DHARMARATNE
v
SAMARAWEERA AND OTHERS

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
JAYASINGHE, J.
SC APPEAL NO. 11/2003
CA WRIT NO. 1202/98
WITH SC APPEAL NO. 12/2003
CA WRIT NO. 695/99
4 AUGUST, 2003

Writ of certiorari – Inquiry under Commissions of Inquiry Act, No. 17 of 1948 – Natural justice – Ultra vires – Rejection of the application on laches ex mere motu by Court of Appeal.

The 1st respondent held an inquiry into certain incidents which occured during the local government elections in the East held on 01.03.1994, having been appointed under the Commissions of Inquiry Act, No. 17 of 1948 ("The Act") At the inquiry which commenced on 26.12.1995. 141 witnesses gave evidence and the report was made in March 1988 and made available to the public after some delay.

The appellant in SC 11/2003 filed his application for a writ in November 1988 whilst the appellant in SC 12/2003 filed his application in July 1988.

By their applications the appellants sought *writs of certiorari* to quash the 1st respondent's findings of guilt against them and the recommendation that their civic rights be deprived for seven years and that they be prosecuted in criminal proceedings.

The appellant in Appeal No. 11/2003 was summoned as a witness but not informed that anybody testified against him. However, evidence of other persons had been recorded against him. This was in breach of section 16 of the Act which requires the Commission to give such notice and to grant an opportunity to appear through counsel at the whole of the inquiry.

The appellant in SC 12/2003 was noticed after one year from the commencement of the inquiry. He gave evidence and was present when some witnesses testified none of whom gave evidence against him. The findings against him were based on the evidence of certain witnesses who gave evidence in his absence and without notice to him.

The Court of Appeal dismissed both applications. One of the grounds for dismissing Application No. 11/2003 was laches which point was not raised by the respondents. The Court of Appeal *ex mere motu* dismissed the application on the ground of laches.

Held:

(i) The proceedings taken against the appellants were in flagrant violation of the *audi alteram partem* rule and *ultra vires* the Act. In particular the 1st respondent acted contrary to the warrant appointing him and the law in recommending the deprivation of civic rights of the petitioners and criminal prosecution. Hence the decision and recommendation were made without any power or authority, and that in making the said recommendations the 1st respondent stepped outside the powers contained in section 2 of the Act.

(ii) In dismissing the application of the appellant in SC 11/2003 on the ground of laches the Court of Appeal itself acted in violation of the *audi alteram partem* rule in that the point had not been raised by any respondent.

Case referred to:
1. *A.G.* v *Chanmugam* 71 NLR 78

APPEALS from the judgment of the Court of Appeal

R.K.W. Goonesekera with *J.C. Weliamuna* for appellant.

S.S. Sahabandu, P.C. with *Hemantha Situge* and *C. Pathmasekera* for 1st respondent.

Y.J.W. Wijayatilake, Deputy Solicitor General for 4th respondent.

Cur.adv.vult

September 5, 2003

JAYASINGHE, J.

S.C. Appeals 11 and 12/2002

These two appeals relate to a single judgment of the Court of Appeal dismissing two separate applications filed by the two appellants for *writs of certiorari* to quash the adverse findings and recommendations of the 1st respondent, a one man Commission of Inquiry appointed under the Commissions of Inquiry Act, No. 17 of 1948. The two appeals were taken up together as they each involved three questions of law; whether the 1st respondent acted in breach of the principles of natural justice in making those findings, whether he acted *ultra vires* in making those recommendations and whether the Court of Appeal erred in law in holding, *ex mero motu*, that the appellants were guilty of laches although those grounds were never urged by the respondents in their pleadings and submissions, thereby denying the appellants the opportunity of meeting that plea.

At the conclusion of oral arguments on 04.08.03 both appeals were allowed, the judgement of the Court of Appeal was set aside and mandates in the nature of *writs of certiorari* were issued, quashing the 1st respondent's findings (contained in his report marked A3) of involvement/guilt as against the two appellants, and his recommendations therein that the two appellants be deprived of their civic rights for seven years and that criminal proceedings be instituted against them.

I now formulate our reasons for allowing those appeals and granting the appellants the relief prayed for.

The 1st respondent was appointed by warrant dated 27.09.95. After a protracted inquiry at which 141 witnesses testified, with over 4000 pages of proceedings, the first respondent found the appellants guilty of certain malpractices and accordingly recommended the imposition of civic disability and the institution of criminal proceedings. The two appellants made applications, in July and November 1998, to the Court of Appeal for mandates in the nature of *writs of certiorari* to quash the findings and recommendations of the 1st respondent contained in his report dated 27.08.97 published in March 1998.

In the Court of Appeal it was agreed on 21.02.02, that in as much as questions of law were concerned, one order would be binding in both cases, and accordingly "Court of Appeal application No. 695/98 was taken up along with CA application No. 1202/98". On 21.08.02 the Court of Appeal dismissed the latter application, and consequently the former as well without regard to factual differences.

S.C. Appeal 12/2003

The appellant states that the Commission of Inquiry commenced its sittings on 26.12.1995 and that 141 persons testified at the said inquiry; appellant complains that he was not noticed to appear before the said Commission at the commencement of the inquiry and that after a lapse of about one year the appellant was informed by letter dated 01.01.1997 (marked P3) that three persons whose names listed in the said letter have been summoned to testify before the Commission and that the Commission believed that the appellant is likely to be implicated by the said persons before the Tribunal. The said letter further informed the appellant that the appellant is entitled to appear before the Commission in person or through counsel and that he would also be entitled to cross examine the said witnesses, if necessary. The appellant accordingly submitted himself on the date specified in 'P3' and all other dates on which the said witnesses testified. He states that none of the witnesses implicated the appellant in their evidence. This position is not contradicted by the respondents. Some time

thereafter the appellant had information that one M.R. Noordeen, Senior Superintendent of Police was to testify before the Commission and the appellant immediately appeared before the Commission. However, the evidence of Noordeen also did not implicate the appellant. Appellant thereafter apprehended that there was an attempt to implicate the appellant with certain incidents which occurred during the local government election in the East held on 01.03.1994 (the subject matter under inquiry) and accordingly obtained from the Commission a list of witnesses who were expected to testify before it. The said letter is marked 'P7'. The appellant claims that none of the witnesses who testified before the Commission (vide P7) implicated the appellant in their evidence. There is no evidence as to whether 'P6' and 'P7' were written in response to an inquiry made by the appellant or whether the Commission had written to the appellant on its own initiative. However, it appears from 'P3', 'P6; and 'P7' that the appellant is being summoned in terms of section 16, even though there is no reference to section 16.

After the inquiry was concluded the report dated 25.08.97 (marked A3) containing the findings and recommendations of the Commission was published on 27.03.1998. The said report was available to the public in May 1998. The Commission having arrived at certain adverse findings against the appellant recommended that civic disability be imposed on the appellant and also recommended the institution of criminal proceedings.

The main contention of the appellant before this Court was that there has been a serious violation of rules of natural justice in that the appellant has not been given an opportunity to present his defence before the Commission. The appellant states that since the persons mentioned in 'P3', P6 and 'P7' dis not implicate him and in the absence of any intimation regarding any involvement of the appellant in any offence or wrong doing by the Commission, the appellant was entitled to assume that there is no incriminatory material placed before the Commission against the appellant. The appellant further contends that he is also entitled to assume that the witnesses who testified before 'P3' was communicated to him had also not implicated the appellant. The evidence of I.T. Kanagaratnam, N.A. Jayashantha, S.B. Upali Hewage, T.P.F. de

Silva and Ali Maulana who testified before the Commission prior to 1st January 1997 relied upon by the Commission to come to an adverse finding against the appellant was therefore led in his absence and without notice (even subsequently) to the appellant. The Commission also relied on the evidence of one Benjemin. However, the name of said Benjemin was not disclosed either in 'P3', P6 or 'P7'. The appellant states that he had no notice that Sirisena Cooray was also due to testify before the Commission.

It has been contended on behalf of the respondents that the procedure to be followed in respect of an inquiry before the Commission is laid down in section 16 of the Commissions of Inquiry Act. The learned President's Counsel submitted that the Supreme Court in *A.G.* v *M. Chanmugam*(1) has held that -

> *"A Commission appointed under the Commissions of inquiry Act is the master of its own procedure and as long as the procedure adopted by it does not offend against one's sense of justice and fair play it cannot be said that there has been a violation of the principles of natural justice. Nor is a Commission bound to adhere strictly to the provisions of the Evidence Ordinance."*

The counsel submitted that,

> *"The Commission had laid down the procedure at the commencement of the inquiry as found in Chapter II of the Commission Report which embodied broad principles of natural justice."*

Section 16 provides that -

> *"Every person whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry, shall be entitled to be represented by one or more attorneys-at-law at the whole of the inquiry; and any other person who may consider it desirable that he should be so represented may, by leave of the Commission, be represented in the manner aforesaid."*

However the respondents concede that when the appellant testified on 18.04.1997 he did so on summons as a witness and not as

a person whose conduct was the subject of the inquiry or who was in any way implicated or concerned in the matter under inquiry. He was not informed of the content of the evidence that has been placed before the Commission by witnesses who testified before 'P3'. The appellant's consistent position had been that since the witnesses who testified on 'P3' and 'P7' did not implicate him and therefore entitled to assume that the other witnesses who testified before the Commission had not implicated him. To expect the appellant to sit through the entire proceedings in anticipation of any incriminating material against him in the absence of any warning in terms of section 16 or to stay vigil to encapsulate any incriminating evidence to my mind would defy all norms of common sense and reasonableness. If however the Commission felt that there was any material against the appellant which the appellant ought to explain then it was incumbent upon the Commission to disclose that fact especially in view of the procedure the Commission had proclaimed to follow as embodied in chapter II of 'A3'. Non compliance of the requirements of section 16 would no doubt vitiate the findings made by the Commission.

The Court of Appeal in its judgement had observed that –

"at the commencement of the proceedings the Commission had with the ***consensus of parties*** *set out the broad parameters of the procedure to be followed. The procedure laid down was that parties would be noticed to appear before the Commission at the commencement of the proceedings and would be afforded an opportunity to cross examine the witnesses or to call witnesses or to give evidence before the Commission as and when such evidence was placed before the Commission. In other word* ***notice to the petitioner would only be issued at the commencement of the proceedings*** *and thereafter it was incumbent upon the petitioner to appear before the Commission on the following dates and avail himself of that opportunity to hear evidence..... and make an application in terms of section 14 if he wishes to make representations."*

"No objection has been taken by the petitioner when this procedure was laid down at the commencement of the inquiry as set out in page 2 of 'the Report."

It is pertinent to note that the appellant was never noticed to be present at the commencement of the inquiry. The appellant had notice of the inquiry only upon receipt of 'P3' limited to the witnesses specified therein.

Therefore the Court of Appeal erred in stating that at the commencement a consensus was reached between the appellant and the Commission regarding the procedure to be followed in the ensuing inquiry. The failure to take objection to the procedure was therefore irrelevant, for the appellant was not given an opportunity of doing so. In any event non compliance with the *audi alteram partem* rule cannot be excused on the basis of a failure to object. It is also relevant to advert to submissions made by counsel assisting the Commission at the commencement of the inquiry regarding the procedure to be followed by the Commission. The counsel in his opening address has stated before the Commission on 26.12.1995 that when a witness gives evidence in public or otherwise and if names of other persons transpire in the course of such evidence, the Commission is under a duty to call those whose names have transpired before the Commission. ('1R2') . That was totally inconsistent with any duty on the part of such other persons to apply to the Commission for permission to intervene or to cross-examine witnesses.

Mr. Goonesekera submitted that the failure of the Commission to inform the appellant the names of witnesses who testified prior to 01.01.1997, (P3) where the appellant was implicated in itself is a breach of the procedure which it had laid down for itself. The appellant's complaint that there has been a failure to follow rules of natural justice is well founded.

The principle which the 1st respondent actually followed was explained by him thus in his affidavit in the Court of Appeal.

".....it was up to the petitioner to be alert and follow the proceedings. He was entitled to come before the Commission and request that any witness be recalled for cross-examination if he found that such witness had given evidence concerning him....."

The basic standard of fairness implicit in the rules of natural justice required the 1st respondent himself, at some stage of his inquiry, to identify the allegation against the appellant, to inform him

thereof, and to give him the opportunity of meeting those allegations, by cross-examining witnesses or otherwise. The 1st respondent failed to do so and what he did instead was to cast this burden on the appellant – namely to attend the Commission or obtain copies of the proceedings, to analyse the entire evidence to ascertain whether there were allegations against him, to assume that the commission wished to pursue those allegations, and on that basis to request the Commission to allow him to defend himself. Section 16 of the Act does not impose any such burden.

The adverse findings against the appellant were therefore reached in flagrant violation of the *audi alteram partem* rule, and must be quashed on that ground.

The appellant also complains that the 1st respondent has acted *ultra vires* in terms of reference set out in the warrant and/or the provisions of the Commissions of Inquiry Act and therefore the findings and the recommendations of the Commissioner are void. Mr. Goonesekera submitted that the Act does not authorise the Commissioner to make recommendations in any form except for costs and expenses as referred to in section 7(f) of the Act. He submitted that the Court of Appeal erred in holding that –

> "*there does not seem to be anything to prevent the Commissioner from making recommendations unless such recommendations are inconsistent or adverse to the findings arrived at on an evaluation of the evidence placed before the Commission.....but recommendations of the Commission are not bound within the ambit of paragraph 7(f) of the said Act. This merely deals with the recovery of costs and expenses. This provision does not exclude the right of the Commission to reach other recommendations outside the recommendations referred to in paragraph 7(f) of the Act.....*"

Since the findings against the appellant are flawed recommendations based on those findings are equally flawed and must be quashed. In any event the Commission has only the powers and jurisdiction conferred by the statute, which does not include recommendations for deprivation of civic rights and institution of criminal proceedings.

Mr. Goonesekera submitted that the Commissioner has acted without any power or authority in making the recommendations affecting the appellant and that the Commission has acted beyond the warrant in the findings and conclusions. The learned President's Counsel during the hearing conceded that the Commissioner stepped out of the ambit of section 2.

The submission of Mr. Goonesekera that section 2 of the Commissions of Inquiry Act postulates only an inquiry and report and nothing more is also valid.

S.C. Appeal No. 11/2003

Having dismissed CA Application No. 695/98 the Court of Appeal dismissed CA Application No. 1202/98 without considering the factual differences.

The appellant states that his statement was first recorded by officers attached to the Commission and then the appellant was summoned as a witness to give evidence on 13.01.1997. The appellant gave evidence with regard to one incident namely, an incident that took place at Kattankudi on 01.03.1994 where a candidate and his security were shot at by the guards at a polling booth. The respondents concede that he gave evidence as a witness and at no stage was he informed that he was implicated in any irregularities. The appellant was present at the Commission only on 13.01.1997 for about an hour and was not summoned thereafter. The appellant was not present at the Commission at any time when the other witnesses gave evidence. The appellant was not given a list of witnesses nor was he informed that there has been any adverse evidence given by any witness against him. The appellant was not given any show cause letter nor was he issued with a charge sheet by the Commission. As a matter of fact the appellant appeared on 13.01.1997, (vide 'P3'), according to which the Commission believed that his evidence was likely to implicate the appellant in 695/99, D.IG.Fernando. Having summoned the appellant as a witness against the appellant, D.I.G.Fernando for the Commission to thereafter to draw inferences on the conduct of the appellant without affording him an opportunity to meet the case against him would not only be a violation of the rules of natural justice but a corruption of all rules of procedure to be followed at any

conceivable inquiry. This procedure to my mind is taking the reasoning of *A.G.* v *Chanmugam* that "the Commission is the master of its own procedure" to the realm of absurdity.

It is also to be noted that the appellant in 695/98 was informed by 'P3' and 'P7' that there might be evidence placed before the Commission that might be adverse to the appellant. However the appellant in CA 1202/98 appeared before the Commission on summons on 13.01.1997 and did not appear before the Commission thereafter. The findings against the appellant in 1202/98 has been arrived at on the evidence that has been placed without the appellant ever being informed. To this extent there has been a misappreciation of the contents of the cases in respect of each of the appellants. Findings and recommendations against the appellant must be quashed for breach of natural justice and excess of jurisdiction.

Plea of laches

The judgement of the Court of Appeal states that the parties agreed that CA Application 695/98 should be taken along with Application No. 1202/98, and "that they would be bound by one order in both cases." What counsel has actually agreed upon was only in respect of questions of law. Accordingly, both applications could not have been fully disposed of by one order because some issues of fact were different. The plea of laches was one example.

The Court of Appeal held that the appellant in CA Application No. 1202/98 was not entitled to maintain the application as he was guilty of "unexplained and undue delay in invoking the writ jurisdiction of the Court." In coming to that finding the Court of Appeal observed in its judgment that the Report had been published in March 1997, whereas it has actually been published in March 1998; that appellant had filed his application in the Court of Appeal in November 1998, averring that copies of the report were available only in May 1998 and that the public could only purchase copies in August 1998. The Court of Appeal observed that the appellant has placed no evidence of those matters to explain his delay of almost "a period of one year". The actual delay reckoned from the actual date of publication was only about eight months.

The Court of Appeal denied the appellant the benefit of the *audi alteram partem* rule on this point, because it is admitted that the question of delay was not raised either by the respondent or by the court at any stage. Delay cannot be characterized as 'unexplained' or 'undue' unless an opportunity to explain is first given. Such an opportunity would have allowed the appellant to place material as to the difficulty in obtaining copies of the report and of the proceedings and documents produced; the time taken to analyse the material with legal assistance; and the time needed to prepare pleadings, taking into consideration the duties of accuracy and disclosure applicable to writ applications and supporting affidavits.

The failure to consider those matters is particularly serious in the other application, which was filed just four months after the report was published – a period which can seldom be considered unreasonable, as learned President's Counsel fairly conceded.

The Court of Appeal erred in denying the appellants relief on the ground of laches.

It was for those reasons that at the conclusion of the hearing I allowed the appeals, set aside the judgement of the Court of Appeal, and issued mandates in the nature of *writs of certiorari* to quash the 1st respondent's findings (contained in his Report marked A3) of involvement/guilt as against the two appellants, and his recommendations therein that the two appellants be deprived of their civic rights for seven years and that criminal proceedings be instituted against them. Each of the appellant will be entitled to costs in a sum of Rs. 5000 payable by the State.

The findings and the recommendations of the 1st respondent against the petitioner in the above applications are accordingly set aside. The appeals against the judgement of the Court of Appeal are also allowed.

FERNANDO, J. - I agree

ISMAIL, J. - I agree

Appeal allowed.