# WIJAYAPALA MENDIS
v.
# P. R. P. PERERA AND OTHERS

SUPREME COURT
FERNANDO, J.,
GUNAWARDANA, J. AND
GUNASEKARA, J.
S.C. SPECIAL (WRIT)
APPLICATION NO. 2/98
C.A. APPLICATION NO. 545/98
MARCH 4 AND 11 1999

*Writ of Certiorari – Findings and recommendations of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978 as amended – Sections 9 (1), (2) and 18A of the Law – Want or excess of jurisdiction – Breach of natural justice and error of law on the face of the record – Unreasonability – Article 140 of the Constitution.*

The Special Presidential Commission of Inquiry whose finding and recommendation were challenged by the petitioners held an inquiry and found the petitioner guilty of misuse or abuse of power on the ground that when he was a Cabinet Minister he used undue influence and acting collusively with a fellow Minister, arranged with the relevant Ministers, governmental authorities and the Land Reform Commission to exchange an extent of 76 acres of land allowed to him and his daughter by the Land Reform Commission for a more valuable land being a partition of Siringapatha Estate. It was alleged that the alternative land which the petitioner obtained by way of exchange under section 22 of the Land Reform Law had been valued by the Land Reform Commission with the approval of the Chief Valuer at Rs. 15,000 per acre in 1982 when in fact the land ought to have been valued at rates ranging from Rs. 30,000 to Rs. 50,000 an acre. It was further alleged that the petitioner forcibly appropriated the 76 acres of alternative land from the southern end of Mawatta Division of Siringapatha Estate whilst the authorities were only agreeable to releasing land from the Northern end of that Division. The Commission held that the petitioner thereby caused wrongful loss to the Government; and recommended, under section 9 (1) of the SPC Law, that the petitioner be made subject to civic disability. The finding of the Commission was gazetted on 26.5.1997. The petitioner filed his application on 12.6.1998.

**Held:**

1. The fact that consequent upon the recommendation of the Commission a notice of a Resolution for the imposition of civic disability on the petitioner under Article 81 of the Constitution had been placed on the Order Paper and that the matter was pending before Parliament did not constitute a bar to the grant of certiorari.

   (*Bandaranaike v. Weeraratne* (1981) 1 Sri LR 10 distinguished)

2. The application was not time barred by delay.

*Per* Fernando, J.

"Delay is never an absolute bar, particularly where the challenge is to jurisdiction. In any event, a plea of delay must be considered on equitable grounds; as for instance, whether the conduct of the petitioner indicates acquiescence or a waiver of his rights and whether any appreciable prejudice had been caused to the adverse party by that delay. Nothing of that kind has been alleged."

3. The jurisdiction which the court exercises under Article 140 of the Constitution is unfettered. It is not restricted by the provisions of sections 9 (2) and 18A of the SPC Law.

4. The findings and the recommendation of the Commission were vitiated for want or excess of jurisdiction in that -

   (*a*) the report of the inquiry had been made with the participation of only two out of the three members who constituted the Commission (*Paskaralingam v. Perera* (1998) 2 Sri LR 169 followed).

   (*b*) The inquiry against the petitioner for an alleged "exchange" of land belonging to the LRC was in excess of the Presidential Warrant. The relevant part of that Warrant specified only "sales and leases of land" as being amenable to such inquiry.

   (*c*) The attempt by the Commission to settle the matter by suggesting to the parties that the Mawatta land for which the petitioner had still not been granted site may by consent be returned to the LRC showed that the Commissioners believed that there was nothing to report: the Commission thereby ceased to have jurisdiction to proceed with the matter.

5. The findings were in breach of natural justice in that –

(*a*) the Commission failed to call material witnesses including Minister Thondaman who had given approval for the impugned "exchange of the Mawatta land; for the demarcation of land by the National Livestock Development Board which was then managing that land; and for the retention by the petitioner of the portion of land which he had actually taken over.

(*b*) only two of the Commissioners (the 1st and 2nd respondents) made the decision. The other member who participated at the inquiry at the hearing did not consider the evidence and the submissions. There was no justification for this omission. The decision was also made in haste and no reasons were given on some important issues.

*Per* Fernando, J.

"Natural justice is fairness in action. The inquiry against the petitioner failed to reach minimum standard of fairness demanded of a judicial or quasi-judicial inquiry."

6. There were serious errors of law on the face of the record in respect of the manner in which the Commission considered the evidence relating to the approval of the "exchange", the identification of the portion of the land to be given to the petitioner, the alleged forcible taking over of a different portion, the existence of a seed paddy farm on the land surrendered by the petitioner and the valuation of the two lands. Some vital documents, many material items of oral evidence were ignored and others were misconstrued.

*Per* Fernando, J.

"Considered in isolation each of these is a serious error of law; taken cumulatively, they are so extensive and so grave as to amount to a denial of a fair inquiry."

7. The Commissioners acted on the assumption that the automatic consequence of a finding that there was a misuse or abuse of power must be the recommendation for the imposition of civic disability. They had wrongly assumed that they had no discretion in the matter. The impugned recommendations are arbitrary and unreasonable.

8. The findings of the 1st and 2nd respondents cannot stand and the recommendations are necessarily null and void.

**Cases referred to:**

1. *Cooray v. Bandaranaike* SC Special (Writ) No. 1/98 SC Minutes 5th February, 1999.
2. *Paskaralingam v. Perera* (1998) 2 Sri LR 10.
3. *Bandaranaike v. Weeraratne* (1981) 1 Sri LR 10.
4. *Sabapathy v. Dunlop* (1935) 37 NLR 113 129.
5. *Senanayake v. de Silva* (1972) 75 NLR 409, 432-433.

**APPLICATION** for a writ of certiorari against the Special Presidential Commission of Inquiry.

*E. D. Wickremanayake* with *Gomin Dayasiri, J. Kulathileke* and *Ms. Priyanthi Gunaratne* for the petitioner.

*K. C. Kamalasabayson*, PC, SG, with *Shavindra Fernando*, SSC and *V. Corea*, SC for the respondents.

*Cur. adv. vult.*

April 27, 1999

**FERNANDO, J.**

This is an application by the petitioner for Certiorari to quash the findings and the recommendations made against him by a Special Presidential Commission of Inquiry.

Pursuant to section 2 of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978 (as amended), by Warrant dated 2.2.95 HE the President established a three-member Special Presidential Commission of Inquiry ("the Commission"), consisting of the 1st to 3rd respondents, namely Justice P. R. P. Perera, Judge of the Supreme Court, Chairman, Justice H. S. Yapa, Judge of the Court of Appeal, and Justice F. N. D. Jayasuriya, Judge of the Court of Appeal (then a Judge of the High Court). That Warrant authorised the Commissioners:

"to inquire into and obtain information in respect of the *management, administration and conduct of affairs of the public bodies*

*referred to in the Schedule hereto* during the period commencing on July 24, 1977 and ending on August 16, 1994, and *more specifically in respect of the transactions, activities and matters relating to such public bodies referred to in that Schedule* or the Government, and

(*a*) whether there has been any malpractice or irregularity, or non-compliance with or disregard of the proper procedures applicable in relation to, such management, administration and conduct of affairs or to any such transaction or activity of such public body or the Government, resulting in loss, damage or detriment to such public body or the Government;

(*b*) whether any contractual obligations relating to any such transaction or activity or of such public body or the Government, have been entered into or carried out, fraudulently, recklessly, negligently or irresponsibly, resulting in loss, damage or detriment to such public body or the Government;

(*c*) whether there has been non-compliance with, or disregard of, the proper procedure applicable to the calling of tenders or the entering into of agreements or contracts, by such public body or the Government;

(*d*) whether such non-compliance with, or disregard of proper procedures has resulted in –

(i) the improper or irregular or discriminatory award of any such tender for the purchase or sale of property including shares by such public bodies or the Government, or the provisions of any service, to or by such public body or the Government;

(ii) loss, damage or detriment to such public body or the Government, or the incurring of any unjustified, unreasonable or unwarranted expenditure on any transaction or activity;

(*e*) whether proper independent valuations had been obtained, where relevant, in respect of any such transaction;

(*f*) whether proper procedures and adequate safeguards have been adopted to ensure that such public body or the Government obtained the optimum price or benefit for the purchase or acquisition or sale of property including shares by such public body or the Government, or the provision of any service to or by such public body or the Government;

(*g*) whether terms of payment which have been agreed, with the purchaser or seller or owner of such property including shares by such public body or the Government for the provision of any service to or by such public body or the Government, have been detrimental or disadvantageous to such public body or the Government;

(*h*) the person or persons responsible for the act, omission, or conduct, which has resulted in such loss or damage to such public body or the Government in respect of any such transaction or activity;

(*i*) whether any inquiry or probe into any of the aforesaid matters had been obstructed or prevented in any manner, resulting in loss or damage to such public body or the Government and person or persons responsible for such obstruction;

(*j*) the procedure which should be adopted by such public bodies or the Government in the future to ensure that such transactions or activities are carried out with transparency and with proper accountability with a view to securing the optimum price or benefit for such public body or the Government;

(*k*) whether there has been –

(i) misuse or abuse of power, influence, interference, fraud, corruption and nepotism in relation to any such transaction or activity or matter;

(ii) non-compliance with or contravention of, any law written or otherwise on the part of any Prime Minister, Minister or other

public officer or other person or persons as defined in Law No. 7 of 1978, as amended by the Special Presidential Commissions of Inquiry (Special Provisions) Act No. 4 of 1978, and Act No. 38 of 1986, or other person or persons, and the extent to which such Prime Minister, Minister or other public officer, or person or persons is or are responsible for such non-compliance or contravention;

And to make recommendations with reference to any of the matters that have been inquired into under the terms of this warrant." [emphasis added]

The Warrant required the Commissioners to transmit to the President within six months reports or interim reports setting out the findings of their inquiries and their recommendations.

It is necessary to reproduce to some parts of that Schedule:

" 1. Air Lanka Ltd. — *Purchase* of Airbus Aircraft.
2. Hotel Developers (Lanka) Ltd. — *Matters relating to* the Hilton Hotel Project and *acts of commission and omission by.* . . .

. . . . . .

6. Urban Development Authority — *Major sales and leases of property.*
7. Sri Lanka Ports Authority — Acquisition of lands, their valuations . . . and *transactions* of ten million rupees and over.

8. Ceylon Electricity Board — Transactions of ten million rupees and over . . .

. . . . . .

17. Land Refrom Commission — *Sales and leases of land.*
18. Government *Contracts and tenders* of ten million rupees and over, and *sales and leases of land* by the government." [emphasis added]

The Commission held several *ex parte* "preliminary hearings" commencing on 11.9.95, and then issued a Notice dated 13.11.95 under section 9 of the Law requiring the petitioner to show cause why he should not be found guilty of misuse or abuse of power. After inquiry, an interim report (the "interim report") dated 2.3.97 was submitted to the President signed only by the 1st and 2nd respondents, and not by the 3rd respondent although he continued to be a member of the Commission. There was then published in the *Gazette* of 26.5.97 a brief summary of that report of which the following is relevant to this application:

"The following contents of the report dated 2nd March, 1997, of the Special Presidential Commission of Inquiry, 1995, appointed to inquire into alleged malpractices . . . are published as directed by Her Excellency the President in accordance with section 9 of the [Law] . . .

ALLEGATION RELATING TO WRONGFUL EXCHANGE OF 76 ACRES OF PANIKANKULAM IN THE ANURADHAPURA DISTRICT BELONGING TO THE [PETITIONER] IN EXCHANGE FOR 76 ACRES OF LAND AT MAWATTA DIVISION OF SIRINGAPATHA ESTATE, DANKOTUWA, BELONGING TO THE LAND REFORM COMMISSION.

*Charges :*

The respondent in this case Tenahandi Wijayapala Mendis was required to show cause why he should not be found guilty of misuse or abuse of power, in that "he did whilst holding office as a Cabinet Minister of the Government of Sri Lanka between the period 1.10.1980 and 26.2.1990 directly or indirectly induce Hon. E. L. Senanayake, the then Minister of Agricultural Development and Research, Hon. S. Thondaman, the then Minister of Rural Industrial Development, Mr. K. D. M. Chandra Bandara, Member of Parliament, officers of the said Ministries, officers of the Land Reform Commission and the National Livestock Development Board, *to permit him to surrender* an extent of about 76 acres of land called Panikankulam situated in the Anuradhapura District belonging to him and his daughter Manouri Mendis and *obtaining in exchange*

an extent of 76 acres of land from the Mawatta division of Siringapatha Estate situated at Dankotuwa in the Puttalam District, *thereby causing wrongful loss* to the Government of Sri Lanka and/ or the National Livestock Development Board and/or the Land Reform Commission".

*The Findings :*

Upon a careful consideration of the evidence adduced before this Commission we are satisfied that the request made to the Chairman, LRC by Mr. Chandra Bandara in his capacity as MP Anuradhapura West to recover the land called Panikankulam for the purpose of converting it into a Seed Paddy Farm (vide P5A), was not a genuine request, but a sham. We are also satisfied that in the context of the relationship which existed between the respondent and Mr. Chandra Bandara who held office as Cabinet Minister and Deputy Minister, respectively, in the Government that they had acted in collusion to achieve a different objective in recommending to the LRC the take-over of the land at Panikankulam belonging to the respondent. It is clear on the evidence before us that when Mr. Bandara made this request for the ostensible purpose of setting up a Paddy Seed Farm on Panikankulam, he was acting in collusion with the respondent who had initiated this course of action and was determined to achieve his real objective of procuring a portion of Siringapatha estate for himself and his daughter which on the evidence before the Commission was much more valuable than Panikankulam which the respondent offered in exchange therefor.

Having regard to the totality of the evidence of this case, we are firmly of the view that had it not been for this dubious and highly questionable exchange of land under section 22 of the Land Reform Commission Law mooted by the respondent in collusion with Mr. Chandra Bandara, the then MP for Anuradhapura West, 76 acres of Mawatta estate would well have been sold for a sum of over Rs. 2,665,000 in the open market.

We hold, therefore, that wrongful loss has indeed been caused to the LRC and the Government of Sri Lanka, by alienating an

extent of 76 acres from Mawatta division, Dankotuwa, belonging to the LRC in exchange for 76 acres of Panikankulam which has been valued at Rs. 998,500 by the then Chief Valuer as the commercial value of this property.

We hold that the allegation set out in the Show Cause Notice has been established.

*Recommendation :*

In view of our finding in respect of the allegation set out in the Show Cause Notice, we hold the respondent guilty of misuse or abuse of power under the provisions of section 9 (1) of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978, as amended by the Special Presidential Commissions of Inquiry (Special Provisions) Act, No. 4 of 1978 and the Special Presidential Commissions of Inquiry (Amendment) Act, No. 38 of 1986.

We, accordingly, recommend that the respondent Tenahandi Wijayapala Hector Mendis be made subject to Civic Disability under the provisions of section 9 (1) of the aforesaid Special Presidential Commissions of Inquiry Law, No. 7 of 1978, as amended by the Special Presidential Commissions of Inquiry (Special Provisions) Act, No. 4 of 1978 and the Special Presidential Commissions of Inquiry (Amendment) Act No. 38 of 1986."

The petitioner filed an application dated 12.6.98 in the Court of Appeal praying for *Certiorari* to quash those findings and recommendations; on 16.6.98 that Court made order transferring the application to this Court in accordance with section 18A; and on 22.6.98 this Court issued notice on the respondents.

The respondents did not plead, and Mr. Kamalasabayson on their behalf did not contend, that our jurisdiction was in anyway restricted by the provisions of sections 9 (2) and 18A of the Law. I respectfully agree with Dheeraratne, J. that the jurisdiction which this Court exercises under Article 140 is unfettered (*Cooray v. Bandaranayake*[1]).

*The Facts :*

It is necessary to state briefly the facts relating to five matters in particular: the approval in principle of the "exchange", the identification of the portion of land to be given to the petitioner, the forcible taking over of a different portion by the petitioner, the existence or establishment of a seed paddy farm on the land to be surrendered by the petitioner, and the basis of valuation, as well as the valuation, of the two lands sought to be exchanged.

The following summary of the facts is based on the interim report, supplemented by other relevant items of oral and documentary evidence which, though led in the course of the proceedings before the Commission, have not been referred to in the interim report; the latter evidence is *italicized* (and references are given to the documents and/or the pages of the proceedings).

When the Land Reform Law, No. 1 of 1972, came into operation the petitioner declared ownership of 250 acres of a land called Panikankulam, of which he was entitled to retain only 50 acres; and he was permitted to effect an "inter-family transfer" of 26 acres to his daughter. This was the 76 acres (the "Panikankulam land") which was sought to be exchanged for 76 acres (the "Mawatta land") from Mawatta division of Siringapatha estate. However, the statutory determination in respect of the petitioner's 50 acres was Gazetted by the LRC only on 10.7.90. *It is not known whether and when the petitioner executed an inter-family transfer in favour of his daughter, and there seems to have been no survey plan identifying the particular allotment for such inter-family transfer* (proceedings of 3.10.95, page 17, and page 11850).

By letter dated 28.10.80, Chandra Bandara, MP Anuradhapura West, requested the Chairman, Land Reform Commission (LRC), to "recover" the Panikankulam land situated in his electorate for conversion into a paddy seed farm. The petitioner by letter dated 30.10.80 informed the then Minister of Agriculture, under whom the LRC was, that he had no objection to that request, provided alternative land was given from Siringapatha estate; nothing seems to have

happened for over two months, until *on 23.1.81* the Minister referred that letter to the Chairman, LRC, with the endorsement "I approve". That estate was in the possession of the National Livestock Development Board (NLDB) which was managing it on behalf of the LRC; the NLDB came under the Ministry of Rural Industrial Development (RID); and the Chairman, LRC, by letter dated 29.1.81 requested the Secretary, Ministry of RID, to ascertain from the Chairman, NLDB, whether 76 acres from Siringapatha estate could be released.

The interim report does not refer to any action taken by the LRC thereafter, between February, 1981 and January, 1982.

*On 31.3.81 the petitioner handed over possession of the Panikankulam land to the District Authority of the LRC (R1 and R13 dated 31.3.81).*

*Thereafter, the petitioner wrote P6B dated 23.9.81 to the Minister, RID, referring to the request made by the LRC to hand over 76 acres to him, and asked him to expedite the matter. By P6C dated 1.10.81, the latter's Co-ordinating Officer forwarded P6B to the Chairman, NLDB.*

The Chairman, NLDB, wrote on 28.10.81 to the Secretary, RID, stating that Siringapatha estate was one of the best coconut lands, and that releasing 76 acres from that estate would be detrimental to the NLDB. *That reply was given by him without any investigation into the feasibility of releasing the land requested* (27.2.96, pages 7351–2). According to the interim report:

> "after he despatched [that] letter he was summoned for a meeting at the Ministry of RID where Minister Thondaman, the [petitioner] and Festus Perera were present. Subsequent to [that] letter [the Chairman] had met the [petitioner] and had discussions . . . and as [the petitioner] had expressed his willingness to accept 76 acres from Mawatta division, he had *reluctantly* agreed to release 76 acres from that division and informed the Secretary, RID, accordingly by his letter dated 11.1.82."

That letter dated 11.1.82 does not manifest any "reluctance", but merely states that the petitioner agreed to take 76 acres from Mawatta division. By another letter dated 25.1.81 the Chairman informed the Secretary, RID, that the petitioner had agreed to take that extent from the northern end.

The Secretary, RID, testified that, some time before 20.1.82, he was summoned to attend another meeting, at which Minister Thondaman, the petitioner, the Chairman, NLDB, and Festus Perera were present; and that *"the Minister agreed to give* [76 acres from Mawatta] subject to the decision of the Chairman, NLDB, who would determine a portion of land from Mawatta division which was not essential for his development work". The Secretary, RID, wrote on 20.1.82 to the Chairman, LRC, that they were agreeable to release 76 acres from Mawatta, the location and boundaries to be decided by the NLDB so as not to interfere with its activities.

On 24.1.82 the petitioner had visited Mawatta division, and he had agreed to take 76 acres from the northern part; that is confirmed in a letter dated 25.1.82 from the Chairman, NLDB, to the Secretary, RID. There was also the evidence of a Director, LRC, that he had informed the petitioner by letter dated 3.2.82 that the demarcation of the boundaries of the 76 acre block would be done by the NLDB.

The interim report states the conclusion that the NLDB and its Chairman:

> "have from the very outset been opposed to the proposal to release any land from Mawatta division to the [petitioner]. The evidence discloses that it was with a *great degree of reluctance* that the Chairman ultimately agreed to release a portion of land from Mawatta division, on the specific condition that the [petitioner] agreed to the NLDB demarcating the boundaries starting from the northern end."

However, the interim report made no reference to *the Chairman's letter R5 dated 29.10.81 to the Sri Lanka Libya-Livestock Development*

*Co. Ltd. (SLLLDC), regarding a request for the release to that Company of that portion of land from Mawatta division which contained the existing poultry unit. In that letter the Chairman stated that that section could not be released (because it contained buildings, etc.), but offered "equally suitable land of lesser productivity available in close proximity", namely, a portion of Field No. 4 comprising 130 acres which consisted entirely of old coconut which would soon require replanting. What the petitioner later took seems also to have been from Field No 4.* (page 7440).

That omission is all the more significant because the interim report did mention in another context – the valuation of the Mawatta land – that the balance portion of Mawatta estate [Division ?] had in fact been sold by the LRC at Rs. 30,000 per acre to that Company in 1983. The interim report failed to consider why the Chairman had been willing to release 130 acres to SLLLDC on 29.10.81, although just the day before he had declined, without any investigation, to release any land whatsoever from Siringapatha estate to the petitioner. *The 1st respondent asked him:*

> *"So without any type of investigation your first reaction was to inform him that it cannot be released?*
> *A: Yes, because we depend on the income of coconut to run the farm."* (27.2.96, page 7352).

According to the Manager of Siringapatha estate, in February, 1982, the NLDB had instructed him to assist a surveyor to demarcate the 76 acres from the northern end; he met the surveyor in the company of the petitioner, and clearly indicated the relevant area; however, he was not present at the survey; but he had given his Assistant Manager specific directions to instruct the surveyor to demarcate from the northern end. (The Assistant Manager did not give evidence.) When he went to Mawatta division to hand over, he found that, contrary to instructions, land had been demarcated from the southern end, and the petitioner's men had already started fencing that portion with barbed wire and railway sleepers. The substance of his evidence was that it was due to the pressure exerted upon him by the petitioner that he handed over that portion to the

LRC officials (who in turn must have handed over possession to the petitioner).

The surveyor testified that he had been instructed by the Assistant General Manager, NLDB, to demarcate 76 acres from the northern end; that he found that he could not carve out one contiguous block of 76 acres; that he informed the Assistant Manager, who told him to get instructions from the NLDB; and that he then met the Assistant General Manager, NLDB, who asked him to carve out one contiguous block of 76 acres starting from the western end. (The Assistant General Manager, NLDB, was not called to give evidence.) *It was also his evidence that soon thereafter the Chairman, NLDB, entrusted to him the survey of the rest of Mawatta division as well – an indication that the Chairman was not dissatisfied with him* (pages 11869,12069). The 1st and 2nd respondents did not accept his evidence.

The Chairman, NLDB, wrote on 18.2.82 to the Chairman, LRC, recording what had happened, and "disassociating ourselves with this release". He said he had already brought this to the notice of his Minister, who summoned him for yet another meeting on 3.3.82 at which the petitioner was present, and directed him forthwith "to inspect the portion of land which the [petitioner] preferred to take and consider whether [that land] could be released to him":

> "He had accordingly visited Mawatta [on 4.3.82 and] . . . saw to his utter surprise that an extent of about 76 acres had already been fenced with railway sleepers and barbed wire. This was not the portion of land which the [petitioner] had agreed to take from the northern end. He had on this day seen the [petitioner] also . . . [who had requested him] not to take any action against the Assistant Manager [who had permitted the land to be fenced]."

He returned the same day, and reported to Minister Thondaman who appeared to be very surprised. Thereafter, he had addressed a letter dated 12.3.82 to the Minister:

". . . stating that a major portion of the 76 acres earmarked had already been barb wired and any adjustments at this stage would require relocating these fences, and also having regard to certain other matters in the context of this demarcation he had allowed the *status quo* to remain as proposed by the [petitioner] since the advantages that would accrue to the Farm would far outweigh the disadvantages resulting from the readjustment."

In summarizing that letter, the interim report fails to mention that the purpose of that visit, as disclosed by that letter, was only to see whether some minor adjustment could be made. I will refer to that matter later.

*The assessment of the evidence of the Chairman, NLDB :*

The interim report states that the gist of the Chairman's testimony was:

". . . to the effect that if the final decision in regard to the allocation of land from Mawatta division to the [petitioner] lay with him, he would undoubtedly have refused this request. He had consistently objected to this course of action. He was compelled to succumb to the pressures exerted on him both by Minister Thondaman and the [petitioner] and to quote his own words, he ultimately 'surrendered'. In the circumstances, he had no other alternative."

Minister Thondaman was not called to give evidence.

The 1st and 2nd respondents had little hesitation in accepting the Chairman's evidence, for the reason that:

"We were impressed with the frank and forthright manner in which [he] testified . . . He was a truthful witness *whose evidence we accept without reservation.* He was *82* years old at the time he testified and although his recollection may not have been perfectly accurate in certain instances due to his age, we had no reason to doubt his integrity or his testimony at any stage in spite of the

very severe cross-examination . . . Besides his evidence has been corroborated by both [the Secretary, RID, and the Director, LRC] and the documentary evidence produced in this connection."

However, even a cursory examination shows not only that his evidence was vague and uncertain, and even contradictory, on important aspects, but also that it was inconsistent with letters contemporaneously written by him; indeed, the record shows that the Commissioners themselves realised these infirmities even while he was giving evidence. None of these matters have even been referred to in the interim report.

The 1st and 2nd respondents glossed over the defects in his evidence, attributing them to his being 82 years of age. Mr. Wickremanayake complained that even that was incorrect, because twice – and both times in answer to the 1st respondent – the witness had given his age, as 75 (on 12.9.95) and 76 (on 29.2.96). While there was no reason to doubt the integrity of the witness, there were serious shortcomings both in his evidence, and in its assessment, and to that I must now turn.

In his *ex parte* evidence-in-chief, the Chairman, NLDB, made various assertions (which were later probed in cross-examination). He described Siringapatha estate:

"That was prime coconut land well-fertilized and yielding *about 4,000 – 5,000* nuts per acre. It was *adjoining the Coconut Research Board land* more or less.

Chairman : So *this is about the best land?*
A : *Best* land." (12.9.95, page 11) [emphasis added throughout]

A little later counsel asked:

"Was the area that was fenced *the best area* in the Mawatta division or . . . ?
A : The entire division was a good estate. *So I can't say it is the best* portion." (12.9.95, page 16)

But the witness quickly reversed himself: "I was surprised when he had taken from *the best*"; and a few minutes later agreed with the 3rd respondent:

"Q : 76 acres of Mawatta from the middle *which was the best part of Mawatta* ? A: Yes . . ." (12.9.95 page 21)

Twice the 1st respondent asked him, "Left to yourself *you would not have given any part of Mawatta?*" (12. 9.95, pages 21-22), and the witness agreed, explaining on the second occasion:

". . . I would never have given. [On another occasion a late Minister] wanted some [forty acres of prime] land and I refused to give. So then he said that he will break my legs when I come to [his electorate] . . . I reported the matter to [my] Minister, and then he reported to [the then President]. Then he denied . . . then a meeting was summoned and [the late Minister] was asked to apologize to me."

It is not surprising that the witness asserted (page 21) that he would not have been influenced by the petitioner.

The Chairman, NLDB, repeatedly claimed that he had not been aware, even as late as the meeting of 3.3.82, that the petitioner had taken over 76 acres otherwise than from the northern end of Mawatta division (as previously agreed); and persisted in that position despite being shown his own letter of 18.2.82 by which he had protested to the Chairman, LRC:

"That means [the petitioner] had taken over in February?

A : *I wasn't aware of this* even at the meeting on the 3rd of March . . ."

". . . Q : On 10.2.82 [18.2.82] you have written to the Chairman, LRC . . . protesting . . .

Chairman : *There is a little controversy [sic] in that.* Now by the letter of 10.2.82 [18.2.82 the witness] has protested

to the Chairman, LRC. Then [his] evidence was that at the meeting of the 10th [3rd] of March he was not aware that the [petitioner] had taken over the land.

Hon Jayasuriya: *Only when he went on inspection [4.3.82] he discovered it . . . .*

(Examination continued)

Q: How did you write a letter on the 10th [18th] February protesting against this?

A : The LRC people had come to this land.

Q : You were aware that possession had been taken over on 5th February, apparently, you knew at that time?

A : *I can't recollect, it is a little complicating.*

Q : Why did you go on the 4th of March?

A : That I can remember because the Minister asked me to go and see whether we can give some land from Mawatta.

Q : So this is the other portion that had been taken over?

Chairman : The other portion is?

Mr. Premaratne: The *best* portion of the land which is fenced.

Chairman : On the 10th [18th] of February, 1982 [the witness] protested to the Chairman, LRC . . . therefore [he] was aware that the [petitioner] had taken over a certain portion of the land. *I can't reconcile that with his evidence on the 3rd of March 1982, when he was directed to go there on the 4th he was surprised that [the petitioner] had already taken possession.*

Hon. Jayasuriya: *The two positions are inconsistent."*
(12.9.95 pages 25, 28-29).

The 1st respondent then intervened with a series of leading questions, forcefully putting a position to the witness:

"Anyway, *what you say is* by 10th of February, 1982, *you were aware that [the petitioner] had taken some portion of the land?*

A : Some portion of the land. Yes.

Q : When you went there in March you found that *he had taken the best portion of the land* which had already been fenced, *that is what you are saying?*

A : Yes.
Q : That is what surprised you, not the fact that he had taken possession. *Is that your position?*
A : Yes." (12.9.95, pages 29-30).

Almost immediately thereafter the 1st respondent turned to the letter dated 12.3.82 which the witness had written to the Minister after his visit to Mawatta on 4.3.82 :

"Q : To get back to your letter of 12.3.82, you wrote to the Minister *a strong protest* informing the Minister *that the best portion of the estate had been taken over and had been fenced* with sleepers, barbed wire and so on ?
A : Yes.
(Mr Premaratne marks the letter dated 12.3.82 as P21)"

There were three questions rolled up: that his letter was a *protest*, that it referred to the *best* land having been taken, and that it had been *fenced*. Was the answer "Yes" a reply to all three questions, or only to the last?

"Q : To this letter to the Minister did you get a reply?
A : No.
Q : What was the reaction of the Minister to that letter?
A : He did not reply that letter nor did the Secretary, but after that he would have given me verbal instructions.
Q : To fall in line?
A : I think so. I can't say something of which I am not very sure. That is what must have happened thereafter.
Q : Anyway, *after your protest of the 12th of March, 1982*, you ceased to protest any further?
A : Yes, there was no point in protesting." (12.9.95, pages 31-32)

Naturally, those matters were probed in cross-examination. On many matters, the Chairman's recollection was poor. Thus he could only remember meeting the petitioner *once*, on 3.3.82 (27.2.96, pages 7363–4, 7366). When shown his own letter P16 dated 11.1.82

which referred to discussions with the petitioner, he said: "I am very sorry. *I can't remember what discussions I had* after so many years" (page 7365). Nevertheless, the interim report baldly records that he testified to three meetings.

He was asked whether the northern portion of Mawatta was more or less the same as the portion which the petitioner took, in regard to the fertility and the age of the plantation. Before he could answer, the 3rd respondent intervened:

Q : In the same condition?
A : *Same condition.* But this land is very close to the Assistant Manager's quarters, office and other buildings. That was one of the objections . . .
Q : That is the only unsatisfactory feature about it?
A : Yes.
Q : In other respects you have have nothing to say?
A : And there is a water course going in the centre where the cattle [go for] water." (page 7443).

Turning to his evidence-in-chief of an annual yield of 4,000 to 5,000 nuts per acre, he was shown the relevant annual report of the NLDB, and was forced to concede that the average yield per acre for the entirety of Siringapatha estate at the relevant time was only 3,064 nuts per acre. He also admitted that no part of Mawatta division "more or less adjoins the Coconut Reseach Board land" (page 7537).

The witness had previously fallen into line with the leading questions put to him (on 12.9.95, pages 29-30) by the 1st respondent, as to when he became aware that the petitioner had taken possession: that by 10th of February, 1982, he was aware of this, and that his surprise was only because the petitioner had taken the best portion. But on 29.2.96, under cross-examination, he again reverted to the position that until 4.3.82 he was not aware that the petitioner had taken over any land from Mawatta. The 1st respondent himself then pointed out the contradiction to him – but to no avail:

"Q : *How do you reconcile your evidence . . . ?*
A : On the 3rd of March if I was aware of this whole situation that the land actually is physically taken over, then I would have told my Minister at that time that there is no point in my visting Mawatta to select land . . .

Hon. Yapa : *But it is difficult to reconcile.* You say there was a meeting on 3rd March and you were asked to go and earmark the land to be given to [the petitioner]?
A : Yes.
Q : By then you have already written this letter . . . that already land has been ear-marked. *How do you reconcile these two situations?*
A : (Witness silent)." (pages 7541-4).

The cross-examination moved on to the letter dated 12.3.82 which the Chairman wrote to the Minister after visiting Mawatta on 4.3.82. Although he had readily agreed (on 12.9.95) in answer to a leading question put to him by the 1st respondent, that he wrote a strong *protest* to the Minister that the *best* portion had been taken over, he was asked to read the letter and identify the protest; he could not. It was then put to him that the only purpose of his visit was to iron out a minor aspect of the demarcation (ie to provide a corridor to connect two portions of the land which then remained with the NLDB). Before he could answer, the 1st respondent told him to read the letter, and asked him:

". . . You were asked to visit the place and to resolve that problem [relating to the corridor]. *Isn't that what the letter speaks of?*
A : Yes.
Q : *So is that correct?*
A : Yes. I have written it. It should be correct." (page 7548).

It then became clear that by that letter the Chairman had not protested at all, but on the contrary had given five reasons why the *status quo* should not be disturbed. The 1st respondent then told the witness: "this is the impression we get from your letter". The witness, weakly, suggested that he had intended to convey a protest, but did not do so directly because he could not go against a Minister (page

7550). Nobody reminded him how firmly he had stood up to that other Minister who had even threatened to break his legs.

Finally, he gave up the position that he had protested because *the best land* had been taken: he agreed (page 7552) that as far as the land was concerned whether it was from the northern end or from the place where the petitioner actually got it, it was the same type of land. Both as to his reluctance to part with the land, and as to how good the land really was, the most relevant contemporaneous documentary evidence was his letter R5 dated 29.10.81 (referred to earlier), which too, somehow, escaped the attention of the 1st and 2nd respondents.

*The valuation :*

The lands sought to be exchanged had been valued at the relevant time by a valuer, Somathilleke, who was then Director (Valuation and Compensation), LRC. His valuation was on the basis of the agricultural value of the two lands, because his view was that a valuation for the purpose of alienation by way of exchange under section 22 of the Land Reform Law should be on that basis. His position was that land alienated under that section could only be used for the limited purposes set out therein. According to him, on that basis, the Mawatta land was worth Rs. 99,000 more: and that sum the petitioner paid to the LRC. *He also stated that his valuation had been approved by the Chief Valuer* (page 4077).

However, in June, 1995, the Commission had requested the Chief Valuer to value the lands as at 1982. He assessed the *market* values: the Mawatta land at Rs. 2,665,000 (four blocks at rates ranging from Rs. 30,000 to Rs. 50,000 per acre) and 65 acres of the Panikankulam land at Rs. 660,000. The latter valuation had been made although he had not been able to identify 26 acres of the Panikankulam land correctly; and he subsequently made a hypothetical valuation of its open market value, at Rs. 988,500.

The interim report does not mention that during the *ex parte* stage the 1st respondent had told the Solicitor-General, who was assisting

the Commission, that it may be useful to call somebody from the LRC, either the Chairman or someone else, "particularly to clarify this position in regard to exchanges which fall outside the ambit of the Law"; and that in fact R. S. Ramanayake, who had been the Chairman from 1978 to 1982, was called by the Solicitor-General for that purpose. Reference was made to his evidence only in quite a different context, namely the existence of the seed paddy farm.

In his evidence, *Ramanayake stated that "when property was alienated by the Commission, for agricultural purposes, the valuation was always on an agricultural basis"; that although valuations were done by an officer of the LRC, they were reviewed by the Chief Valuer; and that the maximum price at which land was alienated from Siringapatha estate was Rs. 15,000 per acre, and that was for a 15 acre block abutting the main road.* (pages 10841, 10859 and 10871)

It is without considering that evidence as to the practice of the LRC during the period 1978 to 1982 that the 1st and 2nd respondents proceeded on the basis that it was market value which was relevant; the evidence of the valuer and of Ramanayake as to approval by the Chief Valuer was not even mentioned; and with one minor exception, the prices at which other allotments from Siringapatha estate had previously been alienated were not considered. The interim report mentions a subsequent alienation, of "the balance portion of Mawatta estate [which] was sold by the LRC at Rs. 30,000 per acre to the SLLLDC *in 1983", but fails to refer to and consider the fact that the Chief Valuer took rates as high as Rs. 50,000 per acre in determining the 1982 value of the 76 acres given to the petitioner.*

The interim report cited an amendment to section 22 of the Land Reform Law effected by Act No. 39 of 1981 (which came into force on 3.6.81), adding a new provision enabling "alienation *by way of sale,* with Ministerial approval, *for non-agricultural purposes",* and added:

> "Thus the limitation placed upon alienation of land vested in the LRC in regard to the purposes for which agricultural land vested in that Commission may be used has in fact been eliminated. This amendment permits the outright *sale* of lands . . . with the approval

of the Minister and has come into effect on a date very much anterior to [5.2.82 when] 76 acres of Mawatta was handed over to the [petitioner] by the LRC."

This amendment the 1st and 2nd respondents seem to have regarded as justification for valuation on a market value basis. However, the interim report itself discloses that the *only* approval given by the Minister of Agriculture was on 23.1.81, long *before* the amendment, and therefore could not have been treated as an approval of an alienation for non-agricultural purposes in terms of the amending Act of 1981.

*The Seed Paddy Farm*

Finally, the 1st and 2nd respondents concluded that the request made by Chandra Bandara to establish a seed paddy farm was a sham, and that his request had been made in collusion with the petitioner to enable the petitioner to obtain land which was much more valuable than the Panikankulam land; that no steps had been taken by Chandra Bandara to pursue the project; and that his subsequent conduct was inexplicable. Those observations were made without having required him to explain or to testify. The interim report discusses the evidence of several witnesses including Ramanayake and Nimal Gunaratne, Deputy Director (Revenue), LRC:

"The *uncontradicted testimony* of [Gunaratne] was that no seed paddy farm was started on Panikankulam . . . He vouched for the fact that there was no seed paddy farm on this land during the entire period he managed this project."

"Mr. Marapana also sought to rely on the evidence of Ramanayake . . . to establish the existence of the seed paddy farm . . . According to Ramanayake the LRC was running a seed paddy farm on this land for some time and he was aware of the fact because one of his Directors [Madawela] was in charge of the Division which managed this Project. Apart from this *vague* answer he did not claim to have any personal knowledge of this fact. It is significant that Madawela was not called to testify . . .

. . . we have no hesitation in rejecting Ramanayake's evidence in view of the *very definite evidence* given by Gunaratne . . . "

That gives the impression that Ramanayake was the petitioner's witness, although in fact he was called because the Commission wanted the Solicitor-General to call him. *While he was under cross-examination, it was the 3rd respondent who raised the issue:*

*"Hon. Jayasuriya: Q. Was the seed paddy station ever set up?*
*A. Yes . . .*
*Chairman: Q. How do you know that?*
*A. One of my directors : . . Madawela was in charge of it."*

*Thereafter the 1st and the 3rd respondents, alternately, questioned Ramanayake five times about the matter. They expressed no doubt about his answers; nor did they treat him as hostile.*

The report does not refer to important aspects of Gunaratne's evidence as to his knowledge of the facts. His evidence was that he had been working in the Estate Management Services Division from 1981 to 1984; that *he came to know of Panikankulam only in about 1982, and left in 1984; and he had visited the land three times.* The impression he created on the 1st respondent when he gave evidence appears from the following:

*"Chairman: Mr. Marapana, you see the calibre of this witness: he says he's Deputy Director; you asked whether he's the subject clerk and he says yes.*
*Q : . . . You can't give a suitable answer to any of the questions asked of you without referring to the files.*
*A. Yes. Without any files I am unable to give evidence.*
*Q : Then why did you give evidence all this time?*
*A : It was under my . . .*
*Chairman: That is not the question you were asked Mr Gunaratne. You were asked by Mr Premaratne whether there was a seed paddy farm?*
*A : No Sir.*

*Chairman: You said no, now you say you can't say anything without a file, what is the correct position? Is it that you can't say anything without a file or are you in a position to say that there was no seed paddy farm?*

*A : There was no seed paddy farm.*

*Chairman: Mr. Gunaratne, the truth is that you are coming here to say that there is no seed paddy farm because you have been asked to say so?*

*A : As I served in that division the Chairman asked me to say anything I know." (page 11856)*

Certainly, the 1st and 2nd respondents could have disbelieved Ramanayake and believed Gunaratne. But to characterize Gunaratne's evidence as "uncontradicted" (when Ramanayake and at least one witness testified to the contrary) and as "very definite" (despite the 1st respondent's own contemporaneous observations as to its credibility) required some explanation, and the interim report contains none. In contrast, to describe as "vague" Ramanayake's answers in reply to the Commissioners, although they had then made no adverse remark whatsoever about his evidence, required even more explanation and reasons. Again, there was none. And in the circumstances the comment that it was significant that the petitioner had failed to call Madawela seems unfair, since Ramanayake was called because the Commission wanted him called; and if the Commission had then any unexpressed doubt about the replies he gave to them, it was the Commission which should, in the interests of justice, have directed that Madawela be called and the relevant files produced.

THE ATTEMPTED "SETTLEMENT"

I have referred to the facts, and the approach of the 1st and 2nd respondents to the facts, not only because they are relevant to the question whether the findings are vitiated by errors of law (by the failure to take into consideration, and/or by the misconstruction of relevant oral and documentary evidence), but also because of rather unusual attempts which the Commissioners made to "settle" the dispute.

On 3.6.96, while the Chief Valuer was being re-examined, the Commissioners realised that there had been no transfers of title, *inter se*. It is necessary to refer in some detail to what happened:

"Hon. Jayasuriya : . . . the witness is seeking to assert that there is no transfer.

Mr. Marapana : Yes.

Hon Jayasuriya : Without a transfer there cannot be a restrictive user?

Mr. Marapana : Without a transfer I do not get any title at all . . . . I have paid very good money and got nothing in return.

Hon. Jayasuriya : *So you return it back to get your own land?* . . . .

Hon. Jayasuriya : . . . If you give this back and take that *everything will end.*

Mr. Marapana : I do not mind.

Hon. Jayasuriya : Are you prepared to do that?

Mr. Marapana : Of course . . .

Chairman : Why do you not consider this proposition?

Mr. Marapana : Yes, My Lord, I will certainly . . .

Hon. Jayasuriya : You have not got title yet?

Mr. Marapana : Yes

Hon. Jayasuriya : If you give back and take your land *everything ends.* . . .

Hon. Jayasuriya : Then we need not go into this any further, Mr. Premaratne?

Mr. Premaratne : It is a matter for the Commission . . .

Hon. Jayasuriya : If he is prepared to give it back and put the *status quo then everything is all right. Then we need not go into this matter any further.* Why do you not consider that?

Mr. Premaratne : I have no stakes here; I am only assisting the Commission . . . .

Chairman : Shall we call this on some other day so that we can consider this . . .

Hon. Jayasuriya : Consider this seriously *without wasting our time going into this* . . . " (pages 8834–6)

On 4.7.96 Mr. Marapana filed a document manifesting the petitioner's consent to restoring the *status quo*, and inquired what the next step would be. The 1st respondent said "then *we will make an order giving directions to the LRC to give effect to this*" (page 9264).

The staff of the Commission delayed for six weeks to communicate that order to the LRC. On 17.9.96 the Chairman, LRC, was present, on summons. The 1st respondent expressed serious concern about the delay, and added: "We have made an order to communicate our order to the LRC *for implementation*. It is very unsatisfactory".

Later, the LRC seems to have reported that it would not be able to restore possession of the Panikankulan land to the petitioner. The "settlement" was not pursued any further, and the inquiry proceeded.

THE CHARGES AGAINST THE PETITIONER

The "allegation" set out at the commencement of the interim report and the "charges" contained in the summary published in the *Gazette* are similar. However, they differ from the show cause notice in subtle, though significant, respects. The interim report and the summary state that the petitioner was asked to show cause why he should not be found guilty of misuse or abuse of power, in that, in substance, "the petitioner did directly or indirectly induce [identified persons] *to permit him to surrender* the Panikankulam land and *obtaining in exchange [sic] the Mawatta land, thereby causing wrongful loss to [named institutions]*". The show cause notice alleges that he committed or omitted to do one or more of the acts specified in six subparagraphs of the notice, "which [acts] directly or indirectly induced [the same identified persons] *to permit the exchange* of the Panikankulam land with the Mawatta land, *with the intention of causing wrongful gain to himself . . . and/or wrongful loss* to [the same named institutions]".

Straightaway, it is manifest that the show cause notice alleged a dishonest intention, as defined in the Penal Code, on the part of the petitioner; it was not enough therefore to establish that he did induce the identified persons to permit the exchange; it had also to be proved that he had induced them to do so with a dishonest

intention. The fact that a valuer, acting independently of the petitioner, might have made an erroneous valuation was insufficient: for that would only prove the fact of wrongful loss, but would be quite inadequate to prove a dishonest intention. Nevertheless, the interim report incorrectly suggests that the "allegation" set out therein was the same as that which the petitioner was required to meet in the show cause notice, and the 1st and 2nd respondents held "that the Allegation set out in the Show Cause Notice has been established".

In order to clarify this matter, we called for written submissions after judgment was reserved, and counsel on both sides have submitted that the show cause notice was never amended. On behalf of the respondents, it was submitted that "the Notice itself is wide enough to contemplate wrongful loss as well as wrongful gain although the allegation relates to only wrongful loss . . . since both these are elements of dishonesty, no prejudice would be caused to the petitioner as there is no reference to the element of wrongful gain in the allegation. In the circumstances . . . the Commission's finding is based on the charge contained in the Notice . . . and the allegation which is couched in general terms is merely a narrative of the gist of the said Notice".

That submission fails to justify the total absence in the interim report of either a finding that there was a dishonest intention as alleged in the notice, or an explanation as to how the charge was held proved despite the absence of such a finding. The finding that the petitioner took over a different portion of land – even a better portion – did not by itself prove a loss, for whether there was a loss or not depended on the subsequent valuation; if there was a proper valuation, there would have been no loss; and even if there was an undervaluation, that would only prove the fact of loss, but not an intention of causing a loss (unless, of course, there was evidence of impropriety on the part of the petitioner in causing or procuring such undervaluation).

It is unnecessary, in the circumstances, to consider the further unexplained difference, namely, that the show cause notice alleges inducement *to permit the exchange* of the two lands, while the interim report alleges inducement *to permit the surrender* of one land and *obtaining in exchange* the other land.

I. JURISDICTION

Several distinct questions of jurisdiction arise:

(1) Did the 1st and 2nd respondents have jurisdiction – after 12.11.96 when the 3rd respondent ceased to participate in the proceedings – to proceed with the inquiry and/or to make findings and recommendations?

(2) Did the Warrant establishing the Commission authorise the Commission to inquire only into sales and leases (and not exchanges) of land belonging to the LRC?

(3) Did the conduct of the Commissioners in regard to the attempted "settlement" constitute an acknowledgement and/or representation by them that the evidence disclosed neither misuse or abuse of power nor justification for subjecting the petitioner to civic disability, with the consequence that they were precluded from proceeding any further?

1. *Non-participation of the 3rd respondent*

Findings and recommendations had been made in the same interim report in an inquiry relating to another person, who applied for *Certiorari*, on the ground that the report had not been signed by the 3rd respondent *(Paskaralingam v. Perera*[2]). The following question was considered:

"Does the non-participation of Justice F. N. D. Jayasuriya render the interim report one made without jurisdiction?"

This Court, by a majority decision, answered that question in the affirmative, and quashed the findings and recommendations made by the 1st and 2nd respondents. Mr. Wickremanayake, on behalf of the petitioner, relied on that decision.

Mr. Kamalasabayson, PC, SG, stated that he was not seeking to canvass its correctness, and I see no reason to decline to follow that decision. However, in his counter-affidavit the 1st respondent pleaded that this application was belated, and that because the subject-matter of this application was before Parliament the petitioner was not entitled to any relief. Mr. Kamalasabayson submitted that we should take into consideration the fact that the petitioner was guilty of delay exceeding 12 months. He pointed out that the Order Paper of Parliament for 7.10.97 contained notice of a resolution for the imposition of civic disability on the petitioner under Article 81 of the Constitution consequent upon the interim report, so that the matter was now before Parliament; and therefore this Court should decline to entertain, hear or determine the petitioner's application. He drew our attention to *Bandaranaike v. Weeraratne*[3] where this Court upheld a preliminary objection and dismissed a similar application; quite properly, he indicated that there was a distinguishing feature, for in that case, by the time the application was taken up for hearing Parliament had already passed the resolution.

Delay is never an absolute bar, particularly where the challenge is to jurisdiction. In any event, a plea of delay must be considered on equitable grounds: as for instance, whether the conduct of the petitioner indicates acquiescence or a waiver of his rights, and whether any appreciable prejudice had been caused to the adverse party by that delay. Nothing of that kind has even been alleged.

As for pending Parliamentary proceedings, it is enough to say that Parliament and the judiciary have distinct and defined roles. Article 4 of the Constitution does not permit Parliament *directly* to exercise the judicial power of the people "except in regard to matters relating to the privileges, immunities and powers of Parliament wherein the judicial power of the people may be exercised directly by Parliament". Apart from that single exception in respect of what may be regarded as an internal jurisdiction intimately connected with its legislative function, if Parliament desires to exercise judicial power in *any* other case, it cannot do so directly; it must do so *only* through courts, tribunals and institutions created and established by the Constitution or by law. While it is undoubtedly true that Parliament can refuse to

act on the findings and recommendations of a Commission, nevertheless Parliament cannot subject them to judicial review or quash them – for want of jurisdiction, or breach of natural justice, or otherwise; it is only the judiciary which can do so.

The application now before us is a legitimate invocation of the jurisdiction of this Court to review the findings and recommendations of the Commission; it seeks relief only in an area in which Parliament has no jurisdiction, and it seeks no order or relief in respect of what Parliament has done or may do. In *Bandaranaike v. Weeraratne*, this Court declined to inquire into the validity of a resolution in view of the preclusive clause contained in Article 81(3). We do not have to decide this case in the shadow of such a resolution. It is true that in that case this Court also declined to review the findings of the Commission, because it was of the view that to do so would indirectly affect the resolution. Assuming, with respect, that that view is right, nevertheless that would not affect in any way the exercise of our jurisdiction in a case where *no* resolution had been passed.

I, therefore, hold that neither delay nor pending Parliamentary proceedings constitute a bar to the grant of *Certiorari*, which must therefore issue to quash the findings and recommendations of the 1st and 2nd respondents on the ground of non-participation by the 3rd respondent.

2. *Jurisdiction regarding exchange of LRC land*

Mr. Wickremanayake referred to the second limb of the first paragraph of the Warrant, and submitted that the Warrant confines the jurisdiction of the Commission: "more specifically in respect of the transactions, activities and matters relating to such public bodies referred to in [the] Schedule", and that it is item 17 which applies in the case of the LRC: "sales and leases of land", and nothing else.

Mr. Kamalasabayson relied on the first limb of that paragraph: "the management, administration and conduct of affairs of the public bodies referred to in the schedule hereto", and submitted that an exchange of land belonging to the LRC could be inquired into under that limb.

I agree that it is a possible interpretation that the second limb does not restrict the amplitude of the first; and that accordingly the Commission did have jurisdiction to inquire into the management (etc) of the LRC; and that in the course of such inquiry it could have made findings and recommendations in regard to either any aspect of such management (etc), or any "transactions, activities and matters" referred to in item 17. But the question is whether this particular inquiry by the Commission was into such management (etc), *or* into one particular transaction.

The starting point of the inquiry was the show cause notice, and that establishes that the inquiry was into a single transaction, and not into the management (etc) of the LRC. Further, the interim report itself (page 228) describes two inquiries as "Malpractices in the *National Housing Development Finance Corporation*" and "Malpractices in the Customs Department", thereby indicating that the Commission was acting under the first limb, whereas this inquiry is titled "Exchange of NLDB/LRC Land Inquiry against Mr. Wijayapala Mendis".

This was, therefore, an inquiry into one transaction, and although the alleged exchange involved land belonging to the LRC, and even involved some aspects of the procedures and practices of the LRC, that did not convert the inquiry into one under the first limb.

An inquiry under the first limb would have involved direct and detailed scrutiny – in general, and not just in respect of one transaction – of matters such as the policy and practice of the LRC in regard to decisions to alienate land, the selection of land for alienation, the basis and procedures for valuation, etc. Indeed, if this inquiry be regarded as one under the first limb, it would have been invidious discrimination to have singled out only the petitioner's transaction, ignoring all others; at least the other transactions falling into the same relevant class – whether Ministers, Members of Parliament, or politicians – should have been included if it were an inquiry held under the first limb.

Upon a scrutiny of the second limb and the schedule, it is clear that the warrant has carefully specified and restricted the matters which

could be inquired into. It said "transactions" in some instances (even specifying a monetary limit); it specified particular types of transactions in other cases – such as "purchase", "contracts", "tenders"; and in still other cases, it referred to "activities". One form of "alienation" which the Land Reform Law contemplates is "exchange". Nevertheless, in the case of transactions involving the LRC, the warrant specified only "sales and leases of land", although it would have been easy either to have expressly included "exchange", or to have specified "alienations" instead. This careful choice of words must be presumed to be deliberate.

I hold that the Commission had embarked upon an inquiry into an alleged exchange of land belonging to the LRC, thereby exceeding the jurisdiction which the Presidential warrant had conferred.

3. *Loss of jurisdiction resulting from attempted "settlement"*

It was the Presidential warrant alone which gave the Commission jurisdiction. It authorised the Commission to inquire into and obtain information about various matters, including the misuse or abuse of power in relation to any "transaction, activity or matter"; and required the Commission to report its findings and recommendations to the President. It did not authorise the Commission to make orders or to take other action designed to remedy any misuse or abuse of power, or to make good the loss caused thereby. If the evidence before the Commission disclosed a misuse or abuse of power, all that the Commissioners could lawfully and properly do was to report their findings and recommendations; indeed, they were bound to do so.

On 3.6.96 the 3rd respondent expressed the view (affirmed by the 1st respondent and acquiesced in by the 2nd respondent) that if the petitioner restored possession of the Mawatta land to the LRC "everything will end", "without wasting our time going into this". If the evidence then disclosed to the Commissioners that the Petitioner was probably guilty of a misuse or abuse of power, they would have been acting contrary to the Presidential warrant in deciding to refrain from reporting the petitioner for misuse or abuse of power (and, instead, "settling" the matter by procuring a retransfer of possession): no amount of "restitution" or "reparation" at that point of time could have

retrospectively wiped out any misconduct which had actually taken place or procured amnesty for it. Although the Commissioners have not said so, it is theoretically possible that they had not assessed the evidence, and therefore had not formed an opinion as to whether or not there was misconduct. But even then they had before them an allegation in respect of which they themselves had issued a show cause notice – suggesting a *prima facie* case. Their duty was to inquire and report; not to mediate, conciliate or settle the dispute. It was only if the evidence disclosed that the petitioner was not guilty of misuse or abuse of power that it would have been lawful and proper for the Commissioners to have refrained from reporting the petitioner.

The respondents did not explain their conduct in relation to the attempted "settlement", either in the interim report or in the affidavits filed in this Court.

It becomes necessary to determine on what basis the Commissioners acted in attempting this "settlement". Should this Court presume that the evidence disclosed to the Commissioners a misuse or abuse of power, but that nevertheless (*a*) they decided that they would not report the petitioner to HE the President; (*b*) the 3rd respondent considered it a waste of time to inquire any further into such misuse or abuse of power, despite the provisions of the warrant; and (*c*) the 1st respondent considered it proper to order the LRC, in effect, to "cover up" such misuse or abuse of power? Or, on the other hand, should this court presume that the Commissioners acted properly in indicating to the petitioner that they would refrain from reporting because they honestly believed that the evidence did not disclose a "reportable" misuse or abuse of power? Especially in the absence of any allegation by anyone that the Commissioners were acting contrary to the terms of the warrant, I hold that at that stage the Commissioners did believe that there was nothing to report. In any event, whatever the Commissioners may have thought, what they actually did say would reasonably have conveyed to the petitioner that the Commissioners were of the view that there was nothing to report. Nothing that transpired thereafter changed that position.

The attempts which the Commissioners made to "settle" the dispute do not have the slightest resemblance to attempts by Judges to settle civil disputes. It is well to remember the caution administered in *Sabapathy v. Dunlop*[4]:

> "This case conspicuously manifests the danger of Judges participating in the discussion of terms of settlement and taking too active a part in seeking to bring about a compromise. The terms of settlement should be left entirely to the parties and their legal advisers who know best, or else there will always remain the possibility of remarks or observations coming from the Judge in the course of discussion being misunderstood and wrong interpretations put thereon."

Judges dealing with civil and criminal disputes have a jurisdiction, albeit limited, to sanction compromise; the Courts in which they function have general jurisdictions, as well as inherent jurisdictions. Commissions of Inquiry do not; their jurisdiction is statutorily limited. If there is a misuse or abuse of power, they cannot initiate or sanction a "settlement" or "compound" misconduct, by refraining to report it in obedience to the Law and the Presidential Warrant.

I hold that the Commission had no jurisdiction to proceed any further in the matter. Whether or not the Commission had jurisdiction, I further hold that in any event the ultimate findings and recommendations of the 1st and 2nd respondents were so completely inconsistent with the previous observations and conduct of the Commissioners that those findings and recommendations are perverse and unreasonable. I must add that this illustrates the gravity of the non-participation of the 3rd respondent who initiated and expressed strong views about the attempted "settlement". The other Commissioners should have postponed their report to enable him to express his views on that matter. Their failure to consider his views becomes all the more serious because they have failed to explain their conduct.

II. NATURAL JUSTICE

As already noted, the 1st and 2nd respondents found the petitioner guilty on a basis significantly different to that set out in the show cause notice, which they have signally failed to justify, even in written submissions filed after judgment was reserved. This is a fundamental breach of natural justice by the 1st and 2nd respondents who have found the petitioner guilty on a charge materially different to that which they asked him to answer.

In other respects too there has been a failure of natural justice. The proceedings of the Commission were not strictly adversarial in nature; the Commissioners had a duty to ascertain the facts themselves. In several instances, the Commission refrained from calling important witnesses: including Madawela, the Assistant General Manager, NLDB, and the Assistant Manager of Siringapatha estate. Further, the evidence showed that at every stage Minister Thondaman had given approval: for the exchange of the Mawatta land in principle (after 28.10.81), for the demarcation to be done by the NLDB (in early January, 1982), and finally for the retention by the petitioner of the portion which he had actually taken over (in March, 1982). There was no evidence of pressure or influence *vis-a-vis the* Minister of Agriculture, Minister Thondaman, the Chairman, LRC, the Chairman, NLDB, and Chandra Bandara. Since Minister Thondaman was directly involved in those three decisions, the question whether any of those decisions had been induced "wrongfully and by undue means" (as alleged in the show cause notice) could not have been fully and fairly investigated without the benefit of an explanation or testimony from Minister Thondaman, but the Commission refrained from asking Minister Thondaman to explain or to testify.

There is yet another unfortunate aspect. By the end of November, 1996, the 1st and 2nd respondents were aware that the 3rd respondent's resignation had not taken effect, and that he was therefore still a Commissioner. However, the petitioner was not told at any time thereafter whether or not he would participate in the proceedings: whether the order of the Commission would be made by the other two Commissioners, or by all three, after the proceedings

were read by the 3rd respondent. Indeed, the record shows a degree of haste which was not seemly. On 21.12.96 the petitioner was told that the Commission had to send its report by the end of January. The judgment in *Paskaralingam v. Perera* shows that the period for submitting that report was due to expire on 2.2.97; that on 31.1.97 it had been extended until 2.3.97; and again on 28.2.97 until 30.6.97. Considering that the sitting on 21.12.96 was the 276th sitting of the Commission, a further short postponement, to enable the 3rd respondent to participate, was only reasonable. The Commission had to submit reports in eight inquiries; of these, three had been concluded as early as September, November and December, 1995, respectively (long before the 3rd respondent fell ill on 12.11.96). But even those reports were signed only by the 1st and 2nd respondents. The *audi alteram partem* rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal. Natural justice would be devalued if the tribunal – and, indeed, *every* member of the tribunal – does not consider the evidence and the submissions; and evaluate it properly and not in haste; and, in general, give reasons for its conclusions. Here the 1st and 2nd respondents failed to take enough time to enable its members to consider the petitioner's case, and, on some important issues, to give reasons.

Natural justice is fairness in action. The inquiry against the petitioner failed to reach the minimum standard of fairness demanded of a judicial or quasi – judicial inquiry.

III. ERRORS OF LAW

I have referred extensively to some portions of the evidence *not* in any attempt to review the findings of fact of the Commission, but in order to identify serious shortcomings in the proceedings of the Commission, which amount to errors of law.

The proceedings began with one charge, an essential ingredient of which was *mens rea* – an *intention* to cause wrongful loss; but instead of a finding on that issue the 1st and 2nd respondents concluded only that wrongful loss had *in fact* been caused.

I have already dealt with the unexplained change of front by the Commissioners in regard to the attempted "settlement".

There were two serious errors of law in regard to the proper basis of valuation of the two lands: ignoring the practice of the LRC, of taking agricultural value, and wrongly assuming the 1981 amendment to the Law to be applicable, despite the lack of Ministerial approval given under that amendment.

It is manifest from the summary of facts that some vital documents, and many material items of oral evidence, were ignored, and others were misconstrued.

Although findings as to the credibility of witnesses would normally have been outside the scope of review, the 1st and 2nd respondents accepted the evidence of some witnesses, and rejected the evidence of others, not only ignoring vital evidence relevant to credibility, but even their own contemporaneous and recorded perceptions as to credibility. In this context, let me recall the observations of this Court in *Senanayake v. de Silva*[5] :

> ". . . Even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of opposing counsel are, in view of the deference with which they treat the Court, inclined to treat with the greatest regard suggestions of this nature when they come from Court and are couched in compelling language, and it is a rare witness who will steadily maintain his version in the face of such questioning by the Court . . .
>
> . . . One of the well-recognised limitations on the powers of Court [to question witnesses] is that the Court must not question a witness in the spirit of beating him down or encouraging him to give an answer . . .
>
> . . . the concessions which the witness made were concessions under the pressure of a view expressed by Court in terms suggesting that that was the only reasonable view . . . It is remarkable however that although this view has been so strongly

put to the witness in the course of the Court's questions to him, the Court has in its judgment expressed a diametrically opposite view."

Those observations are applicable to the unexplained change of views by the 1st and 2nd respondents in relation to the attempted "settlement", as well as to the manner in which they elicited answers from witnesses.

The summary of facts shows how the Chairman, NLDB, so readily fell in line with suggestions strongly put to him by the Commissioners, even to the extent of veering from one position to a diametrically opposite one – all of which the interim report failed to mention. Nimal Gunaratne's evidence was accepted without even a passing reference to the 1st respondent's rebuke that he was merely coming to say what someone else had asked him to say; and Ramanayake's evidence was rejected because of "the very definite evidence given by Gunaratne", and was characterized as "vague" although none of the Commissioners seem to have thought so at the time.

Considered in isolation, each of these is a serious error of law; taken cumulatively, they are so extensive and so grave as to amount to a denial of a fair inquiry.

## IV. RECOMMENDATIONS

Since the findings of the 1st and 2nd respondents cannot stand for the several reasons set out above, the recommendations are necessarily null and void. But even if the findings were valid, the recommendations proceed on the assumption – manifest from the use of the phrase "we *accordingly* recommend" – that the automatic consequence of a finding that there was a misuse or abuse of power must be a recommendation for the imposition of civic disability. They have assumed that they had no discretion in the matter. They failed to consider, for instance, the fact that there had been no transfer of title, that there was no finding as to a dishonest intention, and that the two lands had been valued in accordance with the procedure

prevailing at the time, including approval by the Chief Valuer. It can hardly be argued that upon a proper consideration of those matters the same recommendations might have been made, especially because of the strong views expressed by the Commissioners in regard to the "settlement". Cogent reasons would have been necessary to justify a recommendation for the imposition of civic disability for alleged "misconduct", which the Commissioners had seriously considered to be "compoundable".

I hold, therefore, that the recommendations were arbitrary and unreasonable.

ORDER

In view of the concession made, with characteristic fairness, by Mr. Kamalasabayson, who appeared for the 1st and 2nd respondents, that he was not canvassing the correctness of *Paskaralingam v. Perera, Certiorari* must necessarily issue on the ground that the interim report had not been signed by the 3rd respondent.

I hold, further, for the reasons set out in this judgment, that the findings and recommendations of the 1st and 2nd respondents were vitiated, *inter alia*, by want or excess of jurisdiction, breach of natural justice, and error of law on the face of the record.

I direct the issue of a mandate in the nature of a writ of *Certiorari* to quash the findings and recommendations made by the 1st and 2nd respondents (set out in their interim report dated 2.3.97, Inquiry No. 5/97) against the petitioner. In regard to costs, I cannot ignore the fact that in the course of the proceedings the Commissioners themselves made observations which were consistent only with the considered view that findings of guilt and recommendations for the imposition of civic disability were not reasonably possible. Accordingly, I direct the State to pay the petitioner a sum of Rs. 20,000 towards his costs before the Commission, and a sum of Rs. 20,000 as costs in this Court.

**GUNAWARDANA, J.** – I agree.

**GUNASEKARA, J.** – I agree.

*Application allowed; certiorari issued.*