for stainless steel sink; Rs. 1,600 for water meter, all making a total of Rs. 164,960. According to the petitioners, a reduced amount was allowed for improvements made and the total came to about Rs. 178,000; that the Chairman, UDA was kind enough to add Rs. 12,000 and round off the figure to Rs. 190,000. In their letter dated 3.7.85 to the Chairman, UDA the petitioners say that–

> "this low figure is being accepted as we wish to remove ourselves from Kandy immediately over fears for our safety because of the recurrent thuggery and violence."

I cannot accept the contention of learned attorney for the 1st and 3rd respondents that having accepted this sum of money, the petitioners are precluded from petitioning this Court. If at all, this fact would only affect the quantum of damages.

The petitioners complain that the extensive sign boards cost them Rs. 15,000, they paid Rs. 8,000 for installing a telephone, that they had receipts for these payments, but these items were disallowed by the UDA though they were taken over by it. They further complain that nothing was allowed for the 2 bare land leases, that they lost over Rs. 50,000 over the sale of their equipment and fixtures, that they have expended more than Rs. 50,000 on photocopy, vehicle travel, telephone and other costs in seeking redress from this Court. They also seek additional damages for torment, pain of mind and other suffering over this whole matter.

The 2nd petitioner is entitled to be paid the sums of Rs. 15,000, Rs. 8,000 and the loss sustained in a sum of Rs. 50,000 amounting to Rs. 73,000. I also take into account the pain of mind caused to the 2nd petitioner. I direct that a sum of Rs. 100,000 be paid to the 2nd petitioner by the 1st, 2nd and 3rd respondents. She will also be entitled to costs of this application.

L. H. DE ALWIS, J.

The first petitioner is a citizen of the Unites States of America and a foreign collaborator in a proposed project called Lanka-America (Pvt.) Ltd., approved by the Foreign Investment Advisory Committee (F.I.A.C). The second petitioner, who is his wife, is a citizen by descent of Sri Lanka and the local collaborator in the F.I.A.C. Project. The second petitioner claims to hold permanent tenancies of 3 stalls and two bare land leases from the Kandy Municipal Council at the Jatika Pola, Tomlin Park, Kandy, where she carried on several businesses including that of a cafe. The complaint of the petitioners is that from July 1984 they have been the victims of a relentless and unceasing series of attempts to deprive the 2nd petitioner of her tenancies and destroy her small business by improper and illegal acts committed by the three respondents acting in collusion. The 1st respondent is the Mayor of the Kandy Municipal Council, the 2nd respondent is its Veterinary Surgeon and the 3rd respondent, the Municipal Commissioner. The petitioners allege that the three respondents by their illegal acts have repeatedly infringed the petitioners fundamental rights under several Articles of the Constitution, but at the hearing, confined their application to the infringement only of their right to equality before the law, as guaranteed by Article 12.

In view of the volume of the pleadings and documents filed by the petitioners it will be useful to give a brief narrative of the events that led to the filing of this application.

The second petitioner is the daughter of a retired planter residing in Kandy and both petitioners who were living in the United States of America came to Sri Lanka with a view to setting up a F.I.A.C. Project and took up residence in Kandy. The F.I.A.C. Project was in regard to the export of packeted potato crisps. The 2nd petitioner saw an advertisement in the newspaper inserted by the Kandy Municipal Council offering certain stalls in the Jatika Pola at Tomlin Park, for letting on tender and decided to commence a business herself. She tendered for three stalls numbered 16, 17 and 18 and succeeded in obtaining them. Thereafter she entered into three separate agreements in respect of the stalls with the Kandy Municipal Council. P106 is the agreement entered into on 08.07.83 relating to stall No. 16, where she proposed to carry on a business of "Roberts Honda Rent-A-Cycle Agency." P107 and P108 are the agreements entered into on the same day in respect of stalls No. 17 and 18, where she

proposed carrying on the business of "Roberts Lakeside Cafe" and "Roberts Tours & Travels Agency", respectively. The monthly rental of each stall was Rs. 150 and she had to make a once and for all payment of considerable sums of money ranging from Rs. 26,150 to Rs. 41,150 for the stalls. In front of the Jatika Pola were two small vacant patches of bare land on which were concrete slabs, no doubt the remains of some former structure. The 2nd petitioner offered to take on rent these two sites also from the Kandy Municipal Council and was given them at a monthly rental of Rs. 250 each. But no agreement, as in the case of the stalls, was entered into in respect of them. Sometime later on a request made by her, she was permitted to erect a temporary light-weight roof on these sites on condition that she should demolish them at any time the Council directed her to do so. She spent a considerable sum of money and transformed these vacant areas into a beautiful garden restaurant and decorated it with potted plants and flowers. The 2nd petitioner carried on business peacefully in these three stalls and premises for about a year until July 1984 when a new tenant by the name of Pethiyagoda obtained the tenancy of stalls numbered 5 & 13 in the same Jatika Pola. The 2nd petitioner states she had written a letter dated 10.07.84 to the respondent requesting the exchange of one of her premises at the Jatika Pola for stall No. 1, but received no reply to it. The receipt of this letter is however denied by the 1st respondent. The 2nd petitioner then became aware that this same stall No. 1, had been let to Mr. Pethiyagoda for the duration of the Kandy Perahera. She also found that Mr. Pethiyagoda was occupying stall No. 4 belonging to the Ceylon Oils & Fats Corporation instead of stall No. 5 which was one of the stalls he had taken on rent from the Municipal Council, and that he was carrying on an unlicenced business of a cafe there. It was from then on that friction between the two of them commenced because Mr. Pethiyagoda started running a rival cafe business in close proximity to hers. In the first week of August, 1984, according to the petitioners, Pethiyagoda told the 2nd petitioner that he wanted to take over and use as part of his business one of the bare land patches which had already been let to her and for which she was paying rent. Mr. Pethiyagoda claimed that he was "well connected" with important officials in the Municipal Council and declared that he could get the premises if he wanted to. On receipt of information that this was going to happen the petitioners went to see the 1st respondent, the Mayor, at his office. They allege that the 1st respondent was very curt with them and abruptly terminated the interview before they could place all

their grievances before him, saying that he would look into the matter and asked them to see him later. They state that the 1st respondent is a cousin of Mr. Pethiyagoda and attribute that as the reason for the alleged preferential treatment afforded to Pethiyagoda in the matter of the bare land tenancy and the partiality shown to him in regard to stall No. 1 and the illegal businesss conducted by him in stall No. 4 to which he had no right.

The petitioners thereafter went on several occasions to meet the 1st respondent at his office but felt that he was avoiding them. Again in mid September they received information that the bare land tenancy was to be taken away from the second petitioner and given to Mr. Pethiyagoda. They met the 3rd respondent at the Municipal Office and he confirmed that oral instructions had been given by the first respondent to that effect. Being unable to meet the first respondent in his office, the petitioners went to his residence at about 7 p.m. on 18th September 1984. The first respondent was again rough and rude with them and admitted that he had issued orders to take away the second petitioner's tenancy to the bare land and to give it to Pethiyagoda and walked away. That night the first petitioner wrote a scathing letter dated 19th September 1984 (P127) to the first respondent accusing him of unethical, dishonest and corrupt conduct and nepotism on account of his relationship to Pethiyagoda. He sent copies of this letter to His Excellency, the President, the Hon. Prime Minister and to all the 23 members of the Municipal Council of Kandy. The first petitioner was in the habit of sending copies of such letters to highly placed persons like the Ambassador for the United States in Sri Lanka and Cabinet Ministers.

Within a few days of posting this letter, the petitioners state that a very large gang of thugs attacked the second petitioner's property at night and caused damage to it. The two Municipal Security Guards who were on duty at the Jatika Pola were able to drive away the thugs before they could cause further mischief. The Municipal Security Guards were then suddenly withdrawn without notice to the petitioners. Within four days of the withdrawal of the Municipal guards an extremely violent attack was launched by a gang of eight thugs on the second petitioner's property. The roof was damaged and one of the second petitioner's employees was injured. Thereafter more incidents of theft, damage to the second petitioner's property, thuggery and injury to persons occurred. On 13th February 1985, another violent attack was made by thugs and one of the petitioner's

employees was severely injured on the head and had to be hospitalised. In these circumstances the petitioners had to employ security guards of their own in order to protect their property at night. They also installed an alarm system in the premises and remained there to supervise the security arrangements. They wrote to the first respondent about all this on 8.3.1985 (P271). The petitioners state that the Municipal Council claimed to have withdrawn its security guards because of the cost involved. But they point out that security guards were put back by the Municipal Council within two hours of the petitioners handing over the stalls to the representatives of the Urban Development Authority (U.D.A.) on 11.7.85 when the premises were vested in the U.D.A.

The petitioners also allege that the respondents have tampered with and falsified several documents and fabricated other documents in order to cover up their illegal acts. On 25.9.84 a complaint was made by the second petitioner in the office of the second respondent, which was taken down by a typist on three pages of closely-spaced typing and was signed by the second petitioner. After several futile attempts were made to obtain a copy of her statement the second petitioner telephoned the second respondent on 19.12.84 and reminded him of his promise to post her a copy on the day after the complaint was made. The second respondent replied that she could have a copy the next day. The next day on being informed by a subordinate officer that the copy was ready she sent a messenger and collected it. But on examining the letter she found annexed to it another copy bearing several corrections and deletions which she suggests had apparently been mistakenly handed over by the subordinate officer. They are the two documents P242 and P244. A comparison of the two documents does show that corrections have been made and in P244 and at P245 the words "and he was going to take the slab and might" are scored off by drawing a line across them. The "slab" is a reference to the bare land area on which there was a concrete slab which the 2nd petitioner alleged the first respondent told her he was going to take away from her and hand over to Pethiyagoda, when she went with the first petitioner to the first respondent's residence on the evening of 18.9.84.

The petitioners further allege that the report (P448) of the Special Committee appointed by the Council to inquire into the lease of the stalls at the Tomalin Park, Jatika Pola and the allegations made by the second petitioner against the first respondent consists of several flaws

and is based on documents deliberately fabricated for the purpose of that inquiry. The second petitioner complains that the Committee did not permit her husband, the first petitioner, to be present with her at the inquiry when she was called upon to give evidence and she therefore had no alternative but to walk out. She points out that the Committee acted on a fabricated report submitted by the Superintendent of Works, Mr. Wijekoon dated 18.2.85 (3R15) regarding the structural alterations made by the petitioner in the stalls. In giving evidence before the Committee this officer stated that he visited Tomalin Park, Jatika Pola on 22.2.85 which is four days after the date of his report (vide Report at 452). Learned counsel for the first and third respondents submitted that the date 22.2.85 mentioned in the report is an obvious error on the part of the Committee. The Committee met on six occasions and 18.2. was one of the dates. An examination of the reverse of 3R15 indicates that it was first dealt with on 19.2. since a minute has been made under that date as follows: "For necessary action pl." That endorsement along with the subsequent endorsements made thereon indicate that the document had been tendered by the Superintendent of Works at least on 19.2. and is consistent with his signing the report on 18.2.85.

The petitioners also challenge as a fabrication the report 3 R 16 dated 12.3.85 made by the Superintendent of Markets Mr. Jiffry, who states that he inspected the petitioner's stalls on 5.3.85 and found that the "partitioning" between the three adjacent stalls Nos. 16, 17 and 18 had been broken and provision made for access from one stall to the others. This had the effect of converting the three stalls into one. The petitioners denied that Mrs. Jiffry came to their stalls on the 5th but admitted that his visit was on the 12th as indicated by the date of his report. They also denied that he entered the premises and made a physical inspection of the interior but merely remained outside and asked them a few questions. They further made the allegation that his report 3R16 was written by the second respondent under whom he worked and pointed to certain alleged similarities in the handwriting of the second respondent on this document and his signature on another document, a comparison of which the first petitioner had made and produced photocopies of them marked P569 and P570. In view of the serious allegation of this nature made by the first petitioner, we called for and examined the note book kept by Mr. Jiffry in which the entry of his inspection on the 5th March, 1985 was made. We also made a visual comparison between the writing of Mr. Jiffry in his note

book on the 5th March with the writing on the other pages of the note book and 3R16, and there did not appear to be any glaring dissimilarities in the handwriting on these documents. The first petitioner then made the astounding allegation that the note book itself had been written up by the second respondent for the purposes of this case. The first petitioner is not a handwriting expert and the material he had for a comparison of the handwriting of the second respondent and of Mr. Jiffry is very scanty. The first petitioner had every opportunity of availing himself of the services of a handwriting expert but did not take it, although he had taken great pains in the preparation of his case.

The special Committee which issued its report P448 on 27.2.85 found that the second petitioner had made structural alterations in stall Nos. 16, 17 and 18 in contravention of the terms of the agreements.

In regard to the structure erected by the second petitioner in the "open space" which had been let to her, the Committee in their report erroneously refer to it as unauthorised. That is not correct. The second petitioner was permitted at her request to construct a light-weight roof over the concrete slab on a temporary basis on her undertaking to demolish it, whenever the Municipal Council wanted it done (vide P121A dated 31.8.1983). This is also admitted by the first and second respondents in their affidavits filed in this case.

The Committee also found that Pethiyagoda had violated the terms of the agreement he had entered into with the Council by exchanging without authority stall No. 13 for stall No. 4, that had been let to the Ceylon Oils & Fats Corporation. In fact both Pethiyagoda and Mr. Werellagama, the Manager of Ceylon Oils & Fats Corporation admitted this violation.

The grievance of the petitioners is that they have been maliciously discriminated against in favour of Pethiyagoda because of their earlier complaints of fraud, corruption and maladministration against the first and second respondents. The first respondent, it is alleged, in collusion with the second respondent directed the third respondent to issue the orders set out in paragraphs 500 (A), (B) & (C) of their petition, namely:–

(*a*) To terminate the "life-time hereditary" tenancies of the second petitioner of stalls Nos. 16, 17 & 18 Jatika Pola by notice dated 12.3.85 (P426 & P426A)

(b) To terminate the second petitioner's tenancy of the two bare land leases by notice dated 22.3.85 (P427).

(c) To demolish and remove the structures erected on the two bare land areas by order dated 22.3.85 (P428).

Pethiyagoda and the Manager of the Ceylon Oils & Fats Corporation who were equally guilty of breaches of their agreements, on the other hand did not have their tenancies terminated but were only directed to revert to their original stalls. The petitioners therefore allege an infringement of their fundamental right to equality before the law, as guaranteed by Article 12 of the Constitution.

The respondents denied the allegations made against them in their respective affidavits. The first respondent denied that Pethiyagoda is a cousin of his and said that he did not even know him prior to 1984. The petitioners have been acting on hearsay and are not sure of the true relationship between Pethiyagoda and the first respondent as the correspondence discloses. The petitioners gradually changed their position in regard to the relationship of Pethiyagoda to the 1st respondent, from one of cousin, to cousin-at-law and then to some "connection", which they were unable to establish.

Their allegation that the attack by a gang of thugs was made on the second petitioner's premises within a few days of her writing letter P127 on 19.9.84 to the first respondent seemed to convey the insinuation that it and the subsequent acts of thuggery were made at the instance of the first respondent . The possibility that the attacks could have been instigated by other persons who were angry with the petitioners cannot be ruled out. Pethiyagoda had sent a petition (2R6) to the first respondent on 11.9.84 complaining of several alleged unlawful acts committed by the petitioners. The petitioners in turn had by letter dated 15.9.84 (2R7) made counter-allegations against Pethiyagoda. Both parties were summoned for an inquiry by the second respondent by notices 2R8 and 2R9 dated 19.9.84 that is, on the day P127 was written. The second petitioner's statement P242 was recorded on 25.9.84, and the report of the inquiry 2R12 was made by the second respondent to the first and third respondent on 16.10.84. There was a finding that the second petitioner had converted stall No. 17 into a laundry without the permission of the Council and that Pethiyagoda had changed his stall No. 13 for stall No. 4 without the authority of the Council.

It is therefore abundantly clear that within a few days of 19.9.84 when the petitioners wrote that letter P127 to the first respondent there were other persons against whom allegations had been made by the second petitioner and who could have been responsible for the acts of violence complained of by the petitioners.

The first respondent in his affidavit also pointed out that the council had resolved to withdraw the Municipal night security guards by resolution on 29.8.84, since all the stalls, had been let out. It appears that security guards are employed only to look after stalls that have not been leased out. That resolution was made sometime before the second petitioner's letter of 19.9.84, although, no doubt, it was implemented only a few days after the 19th September.

On the findings in the second respondent's report 2R12, the second petitioner was sent a notice dated 19.11.84 (3R1/P181) by the third respondent to show cause why her tenancy of stall No. 17 should not be terminated for converting it into a laundry. The second petitioner in fact in her letter of 15.9.84 (2R7) addressed to the first respondent admitted at page 4 that they brought to Kandy the first automatic laundry dry cleaning establishment. Nevertheless she asked for time to consult her lawyers and thereafter no further action appears to have been taken about it by the council. Since it did not constitute one of the grounds for eventually terminating her tenancy of stall No. 17 by P426, nothing more need be said about it.

As regards the allegation of falsifying the second petitioner's statement (P244) the second respondent admits in his affidavit that the typist's draft of the statement contained several grammatical and typist's errors and needed correction. He also stated that the uncorrected script was annexed to the fair copy and both were, on his instructions, handed to the second petitioner's messenger when he called for the copy. He however denied that the second petitioner signed her statement, and the 3rd respondent in his reply to the first petitioner's letter to him dated 7.2.85 (P363), categorically states that she did not sign the statement (P259 of 18.2.85). It was further submitted by counsel for the second respondent that irrelevant matters mentioned by the second petitioner were deleted from her statement P244 and so the words at P245 "and he was going to take the slab and might" were scored off as irrelevant. However, in his affidavit the 2nd respondent has given the reason for the corrections as the typist's faulty English and not the irrelevant matters. The inquiry

however, it will be observed, was into the complaint of Pethiyagoda (2R6) dated 11.9.84 against the petitioners and the counter-complaint of the second petitioner (2R7) dated 15.9.84 against Pethiyagoda in which the first respondent was not involved. Consequently the second respondent in his letter (P137/2R11) of 24.9.84 in reply to the second petitioner's letter of 22.9.84 (P136/2R10) requesting a postponement of the inquiry to enable her to consult her lawyers, specifically informed her that no matter that fell outside the tenancy issues would be discussed at the meeting.

The second petitioner submitted that the tenancies were "life-time and hereditary", according to circular of 31.12.80 (P575) and consequently could not be terminated by the Council. But that is not so. The circular states that the tenancies are subject to the terms and conditions of the Agreements entered into between the parties and are liable to be terminated, for any breach of the terms and conditions of the Agreement. Paragraph 7 of the circular further states that the council has the right on the death of a tenant, to transfer the tenancy to the spouse or child of the tenant if such an application is made, and not that the tenant's spouse or child is entitled as of right to the tenancy on the death of the tenant.

The second petitioner also took up the position that since the agreements were entered into between the Kandy Municipal Council and her, it was only the Municipal Council and not the third respondent who could have terminated the tenancies. In fact clause IV of the agreements gives the council the right to terminate the tenancies for any breach of its terms and conditions.

Section 34(1) of the Municipal Council's Ordinance provides that every Municipal Council shall be a corporation with perpetual succession and a common seal.

Section 34(2) provides that the common seal of the Council shall not be affixed to any contract on behalf of the council, except in the presence of the Mayor or Deputy Mayor and the Commissioner who shall sign their names to such contract in token of their presence.

In all the three contracts P106, P110 and P114, the common seal of the Kandy Municipal Council has been affixed in the presence of the Mayor the first respondent, and the Commissioner the third respondent.

Section 14(3) of the Ordinance as amended by section 99 of the Local Authorities Elections (Special Provisions) Law No. 24 of 1971, provides that the Mayor of a Municipal Council shall be the chief executive officer of the Council and all executive acts and responsibilities which are by the Ordinance empowered to be done or discharged by the Council, may, unless the contrary intention appears from the context, be done or discharged by the Mayor. The first respondent therefore was empowered to exercise the powers of the council. He also had the power under section 14(4) to delegate any of the powers, duties and functions imposed on him to any officer of the council. It was under the powers vested in him by section 14(3) and (4) of the Municipal Councils Ordinance as amended by section 99 of the Local Authorities Elections (Special Powers) Law No. 24 of 1977 and in terms of Resolution No. 9(114) of 26.8.83 of the Kandy Municipal Council that he delegated certain functions to the officers specified in the document (1R4/P578).

It was pointed out by the petitioners that the function of determining leases of stalls in Markets under section 156(c) of the Ordinance, falling under Part VII of the schedule of 1R4 (page 5), had been delegated to the Municipal Veterinary Surgeon, the second respondent, and therefore the third respondent had no authority to issue the notices of termination of the tenancies–P426, P427.

1R4 states that the delegation is made by the first respondent–

"subject to the further restriction that the Mayor of Kandy, reserves to himself the right to interpose, at any time, if he deems it necessary to do so, in regard to the discharge of the powers, duties or functions delegated herein."

It is submitted by learned counsel for the first respondent that although the power to determine the leases had been delegated to the second respondent, the first respondent in the exercise of his right lawfully to interpose at any time, directed the third respondent to issue the notices (P426 & P427) terminating the tenancies of the second petitioner.

To my mind, it seems that the tenancies were not terminated under section 156(*c*) of the Ordinance because that could only have been possible if the second petitioner had been convicted of a breach of a by-law, as indicated by section 156(*a*). Section 156 states:

> The Council may–
>
> (*a*) expel or cause to be expelled from any public market any person who, or whose servant, is convicted of a breach of any by-law made under this Ordinance in relation to markets;
>
> (*c*) determine any lease or tenure which such person may have in any such stall, shop or other place within the market.

"Such person" in sub-section (*c*) refers to a person convicted of a breach of any by-law in sub-section (*a*). The tenancies were terminated under clause IV of the Agreement for a breach of the terms and conditions of the Agreement and that is made manifest in the letter P426. The termination was directed by the first respondent as the Chief Executive Officer of the Council performing its functions by virtue of the power vested in him by section 14(3) of the Ordinance, as amended.

It was next submitted by the petitioner that the Council could not act on the recommendations of the Special Committee Report dated 27.2.85 until it was adopted by the Council at a meeting.

Action was initiated on the report of the Superintendent of Works dated 18.2.85 when it was referred to the Council's lawyers on 1.3.85 as indicated by the endorsement on the reverse of that report, regarding the structural alterations made by the second petitioner. The 3rd respondent also states in his affidavit of 18.6.85 that he wrote the letter terminating the second petitioner's tenancies 3R6/P426 on receipt of the petitioner's letter dated 8.3.85 (3R10) addressed to the first respondent regarding their decision to remain in the premises every night until a final solution was found to their problems.

The report of the Special Committee 1R2/P448 was tabled before the Finance Committee on 18.3.85, according to the Minutes of the Council of that date (P516) and that was after the notice of 12.3.85 (P426) terminating the tenancy had been sent. The Mayor informed the Committee that the second petitioner had broken the walls of stalls Nos. 16, 17 & 18 and had altered the character of the building and that she and her family were residing there. He further informed

the committee that legal action was being taken regarding these illegal acts. The documents in Sinhala 1R2 dated 22.4.85 shows that the Finance Committee recommended that the report be accepted and be referred to the Council. That was done and the Council approved and accepted the report on that day. The Council thus by their decision, ratified the action already taken to terminate the second petitioner's tenancies by letter dated 12.3.85 (3R6/P426).

The petitioners complain that the unequal and discriminatory treatment meted out to them by the respondents constitute a violation of their fundamental rights guaranteed by Article 12 of the Constitution. It is confined primarily to the agreements entered into with the Kandy Municipal Council and concerns only the second petitioner who alone held those agreements. The first petitioner is not a citizen of this country and was hard put to it to show any infringement of his fundamental right under Article 12(1) of the Constitution. This Article declares that:

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

In order to succeed the first petitioner must therefore make out that not only has he been treated differently from others, but that he has been so treated from persons similarly circumstanced without any reasonable basis and that such differential treatment was unjustifiably made. *Morarjee v. Union of India* (14) referred to in *Perera v. University Grants Commission (supra).*

The first petitioner's complaint is that the finding of the Special Committee Report P448 at page 6, that the allegations made by him against the Mayor are without substance, was arrived at without affording him an opportunity of being heard. The Special Committee were however dealing with the allegations made by Mrs. Roberts only as they state in paragraph one of the report. She was given an opportunity of supporting them but she refused to give evidence unless her husband was also present. The Committee informed her that they were sitting only as a fact finding committee and since the other tenant, Pethiyagoda, had not asked for any representative of his to be present at the inquiry, it would be unfair to allow her only this concession. She then walked out. The Committee proceeded with the inquiry and after examining the voluminous documents tendered by her found that the allegations made by her were without substance. Unfortunately the Committee which set out to inquire into the

allegations of Mrs. Roberts erroneously added the name of Mr. Roberts also, when they said that the allegations made by Mr. & Mrs. Roberts against the Mayor were groundless. In any event even if the first petitioner's allegations were also considered without giving him an opportunity of supporting them, it would at the most, amount to a violation of the principles of natural justice, which is not a fundamental right. "Rules of natural justice cannot be elevated to the status of fundamental rights."—per Sharvananda, C.J. in *Elmore Perera v. Major Montague Jayawickrema & Others* (15). The first petitioner's next complaint is about the rudeness, incivility and the failure to reply his letters by the respondents regarding official matters. But they do not constitute a violation of any statutory obligation on the part of the respondents and consequently no ordinary legal right, far from a fundamental right, is infringed. The first petitioner's application must therefore fail.

The complaint of the second petitioner is that the reasons given for the termination of her tenancies in the letter P426, that she had made structural alterations in the stalls and was occupying them as a residential premises without authority are not grounds for the termination of her tenancies under the 1982 by-laws (P429) (described as amended by-laws after approval by the Law & General Purposes Committee on 11.3.1982, 12.3.82 and 18.3.82 of the Kandy Municipal Council applicable to all Public Markets).

By-law 53 empowers the Municipal Council to terminate a tenancy for a contravention of only three by-laws, viz. 4, 7, & 19. A contravention of any other by-law is punishable under by-law 56(*a*) with a fine on conviction.

In the case of the second petitioner the breaches of the by-laws commited by her did not warrant the termination of her tenancies since they were not one of the three above-mentioned by-laws. Even by-law 37 which prohibits unauthorised alterations to stalls was inapplicable since it referred only to the Central Market and not to the Tomalin Park Jatika Pola where her stalls are situated. The other ground for the termination of her tenancies, according to her, was that she remained in the premises after 9 p.m. when it should have been closed, implied in contravention of by-law 23. But a breach of this by-law is punishable only with a fine and the tenancies cannot be terminated under by-law 33, except under section 156(*a*) & (*e*) of the Ordinance, upon a conviction under by-law 36(*a*). By-law 23 applies

to the hours of business from 6 a.m. to 9 p.m. when a stall must be kept open and is inapplicable to a situation like this. In my view, the appropriate by-law is 18(*f*), which prohibits sleeping within the premises of a public market. A breach of even this by-law is only punishable with a fine under by-law 56(*a*), but her tenancy cannot be terminated under by-law 53. Of course if she were prosecuted and convicted of contravening this by-law, her tenancies could have been terminated under section 156(*a*), read with 156(*c*) of the Municipal Councils Ordinance. But she was not prosecuted and convicted for her tenancies to be terminated.

Pethiyagoda and the Manager of the Ceylon Oils & Fats Corporation on the other hand, it is submitted, by exchanging their stalls Nos. 5 & 13 have violated by-laws 4 & 7. By-law 4(*c*) prohibits permitting any person other than a servant to use or occupy the stall, without the written permission of the Council and by-law 7 prohibits a tenant from changing or altering the sale of commodities in his stall without the written sanction of the Council. For a violation of these two by-laws the Council is empowered under by-law 53 to terminate the tenancy of the tenant. But Pethiyagoda and the Manager of the Ceylon Oils & Fats Corporation who had violated by-laws 4 & 7 did not have their tenancies terminated, while her tenancies were terminated for a breach of by-law 18(*f*), which did not warrant such termination, under by-law 56(*a*). The second petitioner therefore complains of unequal and discriminatory treatment as against her.

The petitioners came into court complaining of discriminatory treatment on the basis of the 1982 by-laws and referred to them specifically in their pleadings and correspondence with the respondents. The respondents however state that the by-laws which were applicable were those made in 1974. But they made no effort in their affidavits to set out the correct position until much later in the course of hearing when counsel produced a set of the 1974 by-laws which he submitted were in operation at the time.

Section 268(1) of the Municipal Councils Ordinance provides that–

> "no by-law shall have effect until it has been approved by the Minister, confirmed by the Senate & House of Representatives (now Parliament) and notification of such confirmation is published in the Gazette."

Sub-section (2) states that: "Every by-law shall upon notification of such confirmation be as valid, and effectual, as if it were herein enacted."

The 1982 by-laws are only proposed amendments that have been approved by a Committee of the Kandy Municipal Council but have not gone through the procedure set out in section 268. As such they are not valid and effectual. The by-laws of 1974, as their title indicates, have been approved by the Minister, confirmed by the then National State Assembly and been gazetted. They are the only valid and effectual set of by-laws that were in operation at the time.

There was much controversy as to which set of by-laws the Municipal Council was operating under at the time of the agreements. The petitioners state it was the 1982 by-laws but that is denied by the respondents. It could only have been the 1974 by-laws which were the only valid by-laws at the time. They do not cease to operate, until they are revoked. The second petitioner could not have acted to her prejudice on any representation held out to her that the 1982 by-laws were operative, since she was not even aware of their existence at the time of the agreements. It was only much later that she obtained a copy of them from the Deputy Mayor in response to the request by letter of 9.12.84 (P187).

Turning now to the 1974 by-laws, it will be seen that the second petitioner has committed only a violation of by-law 18(*d*) which more or less corresponds to by-law 18(*f*) of the 1982 proposed by-laws, namely sleeping within the premises of the public market after it is closed.

By-law 40 which prohibits alterations to stalls is inapplicable because it relates to the Kandy Central Market only and not to the second petitioner's stalls which are situated in Tomalin Park Jatika Pola. This by-law comes under the heading "By-laws applicable to the Kandy Central Market only." By-law 30 which is the first by-law that comes under that heading states "The succeeding by-laws shall apply only to the Kandy Central Market...."

The second petitioner has thus committed a breach of by-law 18(*f*) which under by-law 53 is only punishable with a fine and her tenancies were not liable to be terminated under section 156(*c*) and (*a*) of the Ordinance on a conviction, as she was not prosecuted.

Pethiyagoda and the Manager of the Ceylon Oils & Fats Corporation are in the same position as the second petitioner as far as the 1974 by-laws are concerned. They have committed a breach of by-law 4(*c*) which corresponds to by-law 4(*c*) of the 1982 by-laws already referred to. By-laws 7 & 53 of the proposed 1982 amended by-laws find no place in the 1974 by-laws. Consequently the tenancies of the stalls of Pethiyagoda and the Ceylon Oils & Fats Corporation also could not have been terminated under the 1974 by-laws for a violation of by-law 4(*c*) except under section 156(*c*) and (*a*) of the Ordinance upon a conviction under by-law 53.

It is now necessary to examine the agreements in order to ascertain if the parties have violated any of the terms and conditions of the agreements. P426 expressly states that the second respondent's tenancies are terminated for a violation of the terms and conditions of the Agreements, namely by making structural alterations in the stalls and occupying them as a residential premises.

The by-laws have also been incorporated in the agreements of all three parties as terms and conditions by clauses (*f*) and 33, which make a contravention of any of them by the tenant a breach of the agreement, empowering the Council to terminate the tenancy under paragraph IV.

The agreements entered into by the Council with Pethiyagoda in respect of stalls Nos. 5 & 3 are 2R4A and 2R4B dated 19.7.84 and that with the Ceylon Oils & Fats Corporation is 2R5C. The petitioners challenge the genuineness of these agreements because there is only one attesting witness to the signature of the Mayor, instead of the required two and none to the signature of the Municipal Commissioner in 2R4A & B, while the agreement with the Ceylon Oils & Fats Corporation (2R5C) does not mention the day of the month it was signed nor are there any attesting witnesses to the signature of the Municipal Commissioner. The allegation of fabrication is denied by the respondents.

Clause 12 of the Agreement prohibits the tenant from making any alterations to the stalls whether structurally or otherwise or whether permanent or temporary without the prior approval in writing of the Municipal Commissioner or any person duly authorised by him. The second petitioner in her letter of 11.3.85 (P390)to the first

respondent and in her affidavit of 15.4.85 filed with this application admitted that she constructed the doorways inside the stalls about two years prior. This alteration had the effect of converting the three separate stalls into one unit by means of the communicating doorways. She however states that the alterations were made at the time she first renovated the premises and that she obtained the verbal permission of some person, but does not mention his name, so that the first respondent could not have been in a position to verify it. The only person who could have permitted the alterations was the Municipal Commissioner in writing or any other person duly authorised by him. These alterations were clearly effected in breach of clause 12 of the agreement only, since by-law 40 of the 1974 by-laws is not applicable to this Market stall. The second petitioner also subsequently admitted her fault and offered to apologise for it and close up the doorways, but the respondents do not appear to have been prepared to accept it. Her tenancies were thus liable to be terminated for a violation of this clause.

Regarding her occupation of the stalls as a residence, clause 23 permits a tenant and his servants to remain inside the Market buildings or premises only from 6 a.m. to 9 p.m. By-law 18(*d*) of the 1974 by-laws prohibits any person, who would include even a tenant, from sleeping within the market premises after it has been closed.

The Superintendent of Markets in his report dated 12.3.85 (3R16) states that he inspected the premises on 5.3.85 and spoke to the petitioners and they admitted that they spend the nights there after the Council had withdrawn its security guards. This was solely done for the purpose of protecting their property from constant attacks by gangs of thugs shortly after the letter of 19.9.84(P127). The petitioners had installed an alarm system in their stalls and had to remain there to supervise the security arrangements . They had also employed their own security personnel after the withdrawal of the Municipal Council security guards. They had every right to protect their property and indeed clause 19 of the agreement makes it their duty to look after the security of their property. The Council itself, when it resolved on 29.8.84 (1R1) that it was unnecessary to maintain a security guard as all the stalls had been rented out, directed that the tenants should be instructed to make their own arrangements regarding security, if necessary. It is therefore abundantly clear that petitioner remained in the premises at night with their employees for the express purpose of safeguarding their property against mischief

and theft at the hands of thugs. They have openly said so in a letter P156 which they wrote to His Excellency the President on 24.11.84. They also wrote to the first respondent a letter on 8.3.85 (P271/3R10) in which they said their entire family would remain on the premises each night along with their employees and security personnel until some final solution to their problem was found.

In these circumstances it can hardly be said that there was a breach of by-law 18(*d*) or clause 23 of the agreement by the second petitioner, except in a very technical sense. Nevertheless the Council acting under the Agreements terminated the second petitioner's tenancies for a breach of these terms and that relating to the alterations to the stalls.

As far as Pethiyagoda and the Manager, Ceylon Oils & Fats Corporation are concerned, they admitted the unauthorised exchange of stalls 5 & 13 which constituted a violation not only of by-law 4(*c*) but also of clauses 4 & 32 of the Agreements. By-law 4(*c*) of the 1974 by-laws correspond with by-law 4(*c*) of the proposed 1982 by-laws. By-law 4 (*c*) prohibits a tenant from permitting any person other than a servant from using or occupying any part of the stall. Clause 4 prohibits a tenant from carrying on a trade which is not authorised in the licence and clause 32 prohibits him from parting with the possession of his stall.

It is however in the discretion of the Municipal Council under paragraph IV of the Agreements to terminate a tenancy for a breach of a term of the Agreement which would, no doubt, depend on the circumstances of each case. Pethiyagoda and Werellegama, the Manager of Ceylon Oils & Fats Corporation had promptly admitted their fault in writing and undertook to revert to their original stalls. No damage had been caused to the stalls. In these circumstances their tenancies were not terminated and they were directed to revert to their original stalls within a week's time.

The Council, on the other hand, decided to terminate the tenancies of the second petitioner on account of the structural alterations made and their occupation of the stalls as a residential premises.

The other two unlawful acts that the second petitioner complains of in the petition is that notice dated 22.3.85 (P427) informing her that permission granted to her to use the bare land sites is withdrawn and

requesting her to vacate the sites within fourteen days of the receipt of the letter. By a letter of the same date (P428) she was also directed to demolish and remove the light-weight temporary roof she had constructed over the concrete slab within fourteen days of the receipt of the letter.

The third respondent in his affidavit filed in this court on 10.6.85 states that he requested the second petitioner to remove the temporary structure made by her, when he saw that she had advertised her business for sale in the newspapers on three occasions commencing on 17.2.85 and feared that she intended to assign or sub-let them, which she had no right to do.

The respondents were unaware that the petitioners had communicated with Mr. Paskaralingam, the Secretary to the Ministry of Local Government, and had been advised by him rightly or wrongly by letter dated 11.2.85 (P456) to go ahead and find buyers. It was in consequence of this letter that the second petitioner assumed that she had the authority to advertise her business for sale.

Although a formal written agreement had not been entered into between the second petitioner and the Council in respect of the concrete slab areas as in the case of the stalls, the second petitioner nevertheless became a monthly tenant of the Council on the payment of a monthly rental, by virtue of the letters referred to earlier, but subject to the conditions set out therein. They were blocks of bare land and the Council had the right to terminate her tenancy and request her to remove the temporary structures erected by her. But since they were monthly tenancies, notice of at least one month should have been given to the second petitioner before terminating them. But by P427 only fourteen days notice to vacate these sites was given. As far as the structures are concerned the Council had the right to direct her to demolish and remove them.

The infringement of a fundamental right, for which relief is provided by Articles 17 and 126 of the Constitution, must be by executive or administrative action. It is therefore incumbent on the petitioners, in the first instance to establish that the wrongful acts of the three respondents in terminating second petitioner's tenancies of stalls No. 16, 17 & 18 by notice P426/3R6 and of the bare land areas by notice P427 constitute executive or administrative action. The three respondents are officers of the Kandy Municipal Council and it is

therefore necessary to ascertain whether the Municipal Council is an organ or agency of the State, if their action is to be regarded as executive or administrative action.

It is contended by counsel for the respondents that the Kandy Municipal Council is a local authority having corporate status and is not an organ of the State. The Indian Constitution, it is pointed out, unlike ours, expressly includes in the definition of "State", in Article 12 "all local or other authorities within the territory of India or under the control of the Government of India." It was further submitted that the second and third respondents belong to a different service, namely the Local Government Service, and are subject to the disciplinary control of the Local Government Service Commission, unlike Public Officers who belong to the Public Service. In *Perera v. University Grants Commission (supra)* Sharvananda, C.J., as he then was, said at page 112:

> "The wrongful act of an individual, unsupported by State authority, is simply a private wrong. Only if it is sanctioned by the State or done under State authority does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions. It refers to exertion of State power in all its forms."

In *Wijetunga v. Insurance Corporation and Another (supra)* Sharvananda, A. C. J., said again at page 6:

> "Delegation of a State function to a party may make the party's action, the action of the Government or thus make the State responsible for such action. The decisive question is what is the involvement of the State, in the activity of the party concerned. 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 subject to the constitutional inhibitions of the State. The inquiry is whether there is a sufficiently close nexus between the State and the action of the agencies that is challenged, so that the action of the agencies may fairly be treated as that of the State itself. Thus the relevant question is what is the relationship between the particular corporation whose acts are

challenged and the State? Is it a Department of Government or servant or instrumentality of the State? Whether the Corporation should be accorded the status of a department of government or not must depend on its Constitution, its powers, duties and activities. Those are basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions. For determining the integral relationship between the State and the Corporation we have to examine the provision of the statute by which the Corporation has been established.....".

He then went on to say at page 14:

"It may be said that there are several criteria which from time to time the Judges have thought relevant. These include: Is the body performing a task formerly carried on by private enterprise?..... To what extent is it subject to Ministerial control? Has it independent discretionary powers?.....Must it consult a Minister before it acts? Can a Minister give directions? Is its function one which has historically been regarded as govermental? Is it incorporated? Is it subject to government audit? Is its authority general or local? Is it a mere domestic body? Is execution against its property allowed?

The main criterion–

'now seems to be whether the body is performing a function analogous to that performed by the Crown Servants and under some degree of control by a Minister of the Crown'."

It is now necessary to determine whether the Municipal Council, Kandy on whose behalf these respondents acted, is an agency or instrumentality of the State by examining the functions it performs and ascertaining what control the State maintains over it. Municipal Councils, Town Councils and other local authorities constitute what is generally called Local Government and as the term signifies is a decentralised form of the Central Government.

Article 27 (4) of the Constitution provides that–

"the State shall strengthen and broaden the democratic structure of government and the democratic rights of the people by decentralising the administration and by affording all possible opportunities to the people to participate at every level in national life and in government."

It will be observed that the State has distributed some of its powers and functions among these various local bodies which exercise them within certain specified areas defined by the State. Under section 2 of the Municipal Councils Ordinance, it is the Minister of Local Government who declares any area by order published in the Gazette to be a Municipality within defined limits and a Municipal Council is then constituted for that area in accordance with the provisions of the Ordinance. Under section 4,a Municipal Council is charged with the regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares and generally with the protection and promoton of the comfort, convenience and welfare of the people and the amenities of the Municipality. These are clearly functions that were the responsibility of the State and which now have been transferred to Municipal Councils with a view to relieving the State of the multifarious functions and duties that it would otherwise have to perform.

For the purpose of discharging the duties entrusted to it, is conferred among other powers, under section 40, the power to establish and maintain public services like water supply, the lighting of streets, public places and public buildings, the supply of electric lighting or power to markets, public bathing places and any form of public service. Under section 46 it is entrusted with the duty:

(*a*) to maintain and cleanse all public streets;

(*b*) to enforce the proper maintenance, cleanliness and repair of all private streets;

(*c*) to supervise and provide for the growth and development of the Municipality;

(*e*) to establish and maintain any public utility service required for the welfare, comfort or convenience of the public; and

(*f*) generally to promote the public health, welfare and convenience and the development, sanitation and amenities of the Municipality.

These functions are clearly of a governmental nature and satisfy the functional test which makes the Municipal Council an agency or instrumentality of the State.

The State also exercises control over Municipal Councils in various ways. Under section 7 the Minister is empowered by Order published in the Gazette to issue all directions as may be necessary or appropriate for the purposes of any preliminary arrangements in connexion with the Constitution of any Municipal Council under this Ordinance.

The power of a Municipal Council to borrow money is restricted by the requirement of Ministerial sanction in the instances set out in section 191 and 193 of the Ordinance.

An Annual Administration Report after the close of each financial year showing a statement of accounts must be submitted by the Mayor to the Minister, under section 218.

A duplicate of the Auditor's report has to be sent to the Minister as soon as possible after the close of the financial year under section 222. Under section 268, by-laws made by the Municipal Council require the approval of the Minister and have to be confirmed by Parliament and published in the Gazette before they become valid and effectual.

By section 277, as amended by Law No. 24 of 1977, the Minister is empowered to remove the Mayor or any Councillor from office or to dissolve the Municipal Council for any of the reasons specified thereunder.

The Minister also has the power to call for extracts of proceedings of the Council under section 278, and for statistics connected with the working, income and expenditure of a Municipal Council under section 279. Section 280 empowers the Minister to make an inquiry into the working of a Municipal Council.

Under section 289 as amended by Law No. 24 of 1977, the Minister is empowered to make regulations generally for the purpose of giving effect to the principles and provisions of the Ordinance. In this manner the State exercises control over the administration and finances of a 'Municipal Council', and the "governmental control test" is also satisfied, making a Municipal Council a State agency or instrumentality. Actions of the Municipal Council and its officers are thus "executive or administrative action" within the meaning of Articles 17 & 126 of the Constitution.

Wade in *Administrative Law*, 4th Ed. at page 122, summarises the position of a local authority as follows:

> "It is needless to emphasise that local government is subjected to Central Government in numerous and important ways.....and it is probably through financial adminstration that the Central Government's control makes itself most felt."

In the present case the second petitioner's complaint is of unequal treatment and discrimination against her by the three respondents in terminating her tenancies of stalls No. 16, 17 & 18 by letter P426, while dealing lightly with Pethiyagoda and the Ceylon Oils & Fats Corporation for breaches of their respective agreements.

Undoubtedly the Kandy Municipal Council entered into all these agreements in the exercise of its statutory powers under section 157 of the Municipal Councils Ordinance which enables it to let to tenants on lease or otherwise, on such terms as it may think fit any part (stall) of any public market. It is admitted by the respondents that the Jatika Pola at Tomalin Park where these stalls are situate is a public market.

The Agreements entered into by the Council with the second petitioner incorporate in them the by-laws by virtue of clauses (*f*) and 33 which impose an obligation on the second petitioner to comply with and not contravene the by-laws. They therefore form part and parcel of the terms and conditions of the Agreements and paragraph IV of the Agreement gives the Council the right to terminate a tenancy for a breach of any term or condition of the Agreement. In the present case it is evident that the Council through the third respondent terminated the second petitioner's tenancies for breaches of clauses 12 & 23 of the Agreements and by-law 18(*d*) which is also made a term of the Agreement. The question now is whether Article 12 of the Constitution can be invoked in dealings between the Council and the second petitioner, under the agreements entered into between them.

Learned Deputy Solicitor-General who appeared as amicus curiae contended that in the field of contract involving the State and a private citizen, violation of fundamental rights have no place except at the threshold stage of entering into the contract when the State acts in its executive capacity while exercising a statutory power. But once the contract is entered into, it is the terms and conditions of the contract alone that bind the State and the individual.

He relied for this proposition on two Indian cases: *M/s. Radhakrishna Agarwal & Others v. State of Bihar & Others (supra),* and *Bal Krishnan Vaid v. The State of Himachal Pradesh & Others. (supra).*

In *Agarwal's case (supra)* the State Government had leased out some forest land to the appellants to collect and exploit Sal seeds for 15 years on payment of royalty at a certain rate, and the State under the terms of the leases, revised the rate of royalty and thereafter cancelled the lease for breach of certain conditions.

The contract was presumably executed in compliance with the provisions of Article 299 of the Constitution, which relates to contracts made in the exercise of the executive power of the State under Article 298 which empowers it to carry on any trade or business and make contracts for any purpose.

It was held there that–

"at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with individual citizens import into every transaction entered into in the exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 (which corresponds with Article 12 of our Constitution) or of any other constitutional provision when the State or its agents, purporting to act within this field, performs any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only, *unless some statute steps in and confers some special statutory power or obligation on the State, in the contractual field which is apart from contract.*" (The emphasis is mine).

Beg, C.J., in that case at para 10, referred to *Erusian Equipment & Chemicals Ltd. case (supra)* where an order of blacklisting had the effect of depriving a person of equality of opportunity in the matter of public contract, and said that case–

"involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the government could contract at all."

The Supreme Court in that case approved of the classification made by the Patna High Court of cases in which breaches of alleged obligations by the State or its agents could be set up, into three types.

The first category does not apply to the present case.

The second category is–

> "where the contract entered into between the person aggrieved and the State is in the exercise of a statutory power under a certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State."

The third category is–

> "where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and the petitioner complains about the breach of such contract by the State."

The cases which belong to the second category are *K. N. Guruswamy v. The State of Mysore (supra), D.F.O. South Kheri v. Ram Sanehi Singh (supra),* and *M/s. Shree Krishna Gyanoday Sugar Ltd. v. State of Bihar (supra).*

In Guruswamy's case (supra) section 15 of the Mysore Excise Act of 1901 prohibited the sale of liquor without a licence from the Deputy Commissioner. Section 29 authorised government to make rules for the purpose of carrying out the provisions of the Act. The relevant Rules are:

Rule 1–1. "The privilege of retail vend of exercisable articles shall be disposed of either by auction or by such other method as may be notified by Government."

Rule 1–2. "In cases where the right of retail vend is permitted by Government to be disposed of by calling for tenders, a notification calling for the same shall be published by the Excise Commissioner in three successive issues of the Mysore Gazette, after obtaining the previous approval of the Government therefor."

Rule II–8. "The shops will be knocked down to the highest bidder, but the sale will be subject to formal confirmation by the Deputy Commissioner who shall be at liberty to accept or reject any bid at his discretion. Such formal confirmation will be tantamount to an acceptance of the bid unless revised by the Excise Commissioner for special reasons . . . . ."

Rule II–10. "Shops remaining unsold at the first auction of shops the sales of which have not been confirmed but cancelled, will ordinarily be disposed of by re-auction or by tender or otherwise at the discretion of the Deputy Commissioner, later on."

The appellant Guruswamy and the fourth respondent Thimmappa were rival liquor contractors. The contract for the City & Taluk of Bangalore was auctioned by the third respondent, the Deputy Commissioner. The appellant's bid of Rs. 180,000 a month was the highest and the contract was knocked down in his favour subject to formal confirmation by the Deputy Commissioner.

Thimmappa was present at the auction but did not bid. Instead of that he went direct to the Excise Commissioner behind the appellant's back and made an offer of Rs. 185,000.

The Excise Commissioner then made order cancelling the auction sale and requested the Deputy Commissioner, Bangalore District, to take action under Rule 10 and forwarded to him the tender given by Thimmappa.

The Deputy Commissioner informed the appellant that the sale had been cancelled by the Excise Commissioner and made an order that the tender of Thimmappa is accepted.

It was held that although the Excise Commissioner exercised his authority a little irregularly because the tender did not reach him through the proper channel nevertheless the cancellation was for the good reason that the government would be able to get an extra Rs. 5,000 a month as revenue. The cancellation was therefore proper and as the appellant obtained no right to the licence by the mere fact that the contract had been knocked down in his favour since the acceptance was subject to sanction, the appellant's prayer for a 'mandamus' to confirm his right to the licence could not be granted.

It was also held that the subsequent action of the Deputy Commissioner in giving the contract to Thimmappa was wrong since the procedure laid down in Rule II, 10 was not properly followed. That Rule required that where the first auction is cancelled, the shops will ordinarily be disposed of by re-auction or by tender or otherwise at the discretion of the Deputy Commissioner. Here there was no re-auction or tender and it was held that the words "or otherwise" had the same meaning as specified in Rule I.1, that is, by notification.

This was therefore a case where in the exercise of his statutory powers the Deputy Excise Commissioner committed a breach of his obligation to follow the procedure laid down in a Rule framed under the Act, regulating the grant of the contract and the discrimination at the threshold of the contract was referable to the statutory authority to enter into the contracts.

In the *D.F.O. South Kheri case (supra)*, an auction was held by the Forest Officer and the petitioner Sanehi Singh purchased the right to cut timber from certain forest lots for the period 1.11.65 to 31.10.66. On 10.1.1967 the D.F.O., South Kheri Division, passed an order that the sleepers "against the tally" dated 29.10.66 in the allotment of 1965-66 season being "wrong" since they were cut in the month of November, 1966, do stand cancelled and that the sleepers be "passed against" the tally after getting the hammer-marks cancelled and be "re-inspected against the allotment for 1966-67 season." By that order the timber which the respondent claims was actually removed by him with the sanction of the forest authorities under the tally dated 29.10.1966 was to be treated as if it was removed in November, 1966.

Under the terms of the contract the D.F.O. had authority to modify any action taken by a subordinate forest authority and it was contended for the appellant that the remedy of the respondents was to institute action in a civil court and that the writ petition was not maintainable.

The High Court had held that since a competent officer duly authorised had already "passed the railway sleepers" and the decision had been given effect to, it was not open to the Divisional Forest Officer to rescind the order. The Supreme Court was of the view that the order passed by a public authority modifying the order or

proceedings of a subordinate forest officer had deprived the respondent of a valuable right and constituted arbitrary and unlawful action on the part of a public authority. In the circumstances it held that although the source of the right was initially in a contract the respondent could resort to a petition by way of a writ and not to a civil suit in order to obtain relief against the arbitrary and unlawful action of the public authority, since the order had to be made in a manner consonant with the rules of natural justice, when it affected the respondent's right to property.

In that case the D.F.O. did not call for any explanation from the respondent nor give him an opportunity of being heard before making the order to his prejudice. The Supreme Court intervened because the order of the D.F.O. was arbitrary and unlawful and violated the principles of natural justice inasmuch as the original decision of the forest officer had already been given effect to. There was accordingly a violation of the fundamental rules of the Indian *"Constitutional set up"* that every citizen is protected against arbitrary authority by the state or its officers. (The emphasis is mine). In *State of Orissa v. Dr. (Miss) Binapani Dei* (16) Shah, J. said:

> "We are unable to hold that merely because the source of the right which the respondent claims was intially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ."

The Full Bench of the Allahabad High Court in *Sitla Prasad v. Saidullah & Others* (17) sought to explain the decision in *D.F.O. South Kheri case (supra)* on the basis that there was a purported exercise of statutory power by the D.F.O.; so that even if a right flowing under contract was affected, it might be possible for the person to maintain a petition under Article 226 of the Constitution. It emphasised that the writ petition was primarily directed against the illegal exercise of statutory power which adversely affected the petitioner's contractual rights.

It will be observed that under Article 226 of the Indian Constitution the High Court, has the power to issue writs for the enforcement of fundamental rights as well as non-fundamental or ordinary legal rights or *for any other purpose* where it may be just or expedient for the court to intervene. The Supreme Court on appeal intervened because

of the arbitrary and unlawful action of a State Officer and the violation of an ordinary legal right, viz. the principles of natural justice in the purported exercise of his statutory powers.

In The Allahabad Full Bench case the petitioner was appointed as the authorised retailer under the provisions of U. P. Sugar Control Order 1966 for the sale of sugar, by agreement between him and the District Magistrate. On a complaint against the petitioner the agreement was terminated by the District Magistrate under the terms of the agreement after getting an enquiry made, but without affording any opportunity to the petitioner to have his say in the matter. The agreement nowhere provided that before terminating the agreement the District Magistrate will have to afford an opportunity to the dealer concerned to have his say in the matter.

It was held that by terminating the agreement the District Magistrate did not interfere with the right of the petitioner which could be secured by filing a petition under Article 226 of the Constitution. Infringement, if any, was of the petitioner's contractual rights, which he could, if so, advised, secure in a properly instituted suit. The cancellation, if at all, infringed merely a contractual right and nothing else. In such a case the question of following the principles of natural justice did not arise.

The third case is *M/s. Shree Krishna Gyanoday Sugar Ltd. & Another v. The State of Bihar & Another (supra)*. In this case the State Government in the exercise of its statutory functions under section 22 of the Bihar & Orissa Excise Act granted the exclusive privilege for manufacturing and supplying of country spirit to government warehouses in North Bihar for a period of three years to the petitioner. In view of a writ application filed by the petitioner the order of the State Government was stayed. During the pendency of the writ application the petitioner, after discussions with the Excise Commissioner agreed to maintain supplies of country spirit to the Government Warehouses, as he was doing under an earlier contract at the rate of 33 paise per London Proof litre provisionally, pending the writ application, because the new rate accepted by the State Government was 42 paise per London Proof litre.

After the writ application was dismissed the petitioner requested the Excise Commissioner to make payment at the rate of 42 paise per London Proof litre. When he failed to comply with the request the petitioner appealed to the Board which had supervisory powers over

the Excise Department and it directed the Excise Commissioner to make payment at that rate on the basis that such an assurance had been given. The State of Bihar and the Excise Commissioner then filed a writ petition to quash this order for several reasons, one being that no licence had been issued to the petitioner, pending the earlier writ application.

Nagendra Prasad Singh, J., said at para 15:

"In my judgment the petitioner had agreed and acted to its prejudice on the basis of the assurance given by the Excise Commissioner, and it is not now open to the Excise Commissioner or the State Government to take the plea that the supplies made by the petitioner were without any licence and as such, it was not entitled to found its claim on the basis of the statutory order passed by the State Government."

The learned judge went on to say:

"This aspect of the matter has been considered in several judgments of the Supreme Court, where it has held that courts have power in appropriate cases to compel performance of the obligations imposed upon departmental authorities by orders which are executive in character, when they find that any person has acted to his detriment on solemn promises made by the State Government or its authorities concerned. I am inclined to hold that there has been a substantial compliance with section 22 (2) of the Act."

He referred to the *Union of India v. M/s. Anglo Afghan Agencies* (18) which dealt with the case whether persons acting on representations made by government can claim in the absence of the execution of a formal contract under Article 299 of the Constitution, that government shall be bound to carry out its promise.

Shah, J., in that case at para 10 said:

"Under our *Constitutional set up* no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law—common or statute—the courts will be competent to, and indeed, would be bound to protect the rights of the aggrieved citizen." (The emphasis is mine).

This was therefore a case where there was a violation of the "Constitutional set up" a term coined by the same learned judge in the *D.F.O. South Kheri case (supra).*

The third category of cases is where the contract entered into between the State and the person aggrieved is non-statutory, and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and the petitioner complains of the breach of such contract by the State.

"Non-Statutory" here, in my view means, not that the contract does not originate in the exercise of a statutory power, but that the contract contains no statutory terms or obligations on the part of the State a breach of which is remediable outside the contract. A State cannot enter into a contract except by virtue of Article 298 of the Constitution or under a statutory power. In *Agarwal's case (supra)* the lease to collect and exploit sal seeds from a forest was entered into by the State by virtue of its executive power under Article 298 of the Constitution. But what was held in that case was that–

> "the contract did not contain any statutory terms or obligations, and no statutory power or obligation which could attract the application of Article 14 was involved."

It therefore fell closely into the third category of contracts pure and simple where the parties are governed only by the terms of the contract.

In *Lekhraj Sathram Das Lalvani v. N. H. Sheh & Others (supra),* the proprietors of two firms had in 1947 migrated to Pakistan and both these firms became vested in the custodian of Evacuee Properties for the State of Madras under section 8 of the Administration of Evacuee Property Act 1950 On 6.3.52 the appellant was appointed as manager of the two firms under section 10(2) (*b*) of the 1950 Act. By order dated 18.12.59 the management of the appellant was terminated and the possession of the business taken over by the deputy custodian. The appellant filed a writ petition to quash that order in the High Court of Kerala and having failed there, brought the present appeals. In this case the appointment was made under a statute but it was held to be contractual, in the absence of any statutory obligation between the custodian and the appellant and accordingly the appellant was not entitled to a writ.

In the second case, *Umakant Saran v. State of Bihar (supra)* the complaint of the appellant was that the 5th & 6th respondents who were both junior to him in service without teaching qualifications had been illegally appointed lecturers in surgery at Rajendra Medical College, Ranchi, in disregard of his own claim to the post. He prayed for the issue of a mandamus for setting aside these appointments. But on the day when the State Government had taken the decision to fill the posts the appellant was not eligible for appointment since he had not completed the minimum period of three years' teaching experience, while the respondents had done so. It was therefore held on the facts, that while the respondents were eligible for appointment as lecturers the appellant was not, and therefore could not be regarded as aggrieved for the purpose of issue of mandamus for setting aside the appointments of the respondents. This was also a case where there were no statutory obligations or duties on the State, which had been violated. It was a contract pure and simple.

In *Sinha v. State of Bihar (supra)* the petitioner who was an unemployed engineer was given a contract by the Superintending Engineer, Flood Investigation Circle, Muzaffapur, for earth-work in Gupta Bund on 29.12.1971. This was in accordance with the policy laid down by the government. The work was to be completed by 31.1.1972. The grievance of the petitioner is that although the date for completion had expired before he could finish the work, fresh tenders were invited by advertisement and arbitrarily and illegally his part of the work was given to the 6th & 7th respondents. The petitioner filed an application for a writ of mandamus commanding the 3rd & 4th respondents to grant adequate extension of time for him to complete the work and to declare the agreement in favour of the 6th & 7th respondents void and illegal. Untwalia, C.J., of the Patna High Court said at page 231–

> "I am conscious of the fact that under certain circumstances a writ of mandamus can issue to compel the authorities concerned to do certain acts even though they related to contractual rights. But in such a situation the contractual right of a petitioner is affected not merely by a breach of contract on the part of the authorities concerned but also because of their violation of statutory duties. The matter stands on a different footing if the action which is taken by the authorities concerned is in violation to their statutory duties. In the instant case, however, it is clear on the fact and in the

circumstances of this case that as between the two contracting parties to the contract, pure and simple, one of them is said to have committed a breach...I am, therefore, definitely of the view that until and unless in the breach is involved violation of certain legal and public duties or violation of statutory duties to the remedy of which the petitioner is entitled by the issuance of a writ of mandamus, mere breach of contract cannot be remedied by this court in exercise of its powers under Article 226 of the Constitution."

In this case also there were no obligations and duties involved which had been violated by the State.

Bal Krishnan Vaid v. The State of Himachal Pradesh & Others (supra) was a case where the State entered into a contract in the exercise of its statutory powers. The Mines & Minerals (Regulation & Development) Act 1957 provided for the granting of prospecting licences and mining leases. The Himachal Pradesh Mines and Minerals (Concession) Revised Rules 1971 which were framed under section 15(1) of the Act, purported to give effect to its provisions so far as they related to mines and minerals. Rules 28 to 33 provided for the grant of contracts to carry, win, work and carry away any mined minerals specified in the contract through open action or by inviting tenders. Rule 33 provided that when a bid is confirmed or a tender is accepted the bidder or tenderer shall execute a deed in Form 'K'. The petitioner executed an agreement in Form 'K' and clause 30 of the agreement stipulated that:

"a contract may be terminated by the government if considered by it to be in the public interest by giving one month's notice;.....Neither in the Act nor in the rules was there any specific provision empowering the government to terminate a contract in the public interest. The provision is to be found only in the agreement in form 'K' prescribed by rule 33."

The petitioner received a notice purporting to be under clause 30 of the agreement that his contract would be terminated on the expiry of thirty days from the date of issue of the notice. It was held that the authority for the termination of the contract on the ground that it was not in the public interest was a right founded in contract and not a power issuing from the statute and the remedy by way of a writ could not be claimed in respect of its breach.

Pathak, C.J., said in regard to the petitioner's contention that he has been the victim of discrimination inasmuch as no such action has been taken in respect of the contracts of the other two persons:

"To my mind, this contention must also fail on the finding that the complaint of the petitioner arises out of a breach of contract. The petitioner's case in regard to discrimination is based on Article 14 of the Constitution (which corresponds with our Article 12). To invoke Article 14, it must be shown that the State has acted in the context of law. When the government is party to a contract and it exercises a right by virtue of such contract it is a matter falling within the sphere of contract. If the government, having entered into contracts with different persons, arbitrarily terminates the contract of one person only its action must necessarily be referred to its contractual capacity from which the contract and the impugned action flow. Had the discrimination been applied in the course of granting a contract, as was the case in *K. H. Guruswamy v. State of Mysore (supra),* the discriminatory action of the government would be referable to its statutory authority, because the statute empowers the government to enter into such contracts. But once the contract has been concluded between the government and an individual any action taken by the government in the application of a term or condition of the contract must be attributed to the capacity of the government as a contracting party. When the government passes from the stage of granting a contract to the stage of exercising rights under it, it passes from the domain of statutory power into the realm of contract. And as was observed by the Supreme Court in *C. K. Achutan v. State of Kerala* (19).

"...A contract which is held from the Government stands on no different footing from a contract held from a private party. In my opinion, Article 14 of the Constitution cannot be invoked by the petitioner."

Vaid's case (supra) which was decided in 1957 does not appear to have been considered in the later case of *Agarwal (supra)* by the Supreme Court. Nevertheless the Judges in both cases have taken the same line of reasoning and come to similar conclusions on the law. There are therefore two independent decisions of the Indian courts, one of the High Court and the other of the Supreme Court laying down the same principle of law. I am of opinion that the decisions set out the law on the point correctly and follow them.

In the present case the second petitioner's tenancies of stalls 16, 17 & 18 have been terminated on two grounds. One is the breach of the prohibition against making alterations to stalls, which is found only in clause 12 of the Agreements and not in any by-law applicable to the stalls in question, incorporated in the Agreements. The authority for the termination of the tenancies on this ground is by virtue of paragraph IV of the Agreements, which is a right founded only in contract and not a power issuing from a statute. It is a term of the Agreements that is binding on the parties. The Council's right to terminate the tenancies, thus, is under the contracts and is not referable to any statutory power or obligation, apart from the contracts. A complaint of discrimination in violation of Article 12 of the Constitution therefore cannot be invoked in a contract pure and simple.

In the result, the second petitioner's application fails. But since she alleges that the by-laws, which are incorporated in the Agreements, have been unequally applied to her, in violation of her fundamental rights, I shall proceed to deal with that aspect of the matter.

The second ground for the termination of the second petitioner's tenancies, is that she used the stalls as a residential premises, that is, by remaining in them at night. The appropriate by-law applicable is 18(*d*) which prohibits sleeping within the premises of any Public Market after it is closed. Clause 23 of the Agreements does not permit a tenant or his servants to remain inside the Market premises between 9 p.m. and 6 a.m.

The by-laws have been incorporated in the Agreements by clauses (*f*) and 33, and form part and parcel of the terms and conditions of the Agreements. In *Vaid's case (supra)* Pathak, C.J., said:

> "If the term or condition which creates the right or obligation is contained in the statute and *has legal force as a provision of the statute* then the violation of the term or condition is a violation of the statute, and that is so even if the term or condition is incorporated in a contract between the parties...."

By-law 18(*d*) is incorporated as a term of the Agreements and has legal force as a provision of the statute, by virtue of section 268(2) of the Municipal Councils Ordinance, and a violation of that term of the agreements is a violation of a statute. A contravention of this by-law is

made punishable with a fine under by-law 53, but it is only after prosecution and on conviction that the Council is empowered by section 156(*c*) read with section 156(*a*) of the Municipal Councils Ordinance to terminate the tenancies.

In the present case the Council did not prosecute the second petitioner and obtain a conviction against her for a breach of this by-law, so that her tenancies could not have been terminated on this ground. Nevertheless the Council terminated her tenancies.

Pethiyagoda and the Manager of the Ceylon Oils & Fats Corporation also committed a breach of by-law 4(*c*) and the corresponding clause 32 of the Agreements. A contravention of the by-law was also punishable with a fine only under by-law 53, though upon conviction their tenancies could have been terminated under section 156(*c*) and (*a*) of the Ordinance. They were not prosecuted and convicted and their tenancies were not terminated.

The grievance of the second petitioner therefore is that in the application of the by-laws, she was unequally treated in that for a breach of a by-law committed by all three of them, only her tenancies were terminated while the tenancies of the other two were not. She thus complains of a violation of her fundamental right to equality before the law as guaranteed by Article 12 of the Constitution.

Before Article 12 of the Constitution can be invoked it must be shown that the Council acted in the context of the law. "Law" as defined in Article 170 of the Constitution means–

> "Any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution."

Section 268(2) of the Municipal Councils Ordinance provides that a by-law shall be "valid and effectual, as if it were herein enacted." Hence a by-law would come within the definition of "law" for the purposes of Article 12 of the Constitution.

The Municipal Council has sought to terminate the tenancies of the second petitioner for what in effect is a breach of by-law 18(*d*) but did not terminate the tenancies of the other two persons for breaches of by-law 4(*c*). Undoubtedly the Council could not have terminated the second petitioner's tenancies for a breach of that by-law in view of the

fact that it had not prosecuted her under by-law 33 and obtained a conviction against her as required by section 156(*c*) & (*a*) of the Municipal Councils Ordinance. The same applies to the other two persons, but in their case the tenancies were not terminated. The termination of the second petitioner's tenancies for a breach of that by-law is clearly unlawful and the remedy for it lies elsewhere.

The Agreements by incorporating these particular by-laws in them have conferred a statutory power or obligation on the Municipal Council which is apart from contract. The Council's action is thus referable to its statutory authority and the breach complained of is of a statutory obligation. .

However, in order, to invoke Article 12 of the Constitution on the ground of unequal treatment and discrimination, the second petitioner must show that she has been treated differently from the two other persons who were similarly circumstanced without any rational basis and that such differential treatment was unjustifiable.

Quite clearly the second petitioner and the two other persons cannot be said to have been similarly situate. The second petitioner had committed two wrongful acts, one in breach of the terms of the Agreements for which her tenancies were liable to be terminated, and the other for a breach of a by-law. The other two persons had committed only one wrongful act in breach of a by-law for which, as stated above, their tenancies could not have been terminated. The second petitioner had thus failed to establish that she and the other two persons were similarly circumstanced and her complaint of unequal treatment in violation of Article 12 of the Constitution must fail on the ground of a breach of the by-laws. In any event Article 12 of the Constitution cannot avail her since her tenancies have been lawfully terminated for a breach of the Agreements.

In view of the conclusion reached by me, it is unnecessary to consider the other objections raised by the respondents.

I therefore dismiss the application of the petitioners, but in the circumstances of this case, I make no order for costs.

Application dismissed.