

SENARATH AND OTHERS
v
**CHANDRIKA BANDARANAYAKE KUMARATUNGA
AND OTHERS**

SUPREME COURT
SARATH N. SILVA, C.J.
TILAKAWARDANE, J.
AMARATUNGA, J.
SC FR 503/2005
March 2, 2007

Fundamental Rights – Art 118, Art 126 (1), Presidents' Entitlement Act 4 of 1986 – S213 - Conferment of wrongful or unlawful benefits – Executive power exercised in trust for the people – Such wrongful act is an infringement of fundamental right? Locus Standi —Sed quis custodiet ipsos cutodies – Nemo debet sua judix.

The petitioners three Attorneys-at-law alleged infringement relating to unlawful unreasonable arbitrary and *mala fide* executive action of the 1st respondent who was at the material time the President of the country and the other respondents who were the then members of the Cabinet in securing for the 1st respondent –

- (a) a free grant of developed land close to the Parliament
- (b) Premises in Colombo 7 from which two public authorities have been ejected to be used as her residence after retirement,
- (c) staff and other facilities purportedly under the President's Entitlement Act.

Held:

Per S. N. Silva, C.J.

"Good governance and transparency characterize democracy and the rule of law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be meted upon."

- (1) Though it is correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption – the fact that the impugned action may or may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from the Supreme Court that the conferment of such benefit or advantage is contrary to the fundamental right to equality before the law.
- (2) The respective organs of government reposed power as custodians for the time being to be exercised for the people. The petitioner allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the people - "*Sed quis ipsos custodies.*"
- (3) The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law.

Per Sarath N. Silva, C.J.

"I am of the view that there is a positive component in the right to equality that where the executive being the custodian of the people's power abuse a provisions of law in the purported grant of entitlements under such laws and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court."

- (4) The denial of *locus standi* in the circumstances as presented in this case where there has been a brazen abuse of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless.

Per Sarath N. Silva, C.J.

"In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a manner where he has a personal interest". "*Nemo debet sua iudix*" is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown into the winds by the 1st respondent in initiating several Cabinet Memorandum

during her tenure of office and securing for herself purported entitlements that would if all ensure only after she lays down the reigns of office."

APPLICATION under Act 126 of the Constitution.

Cases referred to:

- (1) *In Re the Nineteenth Amendment of the Constitution* - 2002 - 3 Sri LR 85.
- (2) *Visvalingam v Liyanage* – 1983 – 1 Sri LR 236.
- (3) *Premachandra v Jayawickrema* 1994 – 2 Sri LR – 90.
- (4) *S.P. Gupta v Union of India and others*. 1982 – AIR (SC) 149.

Peter Jayasekera with Thiranagama and K. Senadheera for petitioner.
Nigel Hatch PC with Gaston Jayakody and Ms. K. Geekiyanage for the 1st respondent.

P.A. Ratnayake PC DSG with Ms. Demuni de Silva SSC for respondents.

Cur.adv.vult.

May 3, 2007

SARATH N. SILVA, C.J.

The petitioners being three Attorneys-at-law of this Court have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. They plead that the applications have been filed in addition to their own interest, as a matter of public interest representing the rights of the citizens of this country, to enforce the fundamental right to equality before the law. 01

The alleged infringement relates to the unlawful unreasonable, arbitrary and *mala fide* executive action of the 1st respondent who was at the material time the President of the country and of 2nd to 35th respondents who were then members of the Cabinet of Ministers, in securing for the 1st respondent a free grant of a land vested in the Urban Development Authority in extent of 11/2 acres close to the Parliament which had been fully developed at a cost of Rs. 800 million; a premises at No. 27 Independence Avenue, Colombo 7, from which two public authorities viz: the Ranaviru Sevana Authority and the Disaster Management Centre were ejected to be used as her residence after retirement; staff and other facilities; purportedly under the President's Entitlement Act No. 4 of 1986. 10

The relevant provisions of the Presidents' Entitlement Act No. 4 of 1986 are as follows:

- (2) *"There shall be provided to every former President and the widow of a former President, during his or her life time, the use of an appropriate residence free of rent;*

Provided that where for any reason, an appropriate residence is not provided for the use of such former President or the widow of such former President, there shall be paid to such former President or the widow of such former President, a monthly allowance equivalent to one third of the monthly pension payable to such former President or the widow of such former President, as the case may be.

3. (1) *There shall be paid to -*

(a) *every former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President; and*

(b) *to the widow of such former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the Minister of the Cabinet of Ministers.*

(2) *There shall be provided to every former President and the widow of such former President, official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."*

The petitioners have pleaded that they had no access to information as to the impugned grant of benefits and advantages to the 1st respondent and that their interest in the matter was aroused by a publication in a Sunday newspaper of 4.12.2005, which has been produced marked "P1", under the heading "All the ex-president's perks". The publication referred to an allocation of a land at madiwela to the 1st respondent and of 36 vehicles, security staff, private staff amounting to a total of 248. The other matters referred to in the publication in regard to certain

withdrawals from President Fund amounting to Rs. 600 million, do not form part of this application. The petitioners state that in view of the specific material contained in the publication they wrote letter dated 8.12.2005 to the Secretary to the Cabinet of Ministers requesting copies of related Cabinet Memoranda and decisions in order to verify their legality. The Secretary replied by letter dated 26.12.2005 (P2B) regretting his inability to comply with the request. Thereupon the petitioners wrote to individual Ministers and some documents that were made available enabled them file the present application. Considering the matters that had been pleaded the petitioners were permitted by Court to file amended papers setting out whatever additional material that was available with them in support of the alleged infringement. 60

The documents produced by the petitioners relate *inter alia*, to premises bearing No. 27, Independence Avenue, Colombo 7, which was being extensively repaired at that stage. Since the allocation of the premises as a residence to the 1st respondent had been directly drawn in issue, the Court made an order on the present Secretary to the President to disclose the basis on which the expenses for repairs were being incurred. Pursuant to that order the Secretary to the President produced the relevant documents marked 37R8 to 37R12 under confidential cover. It is pertinent here to note that Counsel for the 1st respondent and later the 1st respondent herself has filed an affidavit stating that the action of the Court in calling for information regarding the repairs is "*ultra vires*" and the 1st respondent strenuously objected to any inquiry being made into such expenditure. It appears that the 1st respondent has been ill-advised to use the phrase "*ultra vires*" in relation to an order made by this Court which is in terms of Article 118 of the Constitution "the highest and final Superior Court of Record in the Republic". On the other hand the Inquiry before this Court is whether the action of the 1st respondent and of the Cabinet of Ministers of which she was the head is *ultra vires* the provisions of the Presidential Entitlement Act No. 4 of 1986. Good governance and transparency characterise Democracy and the Rule of Law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be insisted upon. The petitioners have pleaded 70 80 90

and established that they were denied access to information. The extent to which information has been denied is borne out by the fact that the documents were sent even to Court under confidential cover. Hence, the objection of the 1st respondent was over-ruled and the documents were made available to the petitioners. 100

I would set out the relevant material in reference to the three matters drawn in issue by the petitioners as regards, the land; the residence; staff and other facilities.

The Madiwala Land

The first reference to this land in the documents produced by the parties is contained in the Cabinet Memorandum dated 28.03.05 submitted by the Minister of Urban Development and Water Supply. The Memorandum commences by stating that the 1st respondent as President "*has requested a block of land 11/2 acres in extent at Madiwela ... for the purpose of construction of a residence for herself after her retirement as President*". 110

It specifically states that "*she wishes this land to be allocated in lieu of the following allowances that a former President is entitled to under the Presidents' Entitlement Act No. 4 of 1986.*

- * *Pension*
- * *The official residence that she would be entitled to;*
- * *Allowance for maintenance of the bungalow, plus allocation for payment of electricity and water bills;*

She will thus only take her entitlements of :

- * *A few vehicles* 120
- * *Security personnel and related equipments and vehicles for security purposes;*
- * *Office staff."*

Paragraph 2 of the Memorandum seeks to justify the grant of the land by stating that in terms of the Act if the President does not avail herself of a residence, she would be entitled to the payment of 1/3 of the pension as rental allowance. This amounts to approximately Rs. 7,000/- per month. But, as Ministerial type of office residences are in short supply presently, if she avails herself of her entitlement of a residence, a Minister may probably have to 130

take a house on rent. The minimum rental of a Ministerial type of residence, at present, in the Colombo 7 area where they are presently situated would be around Rs. 300,000/- to Rs. 400,000/- per month or more. An additional allocation of approximately Rs. 1 million has to be made annually for repairs, maintenance as well as payment of electricity and water bills.

The justification proceeds further to state that the President has suffered by assassination of her husband and injuries suffered in an assassination attempt in 1999 and concludes by stating that "the value of land requested is insignificant" when compared with the entitlements she has given up and also proposes to forego in the future. 140

In paragraph 3 of the Memorandum Cabinet approval is sought to allocate the land to the 1st respondent on a "free-hold basis for the construction of her residence at her cost".

The petitioners contend that the Memorandum is contrary to the provisions of the Act which specifically envisages the payment of a allowance amounting to 1/3 of the pension if a Ministerial type of house is not available. Their main submission is that the Madiwela land was originally intended for the construction of the "Presidential Palace" and a sum of Rs. 800 million has already been spent by the State to develop the land for the purpose of such construction. The Minister, although leave to proceed was granted against him has not sought to contradict this specific averment in the petition. In the circumstances this Court has to act on the basis that the extent of 1 1/2 acres to be allocated, near the Parliament is a fully developed land in respect of which the State has already spent over Rs. 800 million and that the statement of the Minister that the value of land is 'insignificant' is a misrepresentation of facts. 150 160

The Memorandum dated 24.8.2005 was considered on the very next day by the Cabinet of Ministers and approval was granted to it by the decision in 36RIB.

It is not clear as to what the Minister meant by a "free-hold" allocation. Such a concept is not known to the law of Sri Lanka. Whatever it may mean it is seen from document 37R2A that the Urban Development Authority in whom the land had been vested,

on the basis of that decision made a free grant of the land to the 1st respondent by Deed bearing No. 1135 dated 6.9.2005. It is significant that the date in the deed being a document with several schedules covering six pages is the very next day from date on which the decision of the Cabinet of Ministers was communicated. The land had been surveyed and the date of the Plan is 15.8.2005/ It is thus seen that within a matter of a brief period of this Court making a pronouncement as to the term of office of the President, the land had been surveyed, a Cabinet Memorandum submitted and approved and a deed containing a free grant issued.

The premises at 27 Independence Avenue, Colombo 7.

The first reference to the allocation of No. 27, Independence Avenue, Colombo 7, to the 1st resident is made in the Cabinet Memorandum dated 31.10.2005, submitted by the Minister of Public Security, Law and Order (36R2A).

This Memorandum makes no reference to the fact that a Memorandum had been submitted by the Minister of Urban Development and land at Madiwela was allocated to the 1st respondent in lieu of a pension, residence and so on. The Memorandum of the Minister of Public Security recommends that an entirely New Division be established for the 1st residence as "the Retired Presidential Security Division IV" headed by a Senior Superintendent of Police with 198 personnel, 18 vehicles and 18 motor cycles to be provided for the use of the officers.

Addressing the matter from the perspective of security paragraph 3 of the said Memorandum states:

"Allocate the house No. 27, Independence Avenue, Colombo 7, for this purpose since she needs to reside in a house where adequate security can be provided and to effect repairs thereto in order to ensure security measures."

The 1st respondent herself has submitted a Note to the Cabinet dated 2.11.2005 titled "Staff of the office of the President on retirement." (36R3A). It says *inter alia*, as follows:

"I will be entitled to certain facilities under the provisions of the Presidents' Entitlement Act No. 4 of 1986. Provision of official and personal staff would be one such entitlement."

I have already selected premises No. 27, Independence Avenue, Colombo 7, for my office after retirement. Considering the meaningful role that I propose to play in the public affairs of this country on retirement the staff I require to maintain this office is given in the Annexure to this Note.

The annexure sets out a staff as follows:

PARTICULARS OF STAFF

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Designation/Category	No. of Positions	
President	01	
Secretary to the Former President & Chief of Staff	01	
Advisors - Political Affairs & International Affairs	02	
Advisor - Social Affairs	01	
Additional Secretary	01	
Secretaries - Private & Confidential	02	
Directors - Foreign Relations & Special Projects	01	
Senior Assistant Secretary	02	
Assistant Secretaries (SLAS)	03	220
Assistant Secretaries (Non-SLAS)	03	
Co-ordinating Secretaries	03	
Programme Officer	01	
Manager	01	
Stenographer - Sinhala/English/Tamil	05	
Data Entry Operators	03	
Clerks	04	
Information Officer	01	
Cameraman	01	
Video Cameraman	01	230
Garden Specialist	01	
Garden Labourers	02	
Labourers	02	
Messenger	01	
Drivers	09	
Butlers	05	
Cook	01	
KKSS	05	
Total	63	

The matter of the staff would be dealt with under the next 240 heading. As regards the allocation of the premises at No. 27, Independence Avenue, it is seen in paragraph 3 of the Memorandum on security, the Minister has stated that these premises are needed for her to reside, suppressing the fact that the Cabinet has already by a decision taken 2 months before made a free grant of the land at Madiwala in lieu of the entitlement of a residence and a pension. The 1st respondent in her Note to the Cabinet which has been considered by the Cabinet on the same day as the Memorandum of the Minister viz: 3.11.2005, knowing 250 fully well that she has already got a land free in lieu of a residence has stated that she has "already selected premises No. 27, Independence Avenue, Colombo 7, for the office after retirement, considering the meaningful role that she proposes to play in the public affairs of the country after retirement" and requests the personal staff of 63. There is plainly a contradiction, the Minister calls it a house to reside in and the 1st respondent calls it an office. It has to be noted that there is no entitlement to an office in the President's Entitlements Act, No. 4 of 1986. The reference to an office in the 1st respondent's Note is a patent mis-representation 260 since in the staff of 63 included in the annex there are included 5 Butlers and a Cook. Such persons cannot possibly come within an office staff.

The more significant factor not contained in the Memorandum of the Minister and the Note of the 1st respondent is that No. 27, Independence Avenue, was not an "appropriate residence" in terms of Section 2 of the Act. As revealed in the affidavit of the 37th respondent these premises had been donated on 14.05.1980 (37R3) by the then President to the Sri Lanka Foundation. It was used for the Human Rights Centre and at the time material by the Rana Viru Seva Authority and the Disaster Management Centre. 270 Steps had been taken well prior to the Cabinet decision of 3.11.2005 to retake possession of the premises and to shift the Authority and the Centre to rented premises. Letter dated 11.10.2005 (37R4) was sent by the then Chairman of the Sri Lanka Foundation to the then Secretary to the President. It states that in reference "to our telephone conversation last week where you requested that the Sri Lanka Foundation voluntarily surrender the above mentioned land to the State as Her Excellency the President

wishes to use the said premises as her office after relinquishing duties," the Board has unanimously resolved to surrender the land. 280
The surrender was sent for registration but there was an error in the process which had to be rectified with another resolution being passed as recently as 31.10.2006 (vide 37R5, 37R13 and 37R14). Be that as it may, well before even the Cabinet decision with some reference to these premises was made on 3.11.2005 the 1st respondent on her own embarked on the process of effecting repairs. The estimate dated 30.09.2005 (37R12) for a sum of Rs. 43 million reduced to Rs. 35 million appears to have been obtained by her directly. She addressed a minute dated 30.09.2005 to the Secretary that he should obtain the necessary allocation from the Treasury and release it early. The Secretary sent letter dated 7.10.2005 (37R10) to the Treasury requesting a sum of Rs. 40.25 million to repair the building and a supplementary allocation was made by letter dated 11.11.2005 (37R11). The letter states that the allocation is under - 290

Head 801 -	Department of National Budget.
Programme 07 -	Public Resource Management.
Project 02-	Budgetary Support Services and Contingent Liabilities.

Whatever these words may mean the process is nothing but a 300
fiscal ruse to incur unauthorized expenditure. It is significant that the Budget Estimates for 2006 for the former President which has also a column for 2005 does not reflect this figure (Vide: 43R3A). Infact the total expenditure for 2006 is Rs. 37 million and for 2005 Rs. 12 million.

Be that as it may, paragraph 3 of the letter (37R11) states as follows;

"The granting of this allocation should not be construed as adequate authority for incurring expenditure. All expenditure should be incurred in accordance with the provisions of the 310 relevant Financial Regulations, Establishment Code and instructions issued from time to time by Government."

By this time the 1st respondent without any recourse to a tender procedure and in flagrant violation of the guidelines which

she herself laid down as Minister of Finance, personally selected a contractor and agreed on the price payable. The Submission of President's Counsel for the 1st respondent that a deviation was warranted on grounds of urgency is wholly untenable in view of the paragraph 3 of 37R11. This probably is the reason for the strident objection to the order of the Court in calling for these documents. 320 The documents and the facts set out above clearly establish that the entire sequence of events in regard to premises No. 27, Independence Avenue, is an abuse of authority on the part of the 1st respondent and marked by a serious deception i.e. the suppression in both papers to the Cabinet the previous free grant of the Madiwala land in lieu of the entitlement to a pension and a residence.

Allocation of Staff

The allocation of staff reveals a two track approach as seen from the papers referred to above. The Minister in charge of the subject of Public Security, Law and Order has submitted the Cabinet Memorandum (36R2A) referred to above recommending the establishment for the 1st respondent an entirely new Presidential Security Division IV with 198 personnel, 18 vehicles and 18 motor cycles. The 1st respondent has submitted a Note to the Cabinet (36R3A) stating her entitlement to an official and personal staff of 63 personnel. Both have been considered on the same day, that is on 3.11.2005 and allowed by the Cabinet of Ministers. 330

The submission of the petitioners is that in terms of the Presidents' Entitlements Act No. 4 of 1986, a former President does not have an entitlement to an office or to office staff. There is only an entitlement in terms of Section 3(1) to the payment of a monthly allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President. 340

The specific reference to an allowance and the manner in which it is to be computed, in my view, excludes any other staff being allowed to a former President in terms of Act No. 4 of 1986. The tenor of the Memorandum and the Note submitted by the 1st respondent appears to be that the staff requested is a "facility" to 350

which a former President is entitled to in terms of Section 3(2) of the Act. This provision entitles a former President to "official transport and on such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."

In my view the phrase 'such other facilities' have to be read *ejusdem generis*, to mean similar in nature to the provision of official transport. As regards staff the specific provision in section 2 referred above makes reference only to an entitlement of a "monthly secretarial allowance". Therefore the memorandum of the Minister and the Note of the 1st respondent cannot derive any authority from the provisions of Act No. 4 of 1986. 360

The petitioners made a further submission that in any event the entitlements in Act No. 4 of 1986 are to "every former President and widow of a former President". This is clearly seen in sections 2 and 3. Therefore it was submitted that the entitlement becomes effective only after a President ceases to hold office and acquires the status of former President. The entitlement cannot be granted whilst the person is holding the office of President.

In my view the provisions have been advisedly worded in this manner to avoid a situation as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office. 370

In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest. "*Nemo debet sus iudex*" is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office and acquire the eligible status of a former President. To add insult to injury the 1st respondent herself has submitted a Note to the Cabinet stating that she intends "to play a meaningful role in the public affairs of the country on retirement" and requires a staff to maintain her office. Whilst there may be of no objection to any 380

person playing a meaningful role in public affairs the wrongful act submitted by the petitioners is the procurements of land, premises for residence, staff (security and personnel) and vehicles contrary to the provisions of Act No. 4 of 1986, both from the perspective of time and content. The submission of the petitioners is in my view well founded. 390

I am in agreement with the basic submission that the entitlements in the Act apply only to a former President and that the provisions have been worded in this manner to ensure that the incumbent President would not have occasion to decide on his entitlements.

The submission of Counsel for the 1st respondent is that even if the grant of the land, premises and staff do not come within the purview of Act No. 4 of 1986, the petitioners nevertheless have no *locus standi* to file this application and that the Court has no jurisdiction to decide on the matter. 400

The implication of the submission of Counsel appears to be that if there is any conferment of a wrongful or unlawful benefit or advantage, that has to be addressed in appropriate proceedings but it cannot amount to an infringement of a fundamental right guaranteed by Article 12(1) of the Constitution.

It is indeed correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption in terms of section 70 of the Bribery Act, as amended by Act No. 20 of 1994. However, the fact that the impugned action may or may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from this Court that the conferment of such a benefit or advantage is contrary to the fundamental right to equality before the law. Ordinarily, an infringement of a fundamental right is alleged when the impugned wrongful act on the part of the executive or administration affects the right of the aggrieved person. The petitioners' case is presented on a different basis where they seek to act in the public interest. The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the people and where in the purported exercise of 420

such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equally before the law.

In the context of this submission it is relevant to cite from the 430
Determination of a Divisional Bench of seven Judges of this Court
in regard to the 19th Amendment to the Constitution⁽¹⁾. The Court
there laid down the basic premise of the Constitution as enunciated
in Articles 3 and 4, that the respective organs of government are
reposed power as custodians for the time being to be exercised for
the People. At 96 the Court has made the following determination
in regard to sovereignty of the People and the exercise of power.

*"Sovereignty, which ordinarily means power or more
specifically power of the State as proclaimed in Article 1 is
given another dimension in Article 3 from the point of the 440
People to include –*

- (1) the powers of Government.*
- (2) the fundamental rights; and*
- (3) the franchise.*

*Fundamental rights and the franchise are exercised and
enjoyed directly by the People and the organs of government
are required to recognize, respect, secure and advance these
rights.*

*The powers of government are separated as in most
Constitutions, but unique to our Constitution is the elaboration 450
in Articles 4(a), (b) and (c) which specifies that each organ of
government shall exercise the power of the People attributed
to that organ. To make this point clearer, it should be noted
that sub-paragraphs (a), (b) and (c) not only state that the
legislative power is exercised by Parliament, executive power
is exercised by the President and judicial power by Parliament
through Courts, but also specifically state in each sub
paragraph that the legislative power "of the People" shall be
exercised by Parliament, the executive power "of the People"
shall be exercised by the President and the judicial power "of 460
the People" shall be exercised by Parliament through the*

Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People (at page 98). Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People."

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The petitioners allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the People. The basic question therefore arises as posed by Juvenal in the 1st century A.D. who wrote the famous latin phrase in a slightly different context which has been frequently cited thereafter. "*Sed quis custodiet ipsos Custodes?*" meaning, "but who is to guard the guards themselves?". The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, in my view the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law. It has been affirmatively stated in several judgments of this Court that the Rule of Law is the basis of our Constitution (*Vide: Visvalingam v Liyanage*⁽²⁾ and *Premachandra v Jayawickrema*⁽³⁾). The phrase "Rule of Law" itself gained recognition as a premise of English Constitutional Law.

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A.V. Dicey in his Famous work "The Law of the Constitution" at page 202 states as follows:

"That 'rule of law' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

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It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a

breach of law, but he can be punished for nothing else.

*It means, again, equality before the law, or the equal 500
subjection of all classes to the ordinary law of the land
administered by the ordinary law courts; the "rule of law" in
this sense excludes the idea of any exemption of officials or
others from the duty of obedience of law which governs other
citizens or from the jurisdiction of the ordinary tribunals;
.....The 'rule of law', lastly, may be used as a formula
for expressing the fact that with us the law of the constitution,
the rules which in foreign countries naturally form part of a
constitutional code, are not the source but the consequence
of the rights of individuals, as defined and enforced by the 510
courts..."*

The rule of law thus gains its efficacy by being enforced by the Courts.

In *S.P. Gupta v Union of India and others*⁽⁴⁾ at 149, nine Judges of the Supreme Court of India ruled in favour of a public interest suit filed by certain lawyers as a writ petition. In his judgment Bhagawathi, J., who was later the Chief Justice of India made the following observations with regard to the impact of the principle of rule of the law at 197.

*"If there is one principle which runs through the entire fabric 520
of the Constitution, it is the principle of the rule of law and
under the Constitution, it is the judiciary which is entrusted
with the task of keeping every organ of the State within the
limits of the law and thereby making the rule of law
meaningful and effective. It is to aid the judiciary in this task
that the power of judicial review has been conferred upon the
judiciary and it is by exercising this power which constitutes
one of the most potent weapons in armoury of the law, that
the judiciary seeks to protect the citizen against violation of
his constitutional or legal rights or misuse of abuse of power 530
by the State or its officers".*

In considering the provisions of our Constitution as analysed in the Determination in the 19th Amendment (*supra*) and the observations cited above of Dicey and the Supreme Court of India, I am of the view that there is a positive component in the right to

equality. That, where the executive being the custodian of the People's power abuse a provision of law in the purported grant of entitlements under such law and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court. The denial of a *locus standi* in the circumstances as presented in this case where there has been a brazen abuse of power of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless. The facts that have been clearly established in this case prove that the 1st respondent and the Cabinet of Ministers of which she was the head, secured for the 1st respondent benefits and advantages in the purported exercise of executive power in breach of the provisions of the President's Entitlement Act No. 4 of 1986. Since executive power is exercised in trust for the People, such wrongful action is an infringement of the fundamental right to equality before the law guaranteed by Article 12(1) of the Constitution. 540 550

For these reasons I allow the application and grant to the petitioners the declaration prayed for that their fundamental right guaranteed by Article 12(1) of the Constitution has been infringed by executive action in the purported grant of benefits and advantages to the 1st respondent contrary to the provisions of the Presidents' Entitlements Act No. 4 of 1986.

As regards consequential relief it is seen that the 1st respondent has after this application was filed returned the land in question by a notarial instrument. Nevertheless a formal declaration is made that the decision to grant the land referred to in the Petition to the 1st respondent is contrary to law and of no force or avail in law. 560

Similarly declarations are made that the decisions which by implication give a right to the 1st respondent to the use and occupation of premises No. 27, Independence Avenue, Colombo 7, are of no force or avail in law.

I grant further declaration that the decisions that have been made from time to time by the Cabinet of Ministers and produced in Court with regard to the staff, both security and personal of no force or effect in law. 570

The 1st respondent would now be entitled to the benefits as stated in sections 2 and 3 of the Presidents' Entitlements Act No. 4 of 1986. The entitlement would be to an appropriate residence free of rent and where an appropriate residence it is not available the 1st respondent would be entitled to a monthly allowance of 1/3rd of the monthly pension that payable. Premises No. 27 Independence Avenue, Colombo 7, which has not been used as a residence cannot be considered as an appropriate residence for the purpose of section 2 of the Act. 590

The 1st respondent would also be entitled to a monthly secretarial allowance to be computed in the manner stated in section 3(1)(a) of the said Act and for official transport and facilities relating to such transport as permitted in terms of section 3(2)a of the said Act.

It has to be noted that the President's Entitlement Act No. 4 of 1986 is a unique piece of legislation which grants entitlements only to former Presidents and their widows. Intrinsicly it is an exception to the concept of equality before the law, since no other holder of public office is granted such benefits. It appears that there is no similar legal provision in any other country. 590

The provisions of this Act being an exception in itself to equality before the law, have to be strictly interpreted and applied. In the circumstances the submission of Counsel for the 1st respondent the allocation made in the Appropriation Act for 2006 for salaries of the staff for the 1st respondent creates an entitlement to a staff is misconceived. An allocation in the Appropriation Act predicates that the money allocated should be expended according to law. 600

The application is allowed. The 1st respondent will pay a sum of Rs. 100,000/- as costs to the petitioners and the State will pay a further sum of Rs. 100,000/- as costs.

THILAKAWARDENA, J. - I agree.

AMARATUNGA, J. - I agree.

Relief granted.