DAHANAYAKE
v.
DE SILVA AND OTHERS

SUPREME COURT.
SAMARAKOON, C.J., SAMERAWICKRAME, J. AND WANASUNDERA, J.
ELECTION PETITION APPEAL 1 OF 1979-ELECTION PETITION 1 OF 1977 (GALLE).
AUGUST 6, 9, 10, 13, 14, 15, 1979.

Election petition-Contract-Election challenged on ground of successful candidate holding contracts with two state Corporations-Whether such contracts had been terminated at time of election-Mode of termination of a contract-Renunciation by one party-Election law applicable-Election Order-in-Council, 1946 (Cap. 381)-Constitution of Sri Lanka, 1972-Ceylon (Constitution) Order-in-Council (Cap.379), section 13(3)(c).
Public Corporation-Ceylon Petroleum Corporation Act, No. 28 of 1961-Nationalization of industry by State-Distinction between such Corporation and Company incorporated under Companies Ordinance-Corporation invested with juristic personality to do State business-Agent of State when entering into contracts for services for sale and distribution of petroleum.

The 1st respondent had been an Agent of the Insurance Corporation at Galle and also a dealer of the Petroleum Corporation for the sale and disposal of petroleum at a Depot in Galle. The appellant sought a declaration that the election of the 1st respondent to the electorate of Galle was void for the reason that at the time of election, the 1st respondent held contracts with the Petroleum Corporation of Sri Lanka and Insurance Corporation of Ceylon and was thereby disqualified for election as a Member of Parliament in terms of section 77(c) of the Ceylon Parliamentary Elections Order-in Council, (1946) Cap. 381. Clause 12B of the 1st respondent's contract with the Petroleum Corporation provided that a dealer was entitled to terminate the agreement "after three months notice in writing given to the Corporation". The said period of three months was to run from the date on which the Corporation acknowledged the dealer's written notice. The 1st respondent wrote to the Corporation that he had "decided to terminate" the contract by a letter dated 27.5.1977 and thereafter also sent a telegram on 5.6.1977-the day before nomination day - purporting to unilaterally terminate the contract. This telegram was followed up by a letter of the same date in the same terms. The Corporation did not terminate the contract; nor did it accept the unilateral termination sought to be made by the 1st respondent by the said telegram and letter. The 1st respondent was elected to represent the Galle electorate as a Member of the National State Assembly on 21.7.77.

It was held by the Election Judge who heard the petition that the respondent did not hold any of the said contracts on the day of election, namely, 21st July, 1977, and the petition was therefore dismissed. The petitioner was granted leave to appeal to the Supreme Court.

Held :

(1) The petitioner had no contract with the Insurance Corporation at the time of election inasmuch as he had written prior to nomination day which was 6th June, 1977, requesting that his agency with the Corporation be terminated with immediate effect; and by letter dated 6th July, 1977 the Insurance Corporation

informed him that his resignation had been accepted accordingly, although in terms of the contract it could have insisted on a month's notice. Thus there had been a termination effected by mutual consent and the contract ceased to be binding on the parties by nomination day. The 1st respondent was therefore not disqualified on this ground.

(2) On the evidence led at the inquiry the respondent had taken unilateral action to terminate the contract with the Petroleum Corporation but the Corporation did not accept this unilateral action on the part of the 1st respondent. Renunciation by one party alone was insufficient and the contract therefore subsisted.

(3) Section 75 of the Constitution of 1972 kept alive the election laws that were in operation on 21st May, 1972, until the National State Assembly provided for the matters referred to in the section. As no such provision had been made the relevant provisions of such laws, namely, section 13(3) (c) of the Ceylon (Constitution) Order-in-Council, 1946 (Cap. 379) had to be considered for any disqualification by reason of contract. This section provided for such disqualification if a person held or enjoyed any right or benefit under any contract made by or on behalf of the Crown.

(4) An examination of the provisions of Act No. 28 of 1961 which established the Petroleum Corporation and of the circumstances in which the Corporation was created showed that such a legal entity carrying on monopolistic commercial transactions for the State must necessarily be the agent of the State and when the Corporation entered into contracts for services for the sale and distribution of petroleum products it did so as an Agent of the State. The 1st respondent's agreement with the Petroleum Corporation (P1) fell into this category. Accordingly, the 1st respondent being at the time of his election a party to a contract entered into with him by the Petroleum Corporation on behalf of the State, his election was void as he was disqualified from being so elected to the electorate of Galle on 25th July, 1977.

Cases referred to :

(1) *Johnstone* v. *Milling, (1886 16 Q.B.D. 460; 55 L.J. (QB.) 162; 54 L.T. 629; 2 T.L.R. 249.*
(2) *Hirji Mulji* v. *Cheong Yue Steamship Co., (1926) A.C. 497; (1926) All E.R. Rep. 51; 134 L.T. 737; 42 T.L.R. 359.*
(3) *Heyman* v. *Darwins, (1942) 1 All E.R. 337; (1942) A.C. 356; 166 L.T. 306; 58 T.L.R. 169.*
(4) *White & Carter (Councils) Ltd.,* v. *McGregor Ltd., (1961) 3 All E.R. 1178, H.L.; (1962) A.C. 413; (1962) 2 W.L.R. 17.*
(5) *Motion* v. *Michaud, (1892) 8 T.L.R. 253.*
(6) *Martin-Baker Aircraft Co. Ltd., and Another* v. *Canadian Flight Equipment, Ltd., (1955) 2 All E.R. 722; (1955) 2 Q.B. 556.*
(7) *Dahanayake* v. *Pieris, (1944) 45 N.L.R. 385.*
(8) *Rahimtoola* v. *Nizam of Hyderabad, (1957) 3 All E.R. 441, H.L.; (1958) A.C. 379; (1957) 3 W.L.R. 884.*
(9) *Trendtex Trading Corporation* v. *Central Bank of Nigeria, (1976) 3 All E.R. 437; (1976) 1 W.L.R. 868.*
(10) *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd., 28 C.L.R. 152.*
(11) *Queen* v. *Liyanage, (1965) 67 N.L.R. 193.*

APPEAL from an order of the Court of Appeal.

Petitioner in person.
Mark Fernando, with *B.T. Eliatamby* and *Miss A.E. Wickremasinghe,* for the 1st respondent.
G.P.S. de Silva, Additional Solicitor-General, with *Sarath Silva,* Deputy Solicitor-General and *S. Ratnapala,* State Counsel, as *amicus curiae.*

Cur. adv. vult.

September 10, 1979.
SAMARAKOON, C.J.

The appellant was a candidate for election to the electorate of Galle at the General Election held on the 21st July, 1977. The first respondent who was also a candidate was declared elected by a majority of 5,009 votes. The appellant then filed this petition challenging the validity of the said election. He sought a declaration that the said election of the respondent was void for the reason that at the time of election the first respondent held contracts with the Petroleum Corporation of Sri Lanka and the Insurance Corporation of Ceylon and was thereby disqualified for election as a member in terms of section 77 *(e)* of the Ceylon (Parliamentary Elections) Order in Council 1946 (Cap. 381). Cader, J. who heard the petition dismissed the petition for the reason that on the day of election, viz., 21.7.77, the respondent did not hold any of the contracts mentioned above. In accordance with the order of Cader. J. who has granted the petitioner leave to appeal, the appeal before us is limited to the following points:-

"(1) Whether the day of the election is the day of nomination or the day of contest;

(2) Whether the provisions 70, 73 and 75, read with Section 12 of the Constitution of Sri Lanka, create a disqualification for a person who has been holding a contract with any Corporation;

(3) Whether in terms of the provisions of the 1972 Constitution, the petitioner is entitled to invoke the disqualifications that had been set out in the Soulbury Constitution;

(4) Whether there had been a legal termination of the two contracts by the 1st respondent;

(5) Whether the two Corporations are Government institutions and/or whether they are departments of State; and

(6) Whether the 1st respondent is entitled to unilaterally terminate the contracts with the Corporations."

It is specifically stated that no leave has been granted in respect of the relief claimed in this petition praying that he be declared elected in place of the first respondent.

I will deal with the facts first. By letter dated 4.6.67 (P5) the first respondent was appointed Agent of the Insurance Corporation of Ceylon at Galle. It contained the terms and conditions binding on the parties during the period of the agency. By writing dated 10.6.1967 (P6) the first respondent agreed to abide by the terms and conditions set out in P5. These two documents constitute the contract between the parties. Clause 6 of P5 provided that the appointment could be terminated by one party with one month's notice to the other. Nomination day for the Galle Electorate was fixed for 6th June, 1977. On 1st June, 1977 (P7) the first respondent wrote to the Life Manager of the Corporation *inter alia* as follows:-

> "Please terminate my agency as from 1st June, 1977, since I am contesting Galle Seat as a candidate. Also this is to avoid an election petition."

It is obvious that the first respondent himself considered that the contract in question could be a disqualification, and therefore requested termination. By letter dated 6.7.77 (P8) the Insurance Corporation replied-

> "You are hereby informed that your letter of resignation is accepted accordingly."

This can only mean that the Corporation acceded to the request in P7 and released the first respondent from the contract although the Insurance Corporation could have insisted on a month's notice. This termination has been effected by mutual consent and not unilaterally. The contract thus ceased to be binding on the parties by nomination day and therefore cannot be a disqualification for election as a member.

The other contract is with the Ceylon Petroleum Corporation. It was produced marked P1. This was signed by the first respondent on 11.12.67 and by the Corporation on 8.9.68. By it, the Corporation appointed the first respondent its Dealer for the sale and disposal of petroleum at the Depot situated at No. 30, Cripps Road, Galle, and the first respondent agreed to act as dealer subject to the terms and conditions set out in P1. Clause 12B of the Contract states that the Dealer "is entitled to terminate this Agreement after three months' notice in writing given to the Corporation. The three months notice by the Dealer shall commence to run from the date on which the

Corporation acknowledges the Dealer's written notice". By letter dated 27th May, 1977 (P2) the first respondent wrote to the Chairman of the Corporation that he had "decided to terminate" the contract and requested that the Dealership be transferred to his wife, and the Chairman has by a minute called for the recommendation of the Marketing Manager. This request had also been orally made to the Regional Manager (South) and this officer by letter of 3.6.77 (1R2) informed the first respondent that "suitable steps to expedite that transfer" would be taken if and when the land on which the equipment was situate was transferred to the first respondent's wife. It is obvious that the first respondent could not wait until such mutual termination of the contract was effected, as nomination day was fixed for 6th June, 1977. He took unilateral action on 5.6.77 in an attempt to meet the situation. On this day he sent a telegram (1R1) which was received by the Corporation on the next day in these terms:-

> "YOUR NUMBER A (B) 234 OF 1.10.1968 REFER FURTHER TO MY LETTER TO YOU DATED 27.5.1977 I WRITE TO INFORM YOU THAT I HEREBY TERMINATE THE AGREEMENT WITH THE CORPORATION. YOU MAY AT YOUR CONVENIENCE CONSIDER APPOINTING MY WIFE. THIS REQUEST IS MADE WITHOUT QUALIFICATION TO FORTHWITH TERMINATE THE AGREEMENT WITH ME."

He also wrote a letter dated 5.6.77 (1R3) stating *inter alia* "I hereby terminate the agreement with the Corporation". Neither the telegram nor the letter is a notice of termination of the contract by the first respondent in accordance with Clause 12B of P1. The Corporation for its part did not terminate the contract in terms of the contract, nor did it accept the unilateral termination sought to be made by the first respondent in 1R1 and 1R3. By minute P3B dated 23.6.77 the Marketing Manager informed the Chairman that he would put up papers for transfer of the Dealership to the first respondent's wife. The Chairman then made the following minute (P3C) to the Marketing Manager:-

> "That is not the point. He gave up the Dealership without any notice. *Please Spk.* Is anyone operating the outlet now?"

On the 28th June, this officer has made the following minute (P3D):-

> "SK
> Spoke to Ch. Await Developments."

The next development was that the first respondent was elected on

21.7.77 to represent the Galle Electorate. He contends that the contract P1 was validly terminated by the notices 1R1 and 1R8. Cader, J. so holds but I find some difficulty in following his reasoning for this conclusion. He commences the penultimate paragraph of his judgment with the statement that the respondent had clearly taken all steps that he could to terminate the contract." It seems to me that the relevant consideration was not what he "could" but what he "should' under the contract. He then goes on to state that no business was done because the first respondent abandoned the Sales Depot, and thereby, his Dealership. This cannot by any kind of reasoning constitute a termination in law. He then concludes the paragraph with this statement:

> "One should keep in mind that the respondent was taking this step because he was a candidate for an election and he should not be punished for the reason that the Corporation was delaying the termination of the contract though it be for good reasons, namely, to serve the public."

This is the very antithesis of his first statement. In effect it is a finding that action on the part of the Corporation was necessary to bring about the termination of the contract. There is no evidence on record to show that the Corporation terminated this contract on or before 21st July, 1977, nor is it the case of the first respondent that the Corporation did so. In view of this confusion it is necessary for this Court to go into the facts and come to a finding as to whether the contract was terminated so as to absolve the respondent from a disqualification in election law. It is possible to come to a decision on this matter based primarily on the documentary evidence.

It is clear that the Corporation did not accept the unilateral termination of the contract by the first respondent. In fact the minute P3B indicates that the Chairman of the Corporation was not prepared to agree to such termination. The evidence of Mr. Wimalasena the present Chairman of the Corporation is that the Corporation took no action "to terminate or not". Mr Coomaraswamy, who was Chairman prior to and up to election day, stated that neither he nor the Board terminated the contract. It was not the kind of termination permitted by the contract. The only valid termination, unilaterally, if that term could be used, is by the first respondent giving 3 months' notice. On the expiration of this period of 3 months the contract ceases to be of any further effect as far as the business is concerned. It is a well recognised rule that where one party contrary to the terms of contract seeks to terminate it the other party is not bound to accept it and is entitled to hold the first party to the contract. The contract then subsists despite the unilateral attempt at termination. It takes two (at least) to make contract and it takes two to end it. Renunciation by one party alone is insufficient:

> "Such a renunciation does not of course amount to a rescission of

> the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation, as an immediate breach. If he adopts the renunciation, the contract is at an end and except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

per Lord Esher M.R. in *Johnstone* v. *Milling* (1) at 467.

> "Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option....."

per Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2) at 509. Vide also *Heyman* v. *Darwins* (3) at 340. In *White & Carter, Ltd.* v. *McGregor* (4) the respondent's Sales Manager entered into a contract with the appellants for advertising on the litter bins made by the appellants which they supplied to local authorities. The contract was for 3 years. The respondent heard about it on the day the Contract was entered into and wrote to the appellants to cancel it. The appellants, who had not yet taken any steps to carry out the contract refused to accept the concellation and proceeded to advertise for the next three years. The respondent contended that since he repudiated the contract before anything was done under it, the appellants were not entitled to go on and carry out the contract and sue for the contract price. The House of Lords held that the appellants were entitled to sue for the contract price. Lord Reid set out the principle as follows :—

> "The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the

other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it, and then the contract remains in full effect." (p 1181).

This general rule is a rule of our law too. There is nothing on record to show that the Corporation accepted the repudiation by the first respondent. It was faced with a *fait accompli*, an abandonment of the outlet by the first respondent, and decided to watch developments.

It was contended by the Solicitor-General that this being a contract of agency it could be terminated unilaterally. Counsel for the first respondent argued that in such circumstances no Court would grant specific performance of the contract. This by itself, he said, indicated that the contract was at an end and terminated for all purposes. Enforceability and subsistence of the contract are two different things altogether. One party to the contract may well hold the other to the contract but still be unable to enforce specific performance of it in a Court. If this contract was a pure agency agreement and nothing more I would agree that it is summarily determinable at any moment and the contract would then be at an end. The case of *Motion* v. *Michaud* (5) is a clear illustration of it. In that case the plaintiff was an independent merchant selling wines and liquors of various manufacturers, for his own profit, and he was not bound to any of them by contract. Contract P1 is of a different kind. It provided for notice of 3 months' duration should the respondent wish to terminate his services. The Corporation had installed its own equipment of considerable value on the land on which the outlet stood. They would normally take considerable time to remove. Till such time they stood at the risk of the first respondent. In fact they had not been removed even on election day. The contract prohibits the first respondent from selling, stocking, or otherwise dealing with products other than those of the Corporation unless prior consent in writing has been obtained. the period of 3 months notice is stipulated to run from the date the Corporation acknowledges receipt of the first respondent's notice. This is understandable, for the Corporation must be given sufficient and reasonable time to find a dealer and establish another outlet so as not to disrupt a service essential to the life of the community. Some effect must be given to this provision. Agreements of this nature must, as stated by McNair, J. in *Martin Baker Aircraft Co. Ltd.* and *Another v. Canadian Flight Equipment, Ltd.* (6) at 735 be "looked at as a whole and the whole of its contents considered". They are not determinable summarily. Furthermore it is an

agreement which stood honoured for a continuous period of 10 years. Counsel for the first respondent relied on the evidence of the Chairman who stated that the Corporation was powerless in the face of the first respondent's repudiation. Indeed it had no choice. It must have been left gaping and looking foolish too. I am of opinion that the Corporation was justified in refusing to accept the first respondent's unilateral act and it was entitled to hold him to the contract unless properly terminated by giving the Corporation 3 month's notice. I hold that the contract P1 had not been terminated up to the time the respondent was declared the winner in the poll.

The next question I have to consider is whether a contract between an elected M.P. and the State entails a disqualification. This election was held under the provisions of the Constitution adopted in 1972. The Solicitor-General and counsel for the first respondent both contended that such a disqualification can only be imposed by the Constitution of Sri Lanka (Ceylon) of 1972 (hereinafter referred to as the 1972 Constitution) and by no other enactment. They referred to Section 70 (1) (d) of the 1972 Constitution which reads as follows:-

> *"(d)* if he has any such interest in any such contract made by or on behalf of the State or a public corporation as may be prescribed by or under a law of the National State Assembly;"

It is an admitted fact that the National State Assembly did not, during the whole of the period that it was in existence, specify by law "such interest" in any "such contract" for the purpose of the disqualification contemplated by section 70 (1) *(d)*. The National State Assembly was empowered to do this by the provisions of section 73 *(f)* but chose not to do so. Therefore, counsel contend, the question of disqualification by reason of contract does not arise for decision. It is as simple as that. A provision such as the one in section 70(1) *(d)* is one that is enacted for "securing the Freedom and Independence of Parliament" (Vide 22 Geo. III c. 45 of 1782) and to secure "the independence of members of the Legislature and their freedom from any conflict between their duty to the public and their private interests" (per de Kretser J. in *Dahanayake* vs. *Pieris* (7) at 394.) That the National State Assembly deliberately left wide open the doors of corruption for its members is not a proposition we can lightly entertain. We have had a healthy tradition in this regard and it is unthinkable that any fundamental

departure from this tradition of maintaining honesty and purity in public life has been made in the 1972 Constitution. By 1972 numerous State Corporations had come into existence regulating and servicing wide areas of public life. Since their activities touched the lives of the people at many points, sometimes even bringing about contractual relations in respect of their ordinary day to day activities, there was undoubtedly a need for a clear-cut decision as to what contracts and what interests should or should not constitute a disqualification for candidates to Parliament. If there was any intention to do away with this particular disqualification, we would not have expected to find a provision like section 70 (1) *(d)* incorporated in the Constitution. This section, far from doing away with such a disqualification, appears to have added to its ambit and now contains the twin concepts of State and Corporation, where previously only one term "Crown" existed. What appears to have been left to the Legislature, considering the wider context of State regulation now in existence was the duty to demarcate the limit beyond which such contractual relations should constitute a disqualification for membership in the House. Over seven years have passed, and two successive Parliaments have still not addressed their minds to this matter. It is against this background that we have to consider the arguments as to whether the draftsman of the Constitution left a vacuum in this respect or whether the transitional provisions contained in section 75 are adequate to take charge of the situation until such time as Parliament decides to lay down afresh the necessary criteria.

Section 75 states,"until the National State Assembly, provides for the matters referred to in section 73, such laws relating to or connected with the election of members of the Parliament and the determination of disputed elections as were in force immediately before the commencement of the Constitution shall, subject to the provisions contained in the Chapter, be applied *mutatis mutandis* to the said matters."

It was sought to be argued by the respondent that section 73 applied to procedural matters and did not deal with a substantive matter like a disqualification which is already dealt with in the Constitution in Article 70, and hence neither section 73 nor section 75 can be invoked in this case. As against this, we find that certain items in section 73 seems to support the petitioner's arguments. Two of the items in respect of which laws can be

made by the National State Assembly are

> "*(e)* the grounds for avoiding an election, and
>
> *(f)* such other matters as are necessary or incidental to the election of members to the National State Assembly,"

"provided, however, that the law made under this section shall not add to the disqualifications enumerated in section 70."

The petitioner referred us to the provisions of section 77 of the Elections Order in Council 1946 which refers to the grounds for the avoidance of elections and which provision is admittedly in force now. Paragraph (e) of this section gives the disqualification for election as one of the grounds. More significant than this is the specific reference back to section 70, in the proviso to section 73. The prohibition contained in the proviso is in regard to adding to the disqualifications. The reference to section 70, contained in section 73 and the choice of language, indicates that the draftsman of the Constitution had precisely this in mind, namely, necessary action to implement the provisions of section 70 (1) (d), but making sure that that should not involve any fundamental alteration of that section. The working out of the details within the framework given in section 70 (1) (d) can by no means be regarded as an addition to the section. This matter could also be viewed in another way. Section 70 (1) (d) can be regarded as an empowering provision while the machinery and procedure for making the necessary laws is contained in section 73. This is a common feature in legislation where there is a rule making section enabling rules to be made in respect of matters prescribed by the other sections. In this context it would be observed that the legislation contemplated both by section 70 and section 73 is ordinary legislation similar in content and quality and in no way amounts to a constitutional amendment. Counsel also argued that the words "subject to the provisions in this Chapter" in section 75 bring into operation the provisions of section 70. Section 70 (1) *(d)* however is inchoate and inoperative, he said. How can one therefore give any effect to section 70 (1) *(d)* ? It was inanimate then. It is a dead letter now. It cannot operate to disqualify anyone. Secondly, it is argued that to give operative effect to section 75 one has to bring into operation the provisions of section 13 (3) *(c)* of the Ceylon (Constitution) Order in Council (Cap. 379) (hereinafter referred to as the Soulbury Constitution) which they say, has been repealed by section 12 (1) of the 1972

Constitution (vide schedule A). It reads thus:-

> "12 (1) Unless the National State Assembly otherwise provides, all laws, written and unwritten, in force immediately before the commencement of the Constitution, except such as are specified in Schedule 'A' shall, *mutatis mutandis,* and except as otherwise expressly provided in the Constitution, continue in force. The laws so continuing in force are referred to in the Constitution as 'existing law'."

But there is a second exception by the words "except as otherwise expressly provided in the Constitution". Section 75 does just that. It keeps alive election laws that were in operation on 21st May, 1972, until the National State Assembly provides for matters referred to in section 73. The Soulbury Constitution is one of those. I am therefore of the opinion that section 13 (3) (c) of the Soulbury Constitution has to be considered for any disqualification by reason of contract.

Section 13 (3) (c) of the Soulbury Constitution reads as follows:-

> "13 (3) A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives-
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> (c) if he, directly or indirectly, by himself or by any person or on his behalf or for his use or benefit holds or enjoys any right or benefit under any contract made by or on behalf of the Crown in respect of the Government of the Island for the furnishing or providing of money to be remitted abroad or of goods or services to be used or employed in the service of the Crown in the Island;"

The agreement P1 is a contract for services entered into with the Petroleum Corporation which was established by Act No. 28 of 1961 to carry on the business of importer, exporter, seller, supplier or distributor of petroleum. It is also empowered to carry on the

business of exploring for, exploiting, producing and refining, petroleum and the Corporation is now actively engaged in these activities. For some time thereafter private Companies had the business of bunkering in the Port of Colombo but this too has been completely taken over by the Corporation. It now has the monopoly in the business of trading in petroleum products in Sri Lanka. Political ideology at the time considered that, petroleum being an essential service for the community, it should be the responsibility of and the sole business of the Government of the country. Oil, in the modern world is a major economic factor in the planning progress and even the viability of both industrial states and developing countries. Petroleum has ceased to be a mere consumer item of private trade and is now the concern of governments at both national and international levels. The Petroleum Corporation which nationalised this industry contains the necessary framework for placing petroleum and those activities connected with it, solely at the disposal of the State as its monopoly. For the purpose of providing this essential service the Government created this Corporation. It is run by a Board of Directors consisting of five members all of whom are appointed by the Minister (section 8) who has power to give general or special directions to the Board which they must obey (section 7(1)). A member of Parliament would be disqualified from being a Director of the Board. (Section 8). The Minister may also call for accounts and reports respecting the business of the Corporation (section 7(2) and may order investigations of the activities of the Corporation (section 7(3)). Most significant is the fact the Minister has the power to fix prices at which petroleum products shall be sold and also prescribe other conditions for sale (section 66). In short the Corporation does not act like other Corporations who engage in business. Its business is mainly, if not wholly, controlled by the Minister and therefore the State. It does not have that independence in matters of business which is enjoyed by Companies formed under the Companies Ordinance. It is a well known fact that this is a monopoly business acquired by the State which is also compelled to subsidize some part of its business for the welfare of the community. The Corporation's initial capital was wholly supplied by the State and it has therefore no shareholders nor is there an issue of share scripts. Its accounts are audited by an auditor appointed by the Minister (section 31). It can even cause immovable property required for its needs to be compulsorily acquired under the provisions of the Land Acquisition Act. It is a legal hybrid bred by the Government to enable it to engage in commercial business-tailor made to suit its style of business. It is a Government creation clothed with juristic personality so as to

give it an aura of independence, but in reality it is just a business house doing only the State's business for and on behalf of the State. Such a legal entity carrying on monopolistic commercial transactions for the State must necessarily be the Agent of the State. It is however not always necessary that an agent of the Sate should be an Alter Ego or a department of the State. *Rahimtoola v. E. H. H. Nizam of Hyderabad* (8). This does not prevent the agent from entering into private contracts of service for the purpose of engaging employees to run its agency house. For example the officers and servants of the Central Bank, admittedly an agency of the State, are by no means public officers within the meaning of the Constitution. Vide also *Trendtex Trading Corporation v. Central Bank* (9). However when it enters into contracts for services for the sale and distribution of petroleum products it does so as agent of the State. Agreement P1 is of such a kind. I therefore hold that at the time of his election the first respondent was a party to a contract entered into with him by the Corporation on behalf of the State.

The petitioner stated that when section 13(3)*(c)* is read after the necessary changes (*mutatis mutandis*) the words "State or Public Corporation" must be read into the section. Therefore the words "Crown in respect of the Government of the Island" must be replaced by the words "State or Public Corporation in respect of Government of the Island" and in place of the words "Crown in the Island" must be read "State or Public Corporation in the Island". This would be doing great violence to the section. Government by the Crown in 1946 has been replaced by the State in 1972. The "Crown" was replaced by the "Republic of Sri Lanka", and in my view that is the only change that is permitted. Counsel for the first respondent sought to give a restricted meaning to the words "in respect of the Government of the Island". He stated that this refers only to the Executive Government. If that be so there was no reason to include the word "Crown". It must be borne in mind that the Soulbury Constitution was drafted in 1946 at a time when the "Crown" was one and indivisible and was ubiquitous throughout the British Empire but with varying powers or attributes. It was therefore necessary to distinguish the Crown in respect of the Government of one country in the British Empire from the Crown in respect of the Government of another country in the same Empire. "The first step in the examination of the Constitution is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's Dominions". per Isaacs J. in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, (10). The concept became obsolete in Ceylon when Ceylon became a Free, Sovereign and Independent Republic" called the "Republic of Sri Lanka" by the Constitution of 1972. I do not agree that the

words "in respect of the Government of the Island" was included to mean the Executive Government of the Island. In *Queeen v. Liyanage* (11) the Court dealing specifically with these words said: that the word "Government" was quite obviously not intended to refer to the Cabinet of Ministers. Those words were used for the purpose of restricting the disqualification to contracts made with the Government of Ceylon for its purposes in the Island and to eliminate contracts made with the Crown in other Governments of the British Empire. In that view of the matter I see no difficulty in holding that Agreement P1 was a contract for services with the Republic of Sri Lanka and the first respondent was thereby disqualified from being elected to the electorate of Galle on the 21st July, 1977. The said election of the first respondent is void. I would therefore set aside the order of Cader, J. and direct that a certificate be issued to that effect in terms of section 82(B)(2) of the Ceylon (Parliamentary Elections) Order in Council (Cap. 381). The petitioner will be entitled to a sum of Rs. 1,500 as costs of inquiry in the Court of Appeal and a further sum of Rs. 500 as costs in this appeal. Finally I wish to record our thanks for the assistance given to this Court by the Additional Solicitor-General who appeared as *amicus curiae* on notice by this Court.

SAMERAWICKRAME, J — I agree

WANASUNDERA, J. — I agree.

Appeal allowed.