JAYANETTI
v.
THE LAND REFORM COMMISSION AND OTHERS

SUPREME COURT.
SHARVANANDA, J., WANASUNDERA, J., WIMALARATNE, J., COLIN-THOME', J. AND ABDUL CADER, J.
S.C. APPLICATION No. 15/84.
JUNE 12, 14, 15, 21 AND 22, 1984.

Fundamental right of equality under Article 12 of the Constitution–Application under Articles 17 and 126–Rule 65 (1) (b) of the Supreme Court Rules, 1978–Sections 22, 23, 24, 26 and 47 of the Land Reform Law–Articles 4, 12 (1) and 126 of the Constitution–Sole and exclusive jurisdiction of Supreme Court in respect of violation of fundamental rights–Addition of parties after time limit for institution of proceedings–Time limit for determination of Court whether directory or mandatory–Requisites for alienation of land by Land Reform Commission–Is Land Reform Commission an agency or an instrumentality of the State ? Meaning of executive action–Violation of the fundamental right of equality by executive and administrative action.

The petitioner had made an application to the Land Reform Commission (1st respondent) to purchase 50 acres out of Mount Pearl Estate an agricultural land and annexed to it a letter of recommendation from the then Member of Parliament the 6th added respondent as this was an administrative requirement for such an application. By letter dated 4th March 1982 the Regional Director of the Commission informed the petitioner that the request could not be granted because the Member of Parliament had withdrawn his recommendation owing to strong objection raised by the local residents. The Member for Parliament also informed the petitioner that the land would be distributed among the local villagers. But a few months later the Member of Parliament recommended the alienation of 50 acres of this estate to one Mrs. Dassanayake the 4th added respondent whose husband was the Public Relations Officer of the Ministry of Trade and Shipping and a balance extent of 33 acres to Mr. Weerasinghe the 5th added respondent who was his brother-in-law and resident with him.

In view of a general direction given by the Minister (2nd respondent) under section 47 of the Land Reform Law that an alienation exceeding 10 acres should have his approval, the application was sent up to the Minister for his approval with the recommendation of the Commission. The Minister approved the alienation to Mrs. Dassanayake. This was conveyed to the parties concerned by letter dated 14.3.1983.

The petitioner interviewed the Chairman of the Commission Mr. Ranjan Wijeratne who considering that there was some basis for the petitioner's complaint of unfair treatment suggested a compromise whereby 25 acres could be given to the petitioner and 25 acres to Mrs. Dassanayake and submitted the proposal to the Minister for his approval.

Mrs. Dassanayake, the petitioner and the M.P. interviewed the Minister and made representations. In the meantime Mrs. Dassanayake had already deposited three lakhs of rupees towards this purchase and also incurred other expenses. Another application to alienate this land to the children of one Mr Seneviratne had been turned down by the Minister because of his earlier decision to alienate the land to Mrs. Dassanayake and as only 34 acres were left. The petitioner too had by his letter of 13th October 1983 given the impression that he was no longer interested in the suggested compromise. Faced with these facts the Minister chose to abide by his earlier decision. On 2nd February 1984 the Land Reform Commission executed the conveyance in favour of Mrs. Dassanayake and on 10th February 1984 the petitioner filed this application. Mr. Rajan Wijeratne filed his affidavit on 13th March 1984 and brought to the notice of Court that both Mrs. Dassanayake and Mr. Weerasinghe who were not parties would be vitally interested in the proceedings and adversely affected by the prayer to the petition.

As the proceedings went on the petitioner further brought to the notice of Court the fact that Mrs. Dassanayake was employed in the Sri Lanka Insurance Corporation and disqualified under section 23 of the Land Reform Law from obtaining the land in question. The petitioner now insisted on the presence of Mrs. Dassanayake, Mr. Weerasinghe and Mr. Wijegooneratne before Court but the respondents relying on the Rule 65(1) (*b*) of the Supreme Court Rules 1978 objected to this. The respondents also objected that the Court had no jurisdiction to hear and determine this matter after the expiry of two months. The 4th respondent objected that he was added after the time limit for instituting action.

Held–

(1) The Supreme Court Rules 1978 (Rules 63 to 65) deal with the bare skeleton of procedure relating to a proceeding under Article 126. It is inconceivable that these four rules are comprehensive and all embracing and can provide for every situation that could arise in the exercise of the jurisdiction under Article 126. The procedural rules must be considered as secondary to the provisions of Articles 17 and 126 which are central. The Court is empowered to grant such relief or make such direction in the case as it may deem just and equitable and within this jurisdiction of the Court is included the power to make interim orders and to add parties without whose presence questions in issue cannot be completely and effectually decided. The presence of Mrs. Dassanayake and Messrs. Wijegooneratne and Weerasinghe was necessary as the Court could not make a fair order without consideration of the allegations against them in so far as they had a bearing on the conduct of the Land Reform Commission. These persons would be prejudiced if they were not given a full and complete hearing. The Court acting in the interests of justice of necessity had to join them as parties.

(2) The provision requiring the court to make its determination within two months is directory only but this does not mean that the provision is erased from the statute book. The time limit must be complied with except when delay is necessitated in the interests of justice or where the delay is caused by circumstances beyond the control of the Court.

(3) The 4th respondent being impleaded in an action filed within the prescribed time limit, is not entitled to object that the petitioner is barred from proceeding against him as he was added after the expiry of the time limit for instituting action.

(4) Mrs. Dassanayake (4th respondent) being an employee of a State Corporation was disqualified under section 23 of the Land Reform Law from obtaining an alienation of land from the Commission. Further she had no connection with the administrative district where the land was situate and no notice under section 26 of the Land Reform Law of the alienation was published in the Gazette. The mandatory requirement for giving notice of any proposed alienation by publication in the Gazette is designed to ensure fair dealing and equality.

(5) The word "the law" in Article 12 (1) refers not only to legislation but also to executive or administrative action. To confine it to legislation alone would be to emasculate the equality clause.

(6) The expression "executive action" in Article 126 is not to be understood in the meaning given to the expression "executive" in Article 4.

(7) Article 126 provides not only the sole and exclusive remedy in the case of a violation of fundamental rights by executive or administrative action but also the most expeditious remedy.

(8) The Land Reform Commission constitutes an agency or instrumentality of the State and its acts amount to executive or administrative action. All activity of the Commission is subsumed under overriding policy considerations, and this is reflected in the provisions enabling ministerial control with financial assistance being provided and financial control being exercised by the Government.

(9) To make the recommendation of the Member of Parliament a condition precedent or to give him virtually a right of veto would be to frustrate the intention of the Legislature and to abdicate the powers vested in the Commission.

(10) The application of Mrs. Dassanayake has been entertained and processed and dealt with in a most cursory and perfunctory manner.

(11) There has been unequal treatment of the petitioner by executive or administrative action violative of Article 12.

Cases referred to :

(1) *K. K. Kochunni v. State of Madras AIR 1955 SC 725.*
(2) *Maharaj v. A. G. of Trinidad and Tobago [1979] AC 385.*
(3) *Vivienne Goonewardene v. Hector Perera, S. C. No. 6/83–S. C. minutes of 7.2.84*
(4) *Raja Suryapalasingh v. U.P. Govt. AIR 1951 Allahabad 674.*
(5) *State of U. P. v. Deoman AIR 1960 SC 1125.*
(6) *Wijetunga v. Insurance Corporation [1982] 1 SLR 1.*
(7) *Wijeratne v. People's Bank [1984] 1 SLR 1.*
(8) *Ramana v. I. A. Authority of India AIR 1979 SC. 1628.*
(9) *Jackson v. Metropolitan Edition Co. (1974) 419 U. S. 363.*
(10) *Ghanatilleke v. Attorney-General [1978-79] 1SLR 37.*
(11) *Dhanraj Mills Ltd. v. Kocker AIR 1951 Bombay 133.*
(12) *Karthigesu Visuvalingam and Others v. Don John Francis Liyanage and Others. S. C. No. 47/83–S. C. Minutes of 19.10.1983.*

APPLICATION under Article 126 for violation of the fundamental right of equality.

H. L. de Silva, P. C. with *Arthur Samarasekara, Kithsiri P. Gunaratne, Upali Almeida* and *A. L. M. de Silva* for the petitioner.

Mark Fernando for the 1st respondent.

S. W. B. Wadugodapitiya, Addl. Solicitor-General, with *R. Selvaskandan, S. C.* for the 2nd and 3rd respondents.

A. J. I. Tilakawardena with *Mohan M. Burhan,* instructed by *(Miss) I. Siriwardena* for the 4th added respondent.

R. K. S. Sureshchandra for the 5th and 6th added respondents.

Cur. adv. vult.

July 13, 1984.

WANASUNDERA, J.

This is an application by the petitioner under Article 126 of the Constitution complaining of the violation of the equal protection clause by the Land Reform Commission the 1st respondent, and the Minister of Agricultural Development, Research and Co-operatives the 2nd respondent, in regard to certain alienations of land under the Land Reform Law of 1972. The Attorney-General has been made the 3rd respondent in accordance with the provisions of Article 134 of the Constitution.

In his petition and affidavit, the petitioner, a resident of Colombo, has stated that he also has a residence in Welipenna in the Matugama electorate of the Kalutara District, where he is engaged in a business of manufacturing crepe rubber. This crepe rubber factory, which is situated at Lewwanduwa, employs about 60 persons and has the capacity of processing 2,000 kilograms of rubber per diem.

The petitioner has stated that in January 1982 he became aware that the land constituting Mount Pearl Estate, an agricultural land, situated in the Matugama electorate, containing old rubber, vested in the Land Reform Commission and in extent about 83 acres was available for alienation under the Land Reform Law. The petitioner states that he made an application for the purchase of an extent of 50 acres and annexed to it a letter of recommendation from the then Member of Parliament, the 6th added respondent, as this was an administrative requirement for such an application. Though the 1st respondent denied that the petitioner made a formal application in the official form, it is clear that a written application had been made and was entertained and considered by the Commission.

By letter dated 4th March 1982, the Regional Director of the Commission informed the petitioner that his request for the 50 acres of land cannot be granted as the Member of Parliament, the 6th respondent, had in the meantime informed the Commission that he is withdrawing his recommendation due to strong objections raised by the local residents. The 6th respondent himself confirmed this position when the petitioner met him. He informed the petitioner that the land should not be alienated to one or two individuals, but would be distributed among the local villagers.

But, a few months later the Member of Parliament was singing a different tune. In August or September 1982, by his letter annexed to Mrs. Dassanayake's application, he is found recommending the alienation of 50 acres of this estate to Mrs. Dassanayake, the 4th added respondent. About this time, his brother-in-law the 5th added respondent, residing with him, was also making an application for the balance 33 acres and this application too was recommended by the 6th respondent though he was a resident of Galle. The petitioner has placed before us some material to show that all the Gramodaya Mandalayas in that area had protested against the proposed alienation to Mrs. Dassanayake.

Mrs. Dassanayake's application had been entertained and, in our view, processed and dealt with in a most cursory and perfunctory manner. In view of a general direction given by the Minister under section 47 of the Law that an alienation exceeding 10 acres should have his approval, the application was sent up to the Minister for his approval with the recommendation of the Commission. The 2nd respondent Minister then approved this alienation to Mrs. Dassanayake. This was conveyed to the parties concerned by letter dated 14.3.1983.

In the meantime the petitioner had got wind of these developments. He discovered that Mrs. Dassanayake was a resident of Colombo having no connection whatsoever with the Matugama electorate. He also found that Mrs. Dassanayake's husband was employed as Public Relations Officer of the Ministry of Trade and Shipping. The petitioner therefore concluded that she may have brought to bear some official or political influence on the Commission to obtain her alienation. The petitioner believed that he had been discriminated against and sought an interview with Mr. Ranjan Wijeratne, the Chairman of the 1st

respondent, with a view to obtaining relief. Mr. Wijeratne granted the interview and appears to have been sympathetic to the petitioner and thought that there was some basis for the petitioner's complaint that he had not been fairly treated. He suggested a compromise. Of the 50 acres proposed to be alienated, 25 acres should be given to the petitioner and the balance 25 acres to Mrs. Dassanayake. He submitted this suggestion for the Minister's consideration since the Minister had already approved the alienation of 50 acres to Mrs. Dassanayake.

Mrs. Dassanayake, the petitioner and the M.P. had thereafter interviewed the Minister and made representations to him on this matter. By this time Mrs. Dassayanake had taken a number of steps to conclude the transaction and had deposited over 3 lakhs of rupees towards this purchase and also incurred other expenses. Another application to alienate this same extent of land to the children of one Mr. Seneviratne had been turned down by the Minister in view of his earlier decision to alienate this land to Mrs. Dassanayake and as only 34 acres were left. Faced with these facts the Minister chose to abide by his earlier decision. It appears to us that whatever decision the Minister took at this stage would have resulted in litigation, because it would have adversely affected the rights of one or other of the parties. He appears to have advised himself properly when he played safe and decided not to vary the decision he had already made. Besides, the petitioner's own letter of 13th October 1983 gives the impression that he was no longer interested in a compromise settlement. We have no doubts about the bona fides of both the Minister and Mr. Wijeratne in this matter and the allegations made against them are, in our view unfair and without foundation.

The petitioner had filed this application on 10th February 1984. On 13th March 1984 the Chairman, Land Reform Commission, Mr. Ranjan Wijeratne, filed his affidavit before this Court. While explaining the position of the Commission and his own role in the developments, he also brought to the notice of Court that both Mrs. Dassanayake and Mr. Weerasinghe, who were not parties to the application, would be vitally interested in these proceedings and would be adversely affected if an order is made by us in terms of the prayer to the petition in their absence.

On 19th March 1984 the petitioner himself filed a list of persons whose evidence would be required by him, naming Mrs. Dassanayake, Mr. J. D. Weerasinghe, Mr. Reginald Wijegooneratne the ex-M.P., and some officers of the Land Reform Commission, and prayed for notice on them.

On the 21st of March 1984 the 2nd and 3rd respondents filed a motion praying for the issue of notice on Mrs. Dassanayake "as she is a necessary party to be added to these proceedings, as her interests may be adversely affected by the decision in these proceedings."

As the proceedings developed further, the petitioner brought to our notice his discovery that Mrs. Dassanayake has concealed from the Commission the fact that she was employed in the Sri Lanka Insurance Corporation and was therefore disqualified under section 23 of the Land Reform Law from obtaining the alienation in question. The petitioner now insisted on the presence of all these parties in Court.

The respondents, notwithstanding their earlier assertions that Mrs. Dassanayake would be adversely affected and should be made a party, now objected to a widening of the scope of these proceedings by the inclusion of persons not parties to the original application and to any inquiry into matters pertaining to them. They specifically relied on the provisions of Rule 65 (1) (*b*) of the Supreme Court Rules 1978, which they said debarred the addition of new parties.

Due to the importance of this question and the application of the petitioner to examine witnesses in these proceedings, the original bench of three judges thought that it was desirable that this case be heard by a larger bench. It is in deference to this request that the Chief Justice has nominated the present bench to hear this appeal.

After hearing submissions of counsel, we directed that Mrs. Dassanayake, Mr. Wijegooneratne and Mr. Weerasinghe be added as parties and time was given to these added parties to file whatever papers they wished. These parties have filed statements of objection. The submissions of their counsel have also been heard by us. Since we did not at that stage give our reasons for our ruling regarding the addition of these parties, they may be mentioned at this stage.

Rule 65 (1) (*b*) of the Supreme Court Rules requires the petitioner to name in his petition the Attorney-General and any person or persons who he alleges have infringed or are about to infringe his fundamental or language rights. In this context it should be noted that the remedy provided by Article 126 for a violation of a fundamental right is limited to such violation by executive or administrative action. A private person who is in some way connected with such an action such as, for example, a person who stands to benefit by the transaction does not appear to fall within the kind of persons contemplated by Rule 65 (1) (*b*). This problem becomes more complex if such a name were to transpire in the course of the proceedings, for it has been submitted by counsel for the petitioner that Rule 65 (1) (*b*) is limited to the point of time as at the institution of proceedings and does not provide for matters arising thereafter.

As far as the rules go, it would appear that they deal with the bare skeleton of procedure relating to a proceeding under Article 126. Part VI of the Rules which deals with these procedural matters consists of only four Rules, i.e. Rules 63-66. It is inconceivable that these four Rules are comprehensive and all embracing and can provide for every situation that could arise in the exercise of our jurisdiction under Article 126. Incidentally, even the Civil Procedure Code with more than 800 sections is said not to be exhaustive.

The remedy for a violation of a fundamental right is enshrined in Articles 17 and 126 of the Constitution and not in any rules. Article 17 is given the importance of being dignified into a fundamental right itself. This provision is of the utmost importance not only for securing the safety and welfare of the people of this country but stands as an impregnable redoubt protecting the operation of the democratic system of Government in the country. Therefore, if we take our stand on these two provisions as central, we find that any procedural rules must be considered secondary to these constitutional guarantees. We are empowered, and indeed it is our duty, to give full operation to the provisions of Articles 17 and 126. These provisions vest this Court with sole and exclusive jurisdiction to hear and determine any question relating to an infringement of fundamental rights by executive or administrative action. We are empowered after such inquiries, as we consider necessary, to grant such relief or make such direction in the case as we may deem just and equitable. This is an extensive jurisdiction and it carries with it all implied powers that are necessary to give effect and expression to our jurisdiction. We would include

within our jurisdiction, *inter alia,* the power to make interim orders and to add persons without whose presence questions in issue cannot be completely and effectually decided. In fact, our present decision in no way widens the ambit of Article 126 but seeks to articulate its real scope and to make the remedy more effective.

In *K. K. Kochunai v. State of Madras,* (1) the Supreme Court of India, dealing with Art. 32 the corresponding Article in the Indian Constitution, said –

". . . . But on a consideration of the authorities it appears to be well established that this Court's powers under Art. 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party. The present case appears to us precisely to be an appropriate case, if the impugned Act has taken away or abridged the petitioners' right under Art. 19 (1) (*f*) by its own terms and without anything more being done and such infraction cannot be justified. If, therefore, the contentions of the petitioners be well founded, as to which we say nothing at present, a declaration as to the invalidity of the impugned Act together with the consequential relief by way of injunction restraining the respondents and in particular respondents 2 to 17 from asserting any rights under the enactment so declared void will be the only appropriate reliefs which the petitioner will be entitled to get. Under Art. 32 we must, in appropriate cases, exercise our discretion and frame our writ or order to suit the exigencies of this case brought about by the alleged nature of the enactment we are considering. In a suit for a declaration of their titles on the impugned Act being declared void, respondents 2 to 17 will certainly be necessary parties, as persons interested to deny the petitioners' title. We see no reason why, in an application under Art. 32 where declaration and injunction are proper reliefs, respondents 2 to 17 cannot be made parties."

In regard to an argument that was advanced that the Court had no power under Art. 32 to go into disputed questions of fact, the Court observed –

". . . . Clause (2) of Art 32 confers power on this Court to issue directions or orders or writs of various kinds referred to therein. This Court may say that any particular writ asked for is or is not appropriate or it may say that the petitioner has not established any

fundamental right or any breach thereof and accordingly dismiss the petition. In both cases this Court decides the petition on merits. But we do not countenance the proposition that, on an application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention of learned counsel, we would be failing in our duty as the custodian and protector of the fundamental rights. We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Art. 32 and to decide the same on merits may encourage litigants to file many petitions under Art. 32 instead of proceedings by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, prima facie, appear to have been infringed. Further, questions of fact can and very often are dealt with on affidavits. . . . . As we have already said, it is possible very often to decide questions of fact on affidavits. If the petition and the affidavits in support thereof are not convincing and the court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the Court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involves disputed questions of fact."

In the Indian provisions, no doubt, the writ jurisdiction is also intertwined with this jurisdiction, but in substance both Constitutions seek to achieve the same end and, in my view, our jurisdiction is in no way less extensive than that under the Indian Constitution – vide *Maharaj v. A. G. of Trinidad and Tobago,* (2).

The 1st respondent has himself stated that these added parties are vitally interested in the result of the application. The preliminary submissions showed that serious allegations were being made against them and in particular, as Mr. Mark Fernando himself said, in the public interest the validity of Mrs. Dassanayake's alienation may have to be reconsidered by the Land Reform Commission in the light of these allegations. Far from there being any legal bar to their addition as parties, it seems to me that it was the only course any court could have followed in this matter.

It would be interesting to contrast this case with the facts of the case of *Vivienne Goonewardene v. Hector Perera,* (3) where the contrary proposition was advanced. In that case an affidavit of a person admitting certain facts in issue was presented to court by one of the respondents in support of his own case. This respondent treated this person in effect as a willing witness. In that case it was urged on behalf of the witness that he should have been made a party and given a hearing, because the order of the Court could have an adverse effect on him. But that submission failed to draw the distinction between a mere witness and the case of a person who stands independent of the parties but whose presence is required as a proper party to the proceedings.

In this case Mrs. Dassanayake, Mr. Weerasinghe and Mr. Wijegooneratne have been brought into the case against their own will and do not represent anybody but stand in virtue of their own right. Since this Court cannot make a fair order in this case without considering the allegations against them, in so far as they have a bearing on the conduct of the Commission, and since they would be prejudiced if they are not given a full and complete hearing, this Court acting in the interests of justice of necessity had to join them as parties.

Mrs. Dassanayake, Messrs Wijegooneratne and Weerasinghe then filed statements of objection. Mrs. Dassanayake has been evasive in regard to the specific and grave allegation made against her by the petitioner, in that she had misled the Commission by a false statement in her application. She had concealed the fact that she was disqualified from getting an alienation of land from the Land Reform Commission since she is an employee of a corporation. Mrs. Dassanayake has not denied this allegation – which should have been done by affidavit.

I shall now examine the provisions of the Land Reform Law that have a bearing on this matter. The Land Reform Law, No. 1 of 1972, was enacted to fix a ceiling on the extent of agricultural land that may be owned by any individual in this country. Any land exceeding this ceiling is to be vested in the Land Reform Commission established by this Law. This amounts to the nationalisation of all such excess land. The Commission is a statutory Corporation. It consists of a Chairman appointed by the Minister and eight other members. Three of such members are ex-officio members, heads of government departments, namely the Land Commissioner, the Commissioner of Agrarian Services, and the Director of Agriculture. Of the remaining five members, again three have to be state officers nominated by the Minister of Finance, the Minister of Plantation Industry, and the Minister of Planning and Employment. Therefore we find that at least six of the eight members of the Commission must be state officers and they constitute the board of management of the Commission. The Commission has its own Fund, but the initial capital was paid from the Consolidated Fund. Additional amounts could also be voted by Parliament. Section 47 provides for Ministerial control enabling the Minister to give special or general directions to the Corporation. Mr. H. L. de Silva also drew our attention to sections 48, 57 and 62 showing State interest or other ways of State control of the Commission.

Section 22 of the Law empowers the Commission to alienate land vested in it for specified purposes. It provides, *inter alia,* for alienation of land vested in the Commission by way of sale, exchange, rent purchase or lease for agricultural development or animal husbandry. Section 23 prohibits the alienation of land to certain categories of persons. This includes "any employee of the Government or of any State Corporation or of a local authority, save and except for the purpose of construction of residential houses". Section 22 (3) has provided that in determining the persons to whom land should be alienated, "the Commission shall, as far as practicable, comply with provisions that consideration shall be given to persons from the administrative district where such land is situated." Section 26 prescribes that notice of the proposed alienations should be published in the Gazette.

Mr. H. L. de Silva submitted that the material before us shows that many of these statutory provisions have been disregarded by the Commission in the present case. I have already referred to the fact that Mrs. Dassanayake, being the employee of a State Corporation,

was disqualified from obtaining an alienation from the Commission, of which the Commission was apparently unaware. Further, she is a person without any connection with the administrative district where such land is situated.

Equally important is the fact that notice of the proposed alienation has not been published in the Gazette. Mr. Mark Fernando sought to argue that the publication in the Gazette is discretionary. He relied on the use of the word "may" in section 26 and also drew our attention to the various kinds of alienation set out in section 22, and submitted that in some cases a publication in the Gazette did not appear to be called for. These submissions do not bear examination. Section 26 contemplates two separate acts, namely, the decision to alienate and thereafter, if alienation is decided, the publication in the Gazette of notice of such alienation. The discretion vested in the Board relates to the first act. This provision does not show a second discretion, nor is the word "may" used twice to indicate this second discretion in respect of the second act. The very facts of this case militate against leaving such discretion to the Commission. There is also nothing in the provisions of section 22 to indicate why a publication in the Gazette should not be made in respect of all those items. In any event it must certainly apply in the case like the present case where an alienation is made to persons under section 22 (1) (*a*), (*b*) or (*c*). This mandatory requirement for giving notice of any proposed alienation by publication in the Gazette is designed to ensure fair dealing and equality.

Mr. Fernando then contended that even those transgressions would not enable the petitioner to succeed in an application under Article 126, unless he can show a violation of his fundamental right of equality under Article 12. He first contended that the word "the law" in Article 12 (1) refers to legislation and not to executive or administrative action. Such a reading of Article 12 (1) would result in emasculating the equality clause. There are clear indications in the Constitution itself that the fundamental rights are to be secured, respected and advanced by all organs of government. Besides, any proposed legislation contrary to fundamental rights would be struck down at the Bill stage itself and the question of discrimination by "legislation" as such does not really arise.

Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 "combines the English doctrine of the rule of law with the equal

protection clause of the 14th amendment to (the U.S.) Constitution". We all know that the rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality. It was not confined only to legislation, but extended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12.

In India the words used in the equal protection clause are "equality before the law" and "the equal protection before the law". Our Constitution uses the expression "equal before the law" and "equal protection of the law". They mean substantially the same thing. It has been said that "equality before law" may be defined as equal subjection of all persons to the ordinary law of the land and "equal protection of laws" as the protection of equal laws. *Raja Suryapalasingh v. U.P. Govt.* (4).

In *State of U.P. v. Deoman* (5) the Indian Supreme Court defined those expressions as follows :

> "Equality before the law is a negative concept ; equal protection of law is a positive one. The former declare that every one is equal before the law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land ; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed."

Seervai sums up the position as follows :

> "And law in Article 14 is not confined to the law enacted by a legislature but includes any order or notification. Thus Article 14 protects a person not only against legislation but also against executive orders or notifications. This is not surprising, for the protection given by the Article would be worth little if a law enacted by the legislature could not violate it but executive action could. As Lord Atkin said in another context : 'The Constitution is not to be mocked by substituting executive for legislative interference with freedom'."

The next ground urged by Mr. Fernando is that the alleged acts do not constitute executive or administrative action bringing them within the ambit of Article 126. This has been presented in two ways first, on the broad basis that Article 126 is limited to violation of fundamental

rights by executive action, meaning that the expression "executive" must be read in accordance with and given the same meaning as indicated in Article 4. This is not the first time such an argument has been raised before us to narrow the application of Article 126 and been rejected. I think it is time that we finally nail this to the counter. It would be a sufficient answer if we merely indicate that the expression used in Article 126 and the expression used in Article 4 are not identical. In Article 126 the expression is "executive and administrative action", while Article 4 uses the words "executive power". We are therefore of the view that as a matter of ordinary interpretation the wording in Article 4 cannot have a controlling effect on the interpretation of Article 126.

In aid of this argument, Mr. Fernando submitted that Article 126 does not exhaust the reliefs available to a person complaining of a violation of a fundamental right, so that any category of persons left out by a narrow interpretation of Article 126 could obtain relief elsewhere. He probably thought that the Court had opted for a broad interpretation of Article 126 because of this wrong view. While this Court has been aware that in suitable cases resort to the Court of Appeal and even to the lower Courts is available and relief by way of writ, declaration, injunction, etc., can be obtained, it must however be pointed out that Article 126 provides not only the sole and exclusive remedy in the case of violation of fundamental rights by executive or administrative action, but also the most expeditious remedy. The intention embodied in Article 126 for a summary disposal of cases involving transgression of fundamental rights is a satisfactory and effective provision for protecting fundamental rights. At the same time this provision has been designed to aid the administration, for past experience has shown that administrative action can be delayed or even brought to a halt by protracted litigation and by interim orders, injunctions, etc. In this context it somewhat surprises me to find a State Corporation endeavouring to get out of the operation of Article 126 when one would expect them to act otherwise and take advantage of this provision.

The other objection was narrower. Mr. Fernando submitted that the Land Reform Commission does not constitute an agency or instrumentality of the State, nor does its acts amount to executive or administrative action. Earlier decisions of this Court have considered

this matter in great detail and I would refer with approval to the judgments of my brother Sharvananda, J., in *Wijetunga v. Insurance Corporation* (6) and *Wijeratne v. People's Bank* (7) in this regard.

In the *Insurance Corporation* case, my brother Sharvananda, J. has set out the several criteria which judges have accepted in determining whether or not a public corporation is an agent or instrumentality of the State. In the *People's Bank* case, my brother Sharvananda, J. summed up the law as follows :

"It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of the government. Bhagawathi, J. in his very lucid judgment in *Ramana v. I. A. Authority of India* (8) summarised some of those factors 'whether there is any financial assistance given by the State, and if so , what is the magnitude of such assistance, whether there is any other form of assistance given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions".

"He further observed that this particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relation between the corporation and government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is a governmental instrumentality or agency. Consideration of any single factor may not suffice, a Court will have to consider the cumulative effect of these various factors to arrive at its decision. 'It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each as being individually insufficient to support a finding of State action. It is the aggregate that is controlling'—per Douglas, J. in *Jackson v. Metropolitan Edition Co.* (9). It is the cumulative effect of all the relevant factors that determines the measure of State responsibility."

Earlier in his judgment, my brother had explained another type of situation where a public corporation not strictly an agency or instrumentality of the State can in the exercise of a particular power or powers be endowed with a function that is executive or administrative.

He said :

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

The Land Reform Commission was an instrumentality established by the law to manage and administer the vast acres of agricultural land appropriated or "nationalized" by the State. These lands have to be managed in terms of State policy which is writ large in the numerous provisions of the law. In this case we are concerned with its powers of alienation. One cannot imagine that the Commission has been given a free hand to deal with those properties in any manner it wishes as in the case of an individual. Mr. Tilakawardena, whose argument was supported by Mr. Fernando, sought to argue that while alienations under section 22 are fettered to the extent set out therein, in other matters the Commission has an absolute power over its lands with the discretion to alienate them in any way it chooses. He saw such a power in section 26 and drew a distinction between section 22 and section 26.

Mr. H. L. de Silva demonstrated that sections 22-26 must be read in sequence and when one does so, it is quite apparent that the empowering power as regards alienation is contained in section 24 alone. These provisions hang together as a part of a coherent scheme with section 22 dealing with the purposes of alienation, section 23 with qualifications, and section 26 setting out the machinery or the procedure for effecting such alienations. This view is reinforced when

we examine the preamble to the law which emphasis that alienations should be strictly confined to purposes which would ensure productivity or utilization of man power, and not for other reasons. All activity of the Commission is subsumed under overriding policy considerations and this is reflected in the provisions enabling ministerial control with financial assistance being provided and financial control being exercised by the Government.

The affidavit filed by the Chairman of the Commission states that alienations are subject to Ministerial direction. Section 47 empowers the Minister to give special or general directions to the Commission and the Commission is obliged to comply with such directions. Directions have been laid down in respect of alienations and, since the extents involved in this case are over 10 acres, any such alienation must have the approval of the Minister.

Mr. H. L. de Silva sought to attack the acts of both the Commission and the Minister in this regard. He said that the Commission had wrongly required a recommendation from the M.P. which is in the nature of a condition precedent to the exercise of its jurisdiction. It had also surrendered its decision making power to the Minister and the Minister had dictated to the Commission. All these acts, he submitted, were impermissible. I do not think that this criticism of the Minister is justified. As I read these provisions together with the manner the powers have been exercised, I find that it was the Commission alone that went into the merits of each application and made the decision. The recommendation to the Minister for his approval was a requirement validly imposed in terms of the law. The Minister was entitled in terms of section 47 to vest in himself a right of approval not in the generality of cases which is left to the Commission, but in those exceptional cases recommended by the Board. Even here, the decision is made by the Commission, the Minister can only approve or not approve it. I can find nothing illegal in this arrangement.

The need for the Minister's approval and his sanctioning the alienation in the present case brings this particular alienation in close relationship to the Ministerial powers, thereby giving it an executive or administrative character whether or not the Commission itself is an agent or instrumentality of the Government. It is superfluous therefore to decide in this context the larger question as to the character of the Commission itself.

Mr. Fernando next contended that a mere mistake or error on the part of the officers administering that law will not entitle a person to come into court on the basis of a violation of fundamental rights by the State. He submitted that to found an application under Article 126, there should be an intentional or purposeful act by or at the instance of the State. In this case, he submitted, what is alleged is an error or mistake on the part of an officer who dealt with the relevant applications for alienation. In support of this proposition he referred us to the case of *Gnanatilleke v. Attorney-General,* (10)

In *Dhanraj Mills Ltd. v. Kocker,* (11) the court stated the law in the following terms :

> ". . . . a clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere and say (*sic*) 'We are more concerned with how the law actually works rather than how it appears in black and white' . . . One may even have a case where in exercising the discretion vested in officers under the statute, the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally . . . . even in such a case the Court may interfere and say . . . . the administrative orders suggest behind them a policy of the State of discrimination. But . . . . the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Art. 14. The officer in acting contrary to Art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law . . . In such a case the subject comes to Court not for protection under Art. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art. 14 or under Art. 226."

But this view is not without its critics. Text writers have strongly advocated that the State should be made liable even in respect of errors and mistakes on the part of public officers if the end result is a violation of fundamental rights.

Mr. H. L. de Silva however placed his case on a somewhat broader footing than that of a mere error or mistake on the part of an officer of the Commission. He referred to a number of acts and omissions on

the part of the Commission which he said induced or facilitated the discrimination complained of by the petitioner. He submitted that the whole operation of the alienations was conducted by hole and corner methods ; there was no public notice of it given by gazetting as prescribed by the Law. There was the unwarranted requirement of having a recommendation from the local Member of Parliament annexed to each application, although it would have been legitimate for the Commission to have obtained the views of the local Member of Parliament as regards the needs of land for his electorate. To make the recommendation of the Member of Parliament a sort of condition precedent or to give him virtually a right of veto would be to frustrate the intention of the Legislature and to abdicate the powers vested in the Commission.

He added that the procedures for processing applications were unsatisfactory, leading to abuses and discrimination. In this regard, he said that vital matters in Mrs. Dassanayake's application were taken merely at their face value and not subjected to checking and confirmation as expected of a prudent and efficient institution. This was absolutely necessary since the project put forward by her involved an outlay of a large sum of money. On examination, it now appears that she was not even in a position to pro ide any worthwhile security for her undertaking. Similarly, Mr. Weera nghe's application did not even contain the basic information called for in the application. Mr. H. L. de Silva also complained that the *volte face* of the Member of Parliament and his recommendation of Mrs. Dassanayake and Mr. Weerasinghe soon after should have alerted the Commission to the fact that something was amiss, but the Commission turned a blind eye to this turn of events. Mr. de Silva also stated that when Mr. Ranjan Wijeratne thought that the petitioner had been unfairly treated, it was virtually an admission on the part of the Commission that it had not acted correctly towards the petitioner.

These submissions show something more than an error or mistake on the part of an individual or isolated officer administering the Law. This is more akin to the existence of an administrative policy in the administrative procedures inducing or resulting in the discrimination complained of in this case. If so, it could amount to a violation by the executive or administrative authorities themselves.

There is also another aspect to this matter. Section 23 provides for a disqualification. Although it is couched in that form, this provision basically sets out a classification. It has not been suggested that this classification is unreasonable. In the present case, when the Commission made an alienation to Mrs. Dassanayake, it has disregarded a classification made by the Legislature itself. In the result, the case of the petitioner, who is legally entitled to make an application, has suffered in preference to the case of a person who is disqualified by Law. The disregarding of a valid classification is the clearest example of discrimination. In the above circumstances I am of the view that there has been a violation by the Commission of the fundamental right of the petitioner guaranteed by Article 12.

Counsel for the respondents also contended that due to the imperative provisions of Article 126, this Court would have no jurisdiction to hear and determine this matter after the lapse of a period of two months. On this issue, we are bound by the decision in *Karthigesu Visuvalingam and Others v. Don John Francis Liyanage and Others,* (12) which held that this provision is directory. Our ruling that this provision is directory does not signify that it is being erased from the statute book. It only means that the time limit imposed by the provision will not be strictly applied to defeat the interests of justice, where such delay is caused by circumstances beyond the control of court or when such delay is necessitated in the interests of justice.

Mr. Tilakawardena's further submission that we cannot proceed against the 4th respondent outside the initial time limit set out in Article 126 is equally untenable. The correct position is that the 4th respondent has been impleaded to an action filed within the prescribed time limit. That action is against the State and the 4th respondent has been added as a proper party to this action.

In the result I would hold that there has been unequal treatment of the petitioner violative of Article 12 by executive or administrative action in this case. In the exercise of our powers under Article 126 (4) we would declare that due to the violation of the provisions of the Land Reform Law, the deed of transfer to Mrs. Dassanayake No. 1125 dated 2nd February 1984 and all proceedings in connection with the alienation of the 84 acres of this land are null and void. We refrain however from giving any other specific directions in the matter. We leave it open to the Commission to take whatever action in

accordance with the Law, which it considers meet in respect of dealings with this land which is vested in it. The parties will bear their own costs.

SHARVANANDA, J. – I agree.

WIMALARATNE, J. – I agree.

COLIN-THOMÉ, J. – I agree.

ABDUL CADER, J. – I agree.

Application allowed.