

SHAUL HAMEED AND ANOTHER
v.
RANASINGHE AND OTHERS

SUPREME COURT

MARK FERNANDO, J., KULATUNGA, J. AND DHEERARATNE, J.

S.C. APPLICATION No. 78/87.

APRIL 25, 1989.

Fundamental Rights – Constitution, Articles 12(1) and 136(4) – Persistent discrimination and partiality by Police to one party in land dispute – Penal, Code sections 90, 92, 92(3) – Section 56 of the Police Ordinance – Male fides – Degree of proof.

There was a dispute between the 5th Respondent's family and the Petitioners for possession of a plot of land set apart for construction of wells by one Gracian Wijesuriya. The Police, it was alleged, persistently supported the 5th Respondent who was the Personal Assistant to the Secretary to the President. The Police assisted the 5th Respondent to erect a fence on the disputed land, charged the Petitioners in Court in two cases but they were tardy in taking action on the Petitioners' complaints although they were victims of assault, robbery and damage to their house.

Held :

(1) The limit of the authority of the Police to intervene in property disputes has to be determined having regard to the rights involved and the powers of the Police under the law. The right to defend property is available only in cases where there is no time to have recourse to the protection of the public authorities (section 90, 92, 92(3) of the Penal Code). Section 56 of the Police Ordinance makes it the duty of the Police, *inter alia*, to prevent crimes and public nuisances and preserve the peace. In the discharge of this duty also it may become necessary for the Police to intervene in property disputes and afford protection. However, protection of property or its possession does not extend to assistance to recover property or possession where the dispute is essentially civil in character except very soon after deprivation by an aggressor having no *bona fide* claim to the property. Here the evidence favours the claim that the Petitioners were in possession and that the 5th Respondent was probably never in possession. In the circumstances, the 5th Respondent had no right of private defence of property and the Police were under no duty to assist her to gain possession of the property in dispute. The breach of peace in this case was caused mainly by the 5th Respondent and her supporters who had the assistance of the Police on every occasion. Such assistance in fact contributed to the breach of peace.

(2) It is significant that the Police were always prompt in taking action against the Petitioners but they were tardy in taking action on the complaints of the Petitioners and the persistent indifference to the rights of the Petitioners could not be attributable to mere procedure. Here the impugned acts were deliberate repeated and unequal and not isolated instances of mistake or errors of judgment. Equal protection has been denied to the Petitioner.

(3) An alleged violation of human rights has to be established by cogent evidence having a high degree of probability which is proportionate to the subject matter. However the degree of proof is not so high as is required in a criminal case.

(4) It was the conduct of Police which aggravated the dispute and when criminal acts were alleged they chose to apply pressure only against the Petitioners despite the fact that they were victims of assault, damage to their house and robbery. The Police have used their power unreasonably or for an improper purpose even though they may not be guilty of intentional dishonesty. Such conduct is *mala fide* even though no moral obliquity is involved.

(5) Even though the 5th Respondent benefitted by the acts of the Police she is not liable for the infringement of fundamental rights. The Court however has the power to make an appropriate order even against a Respondent who has no executive status when such Respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights or even otherwise, where in the interests of justice, it becomes necessary to deprive a Respondent of the advantages to be derived from executive acts violative of fundamental rights e.g. an order for payment of damages or for restoration of property to the Petitioner. The power of the Court to grant relief is very wide (Article 126(4)).

(6) No infringement has been proved against the 1st and 6th respondents but 2nd, 3rd and 4th Respondents and the State is liable.

Cases referred to :

- (1) *Katunayakege Demesius Perera v. Premadasa* 1 FRD 70
- (2) *Gunatilake v. Attorney-General* 1FRD 86
- (3) *Velmurugu v. The Attorney-General* 1 FRD 180
- (4) *Goonewardena v. Perera* 2 FRD 426
- (5) *Kapugeekiyana v. Hettiarachchi* (1984) 2 Sri L.R. 153

APPLICATION for infringement of fundamental rights under Article 12 (1) of the Constitution.

R. K. W. Gunasekera for petitioner *J. W. Subasinghe, P. C.* with *D. J. C. Nilanduwa* for 1st, 2nd, 4th and 6th Respondents.

D. S. Wijesinghe with *Jayantha Suriapperuma* for 5th respondent *A. R. C. Perera S. S. C.* for 7th Respondent.

Cur. adv. vult.

June 20, 1989.

KULATUNGA, J.

In this case the Petitioners claim reliefs in respect of the alleged violation of their fundamental rights guaranteed by Article 12 (1) of the Constitution arising from purported official acts performed by Police Officers in connection with a land dispute between the Petitioners and the 5th Respondent.

At all time material to these proceedings the Petitioners were resident at No. 10, Bahirawakanda Path, Kandy, situated on a land which the 2nd Petitioner's 1st husband had purchased in 1970 by deed No. 9937 (XI). They were the neighbours of Mrs. Johana Hamine Athukorale who was resident at No. 14, Bahirawakanda Path, Kandy, situated on Lot No. 1 in Plan No. 4035(X3), a fair copy of which has been produced by the 5th Respondent marked 5R3. Mrs. Athukorale had purchased the said Lot in 1956. She sold it to her daughter the 5th Respondent in 1984 by deed No. 28 (5R1), but continued to reside there with her daughter Mrs. Chandra Wickremeratne whilst the 5th Respondent lived in Colombo with her husband.

The 5th Respondent was the Personal Assistant to the Secretary to the President and her husband Mr. Morris Dahanayake was employed as Co-ordinating Officer, Insurance Corporation, Colombo.

Adjoining Lot No. 1 owned by the 5th Respondent is a triangular block of land 4.04 perches in extent comprising Lots 1A, 1B and 1C in Plan X3. This block of land was originally owned by one Gracian Wijesuriya who had set it apart for construction of wells when he blocked out the land for sale in 1956. He had, however, left it unsold and this led to a dispute between the 5th Respondent's family and the Petitioners for its possession. The earliest complaint over it was made to the Police on 25.8.86 by Mrs. Athukorale who states that it was given to her by Gracian Wijesuriya (5R1). However, she had no title to it. According to the 5th Respondent, Mrs. Athukorale was in possession of it from about 1984.

The 2nd Petitioner claims that she and her husband possessed the allotment in dispute for over 15 years and planted fruit trees thereon which were 10 to 12 years old. The fact that it had been planted is borne out by the photographs produced in these proceedings by the Petitioners and the 5th Respondent - (P3, p4, p5-p13 and 5R4, 4R4A, 5R4B).

Whilst the dispute for the possession of the concerned allotment of land was on, Wijesuriya gifted it to the 5th Respondent by deed No. 12711 dated 04.03.87 (5R2). This deed contains a condition that "the donor does not warrant or defend title to the premises and further that the donor does not undertake to give vacant possession of the said premises to the donee". The inference which one makes on this condition is that the donor was able to transfer only a paper title and that as on the date of the gift

he did not have possession of the land. This would tend to support the claim of the Petitioners to the land, based on prescriptive possession.

Neither the deed 5R2 nor the plan 5R3 relied upon by the 5th Respondent show any fence as a boundary to the land in dispute. It is bounded on the West by Lot 1 owned by the 5th Respondent, on the North and East by a 3 feet reservation (in which direction the Petitioners' land is situated) and on the South by the road way. However, both parties claim there was a fence.

According to the 5th Respondent, the fence was along the 3 feet reservation in which event the land in dispute would be an annex to the 5th Respondent's land depicted as Lot 1 in Plan 5R3. According to the Petitioners, the fence constituted the boundary between the said Lot 1 and the land in dispute in which event it would be an annex to their land. In this context, the dispute blossomed into a battle for fixing the fence which each party attempted to effect by force until 6.6.87 on which date the 5th Respondent's party erected it with concrete posts. However, it is alleged that the Petitioners' party uprooted it on 26.6.87 in support of which allegation the 5th Respondent has produced photographs 5R4, 5R4A and 5R4B.

The Petitioners complain that the police were partial to the 5th respondent and exceeded their authority beyond limit acting *mala fide* and in disregard of the rights of the Petitioners. It is alleged that the Police stood by and even assisted whilst the 5th Respondent's party constructed the fence as they wished and took no meaningful action against offences committed by them but whenever complaints were made by the 5th Respondent's party against the Petitioners the Police promptly arrested the Petitioners and produced them before Court. The Petitioners allege that the Police have thereby violated their fundamental rights under Article 12 (1) of the Constitution by denying to them equal protection of the law.

The Petitioners rest their claim for relief on certain incidents which occurred on 6.6.87 and thereafter. They allege that these incidents were a sequel to another incident which occurred on 28.3.87 which was followed by certain other incidents which culminated in the incidents which occurred on 6.6.87 and that the Respondent Police Officers were partial to the 5th Respondent during all such incidents.

It is alleged that on 28.3.87 the 5th Respondent together with several Police Officers including the 3rd and 4th Respondents and a Surveyor visited the land and started removing the fence stating that it would be relocated after the survey of the land purchased by the 5th Respondent. Although the 1st Petitioner protested the 3rd Respondent threatened to take him into custody and allowed the survey to proceed. The Petitioner then contacted Mr. Wickremaratne, a lawyer who came to the spot and inquired from the Police and the Surveyor what they were doing on the land. The 3rd Respondent and the Surveyor said that they had orders from Mr. Menikdiwela, the Secretary to the President to survey the land and to relocate the fence. However, Mr. Wickremaratne pointed out that they had no authority to do so whereupon they left leaving a partially put up fence. The petitioners re-erected the original fence and removed the part of the fence put up by the 5th Respondent.

Admittedly the alleged survey was carried out with a view to erecting a fence, police officers were present at the time, and this work was interrupted by the intervention of Mr. Wickremaratne, Attorney-at-Law. The Surveyor and the 3rd Respondent have denied informing Mr. Wickremaratne that this work was undertaken on the orders of Mr. Menikdiwela who himself has made an affidavit denying that he gave any such order. The learned Counsel for the Petitioners agreed that this denial has to be accepted. Mr. Wickremaratne has declined to furnish an affidavit in support of the allegation that Mr. Menikdiwela's name had been used on this occasion. As such, the allegation that Mr. Menikdiwela's name was used is also not established. Nevertheless the allegation of discrimination against the Police has to be considered on the basis of the available evidence.

What was the role of the Police on 28.3.87? According to the statement of the 1st Petitioner made to the Police at 10.05 a.m. on that day (2R2) the 5th Respondent's husband Morris Dahanayake had broken the fence about 8.00 a.m. and they started making a new fence. Police Officers were also present at the spot. According to Morris Dahanayake's statement (2R3) made at 11.45 a.m., he had visited his wife's house in Kandy at about 7.30 a.m. that day when the 1st Petitioner's brother-in-law broke the fence. When he questioned him, he said that the land belongs to them and this was reported to the Police. Then, the lawyer Mr. Wickremaratne was brought. A number of Police Officers visited the spot and left after inquiry.

The 2nd Respondent Beddewela who was the Chief Inspector of Kandy Police admits that the 3rd Respondent SI Aththudawa visited the scene but not the 4th respondent PC Tikiri Banda. The 3rd Respondent himself merely denies the allegation that he directed the 5th Respondent and the Surveyor to proceed. He admits that he visited the scene on many occasions but does not clarify whether he went there on 28.3.87. The 4th Respondent denies the allegation in respect of 28.3.87. He too admits that he visited the scene on many occasions but does not clarify whether he went there on 28.3.87. On the other hand, the 6th respondent (SI Amunugama) admits having gone there on his traffic rounds on 28.3.87 having seen the 4th Respondent who said that he was there to investigate a complaint.

On the basis of the available evidence, I am satisfied that the survey was conducted on 28.3.87 and the work on the fence had been pre-planned and Morris Dahanayake visited Kandy that morning to supervise that work. I am also satisfied that at least three police officers were present at the scene. Even if the 6th Respondent had gone there having seen the 4th Respondent, the latter along with the 3rd Respondent were at the spot presumably on the instructions of the 2nd Respondent. However, they do not clarify with precision what their mission was. They owe a duty to this Court to be more specific. Yet they have opted to make vague or evasive statements. After referring to the complaints 2R2 and 2R3, the 2nd Respondent states that both parties were warned to keep the peace. However, this cannot be a reference to what occurred at the scene. In the circumstances, I accept the version of the Petitioners that the police officers were there to ensure that the survey and the construction of the fence were not impeded but were constrained to leave due to the intervention of Mr. Wickremaratne, Attorney-at-Law.

Petitioners allege that after 28.3.87, Kandy Police made almost daily visits and threatened them to permit the 5th Respondent to possess the land in dispute. This allegation is supported by the complaint made by Mrs. Chandra Wickremaratne, a sister of the 5th Respondent on 6.4.87 (2R4), in which she states *inter alia* that the Police warned the 1st Petitioner several times not to touch the fence. She complained that despite such warnings the 1st Petitioner had broken the fence again. Consequently, the Police filed MC Kandy case No. 54537 (2R5) on 20.04.87 charging the 1st Petitioner under sections 433 and 410 of the Penal Code.

On 23.5.87, the 5th Respondent made a complaint to the Police to the effect that the 1st Petitioner was trying fraudulently to claim title to the land in dispute which had been gifted to her by the owner (2R8). It is significant that the 5th Respondent states in that statement that the 1st Petitioner referred her to his Attorney-at-Law who informed her that the 1st Petitioner has a road through this land and adds "It is not true. This Abdeen has a motorable road separately". In view of such rival claims it is difficult to characterise the 1st Petitioner's claim as being fraudulent. However, the 2nd Respondent states that on a perusal of the complaint, he gave orders for an investigation and for charges to be framed against the 1st and 2nd Petitioners under sections 433, 386 and 332 of the Penal Code.

According to 2R12 copy of report to the Magistrate in M.C. Kandy No. B/21120/87 the Police had inquired into a complaint of Mrs. Chandra Wickremaratne, sister of the 5th Respondent to the effect that on 29.05.87 the Petitioners and one Kumarasinghe had with others entered the land in dispute and broken the fence. On this complaint, the Police produced the two Petitioners and Kumarasinghe before the Magistrate on charges under sections 140/141, 410 and 433/146 of the Penal Code. It is significant that by this report the Police also represented to the Magistrate that Gracian Wijesuriya had remained in possession of the land in dispute since the sale of the other lots in 1956 until March 87 when it was gifted to the 5th Respondent by deed No. 12711 (5R2) and the complainant was entitled to the possession of this land.

In so reporting to Court the Police do not appear to have taken cognizance of the terms of the deed according to which Wijesuriya had presumably lost possession of the land as on the date of the gift. In the result, they misrepresented the facts to the Magistrate which tends to support the allegation that the Police were partial to the 5th Respondent.

In his affidavit, the 2nd Respondent himself asserts that as on the date of the deed (5R2) the land in dispute had been in the possession of Johana Hamine the mother of the 5th Respondent. He states that this and other facts are based on his knowledge gained in the course of investigations, and conferences with Respondent Police Officers and a perusal of relevant documents. It is thus clear that the 2nd Respondent and some other police officers were acting together and in concert in handling the dispute and all of them favoured the claim of the 5th Respondent. I now come to the events of 6.6.87.

The Petitioners allege that on this day the 2nd Respondent came fairly early in the morning and ordered the 1st Petitioner to permit Mr. and Mrs. Dahanayake to put up a fence enclosing the land in dispute. Thereafter, the 2nd, 3rd and 4th Respondents and several other police officers along with the 5th Respondent and her husband and about 20 thugs entered the land, pulled down the existing fence and erected a fence with concrete posts. The 3rd Respondent said that they had orders from the 1st Respondent. The 2nd, 3rd and 4th Respondents remained till the new fence had been erected and left warning the Petitioners not to attempt to regain possession of the land.

The Petitioners have produced photographs P2, P3 and P4 - P14 as evidence of the alleged incident. The photographer Kumarasiri Pereira in his affidavit states that he took them on 06.06.87 at about 10.30 a.m.. The Petitioners identify the 3rd, 4th and 6th Respondents in some of the photographs and members of the gang which helped in erecting the fence in photograph P14. Photographs P3, P4, P5 and P13 show the work in progress and police officers standing by in various positions. Petitioners identify the man in shorts in P4 as Morris Dahanayake. The photographs also show a van and a car..

The Petitioners allege that on the same day at about 4.30 p.m. the 5th Respondent and her husband and their thugs started smashing the Petitioners' house and assaulted the Petitioners and their daughter. The 1st Petitioner and the daughter were treated at the hospital for the injuries sustained during this incident. Photographs P6 - P12 have been produced as proof of damage to the house and medical certificates P14 and P15 in proof of injuries sustained by the 1st Petitioner and his daughter.

The 1st Petitioner has with his affidavit dated 25.11.87 annexed affidavits P18 -P22 from persons claiming to be eye witnesses to the incident which occurred on the evening of 6.6.87. Mathew Joseph (P18) states that he identified Chandra Athukorale and Abey. Issadeen (P20) states that a gang of people attacked the petitioners' house and assaulted them. He identified Morris Dahanayake. They went away in vehicle No. 8 Sri 2621 and a white colour van which belongs to the Insurance Corporation.

The 5th Respondent states that on 6.6.87, they were repairing the fence which had been damaged by the Petitioners when Kumarasiri

On 23.5.87, the 5th Respondent made a complaint to the Police to the effect that the 1st Petitioner was trying fraudulently to claim title to the land in dispute which had been gifted to her by the owner (2R8). It is significant that the 5th Respondent states in that statement that the 1st Petitioner referred her to his Attorney-at-Law who informed her that the 1st Petitioner has a road through this land and adds "It is not true. This Abdeen has a motorable road separately". In view of such rival claims it is difficult to characterise the 1st Petitioner's claim as being fraudulent. However, the 2nd Respondent states that on a perusal of the complaint, he gave orders for an investigation and for charges to be framed against the 1st and 2nd Petitioners under sections 433, 386 and 332 of the Penal Code.

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In so reporting to Court the Police do not appear to have taken cognizance of the terms of the deed according to which Wijesuriya had presumably lost possession of the land as on the date of the gift. In the result, they misreported the facts to the Magistrate which tends to support the allegation that the Police were partial to the 5th Respondent.

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The 1st Petitioner has with his affidavit dated 25.11.87 annexed affidavits P18 -P22 from persons claiming to be eye witnesses to the incident which occurred on the evening of 6.6.87. Mathew Joseph (P18) states that he identified Chandra Athukorale and Abey. Issadeen (P20) states that a gang of people attacked the petitioners' house and assaulted them. He identified Morris Dahanayake. They went away in vehicle No. 8 Sri 2621 and a white colour van which belongs to the Insurance Corporation.

The 5th Respondent states that on 6.6.87, they were repairing the fence which had been damaged by the Petitioners when Kumarasiri

Pereira a brother of the 2nd Petitioner accompanied by the others threatened them with bodily harm. The timely arrival of the Police prevented a serious breach of the peace. The parties were instructed to maintain peace and the damaged fence was re-erected. As regards the incident on the evening of that day the 5th Respondent states that just before they left Kandy the Petitioners and others started shouting and created a commotion and she heard windows being smashed in the house of the Petitioner.

The 1st Petitioner appeared at the Kandy Police Station with bleeding injuries on his forehead on the evening of 6.6.87. In his statement which was recorded at 5.15 p.m. he complained of an attack on his house by about 20 persons. One Abey of Kandy caused damage to the house and also assaulted him with a flower pot, and snatched the 2nd Petitioner's gold chain. He identified only Abey among the crowd (2R14).

The 1st Respondent (Superintendent of Police, Kandy) denies having given an order for the construction of the fence on 6.6.87. He admits having visited the scene along with the 2nd Respondent in connection with the 1st Petitioner's complaint as regards the incident which occurred at his house on the evening of that day.

The 2nd Respondent denies the allegations in respect of 06.06.87. However, he admits -

- (a) that he visited the scene at 11.30 a.m. and returned to the station at 12.00 p.m. in connection with the dispute;
- (b) that the 4th Respondent had visited the scene in the course of his duties to ensure that there was no breach of the peace;
- (c) that the 6th Respondent who was attached to the traffic branch had gone to the scene in the course of his rounds.

The 3rd Respondent denies having visited the scene on 06.06.87. However, he admits his appearance in photographs P4 and P5 but states that he visited the scene on many occasions in the performance of his duties and that said photographs may have been taken on such occasions at the scene.

The 4th respondent denies the allegations in respect of 6.6.87. He states that on the orders of his superior officers he held investigations into complaints relating to the land dispute between the 1st and 2nd petitioners and the 5th respondent and visited the scene on many occasions and that he appears in photograph P2 taken on one such occasion.

The 6th respondent denies the allegations in respect of 06.06.87. He neither admits nor denies having visited the scene on that day. He admits that he appears in photograph P3 and states that he had been to the scene on 28.3.87 whilst on traffic rounds and that it had been taken on such occasion.

The petitioners' allegation is that after a series of attempts to deprive them of the possession of the land in dispute, they were dispossessed on 6.6.87, by a show of force and threats with the active assistance of the Police. This allegation is supported by the evidence which I have summarised. The construction of a fence with concrete posts was carried out in the presence of some of the respondents. The 3rd, 4th and 6th respondents appear in the photographs which have captured the incident in graphic detail despite attempts by the respondents to shift the date when they were photographed. Admittedly, the 2nd respondent was at the scene from 11.30 a.m. to 12.15 p.m. The 5th respondent says the timely arrival of the Police saved a breach of the peace and that they re-erected the fence after the Police had instructed the petitioners to maintain the peace.

Mr. R.K.W. Goonesekera, Counsel for the petitioners submitted that whilst he concedes to the Police the traditional function of conciliating minor disputes and the authority to maintain peace in appropriate situations, in the instant case the Police have exceeded their authority beyond limit and in a discriminatory manner. I am of the opinion that this submission is warranted by the evidence.

The limit of the authority of the Police to intervene in property disputes had to be determined having regard to the rights involved and the powers of the Police under the law. Section 90 of the Penal Code confers on every person the right, subject to restrictions contained in section 92, to defend the property of himself or any other person against acts constituting offences affecting property. Section 92(3) provides that there is no right of private defence in cases in which there is time to have recourse to the

protection of the public authorities. Therefore, the Police do have a duty to afford such protection. Under section 56 of the Police Ordinance it is the duty of the Police *inter alia* to prevent crimes and public nuisances and to preserve the peace. In the discharge of this duty also it may become necessary for the Police to intervene in property disputes.

However, protection of property or its possession does not extend to assistance to recover property or possession where the dispute is essentially civil in character except very soon after deprivation by an aggressor having no *bona fide* claim to the property. Here the evidence favours the claim that the petitioners were in possession and that the 5th respondent probably was never in possession. In the circumstances, the 5th respondent had no right of private defence of property and the Police were under no duty to assist her to gain possession of the property in dispute.

It is apparent that the dispute between the parties was essentially a civil dispute resulting from the efforts of the 5th respondent to gain possession of the land in dispute after she had obtained a gift of it on 4.3.87 on deed 5R2 according to which the donor was not in a position to give vacant possession. The Police have no authority to assist in such a case.

The breach of peace in this case was mainly by the 5th respondent and her supporters who had the assistance of the Police on every occasion. I am of the view that such assistance in fact contributed to the breach of peace and was not warranted by section 56 of the Police Ordinance.

The appropriate procedure was to refer the dispute to the Primary Court under section 66 of the Primary Court Procedure Act. The Police failed to make such reference and thereby aggravated the breach of peace. In the result the 2nd petitioner was constrained to institute D. C. Kandy case No. 15490 (2R17) against the 5th respondent, her sister and another on 2.6.87 for a declaration of title to the land by prescription, for the ejectment of the defendants and damages.

If the defence of the Police is that they had been summoned to prevent a breach of the peace they have a duty to clarify to this Court the circumstances of their intervention. This duty cannot be discharged by a

mere denial of the allegation or evasive averments. It is strange that whenever the 5th respondent wished to erect the fence the Police were present at the scene in force in circumstances which suggest that they were so present by engagement with the 5th respondent, outside the performance of their normal duties.

It is also significant that the Police were always prompt in taking action against the petitioners. Thus in respect of the incident on 6.4.87 criminal proceedings were instituted on 20.4.87. In respect of the incident on 29.5.87 the petitioners and one Kumarasinghe were arrested and produced in Court with the report under section 115 (1) of the Code of Criminal Procedure. However, in respect of the petitioners' complaint on 6.6.87, investigations were not complete even at the time of the 2nd respondent's affidavit in September 1987.

On 25.6.87, the 5th respondent's mother made a complaint to the Police (2R 15) in which she alleged that the disputed fence had been uprooted by the petitioners. The 1st respondent ordered the 2nd respondent to proceed to the scene and investigate the matter. Consequently, the petitioners were arrested and produced before the Magistrate for offences under Sections 140, 144, 433, 434, 410, 367 and 486 of the Penal Code.

I shall now examine the steps taken by the Police on the 1st petitioner's complaint of 6.6.87. He told the Police that he identified one Abey of Kandy among the crowd that came to his house. Abey caused damage to the house, assaulted him with a flower pot and snatched the 2nd petitioner's gold chain. On 15.6.87 the Police made a report to the Magistrate (2R14A) but did not produce any suspect. It was only on 9.1.89 that criminal proceedings were instituted against Gamini Abeyratne and Chandra Athukorala in M. C. Kandy case No. 79202. The proceedings in that case (2R14B) show that as on 24.4.89 summons had not been served on the accused.

The address of Gamini Abeyratne mentioned in the charge sheet filed by the Police is Kengalle Street, Kengalle. I find that one Gamini Abeyratne of Kengalle Street, Kengalle had witnessed the deed of gift (5R2) on which the 5th respondent claims title to the land in dispute. The 5th respondent in her complaint made on 23.5.87 (2R8) told the Police that on that day she visited the land in dispute with her son Channa

Dahanayake accompanied by one Gamini Abeyratne. Probably therefore the accused Gamini Abeyratne and the man referred to in documents 5R2 and 2R8 are one and the same person who was a close associate of the 5th respondent and whose movements were well known. Yet there is no evidence of any effort by the Police to trace him.

The 2nd respondent's explanation for the inordinate delay in instituting criminal proceedings on the 1st petitioner's complaint is that as this complaint disclosed an offence of robbery of a gold chain the matter had to be reported to the Police Headquarters in conformity with departmental orders. Mr. Subasinghe, P. C. told us that the Police were awaiting instructions from Police Headquarters before institution of criminal proceedings. However, the learned Counsel conceded that departmental orders cannot supercede the provisions of law applicable to criminal proceedings.

Having regard to the entire conduct of the Police established in these proceedings, I am unable to treat the delay by the Police in pursuing action on the petitioners' complaint as attributable to mere procedure. On the other hand, it is attributable to their persistent indifference to the rights of the petitioners.

It is true that the Police have onerous duties in maintaining law and order and often have to act under constraints. I would not construe every excess by them as constituting a breach of fundamental rights under Article 12 (1). It is only where the discrimination is deliberate that it would infringe on Article 12 (1) - *Katunayakege Demesius Perera v. Premadasa*, (1). If the Police made a mistake (specially a single mistake) in attempting to assist in recovery of possession, it would not per se be a violation of Article 12 (1). Here the impugned acts were deliberate, repeated and unequal because complaints against the 5th respondent were so tardily and inefficiently dealt with. Therefore, equal protection has been denied to the petitioners.

At the same time, a wrong decision due to an error of judgment on a question of fact cannot constitute a breach of the fundamental right of equality in the eye of law - *Gunatilleke v. Attorney-General* (2). An alleged violation of human rights has to be established by cogent evidence having a high degree of probability which is proportionate to the subject matter. However, the degree of proof is not so high as is required in a criminal

case-*Velumurugu v. The Attorney-General*(3). This standard of proof has been applied in *Goonawardena v. Perera* (4) and *Kapugeekiyana v. Hettiarachchi*, (5).

Mr. Subasinghe, P. C., learned Counsel for the 1st, 2nd, 4th and 6th respondents and Mr. D. S. Wijesinghe, learned Counsel for the 5th respondent, submitted that the acts of the Police were bona fide and at the most committed by an error of judgment. I am unable to agree with this submission except as regards the 1st and the 6th respondents. The evidence establishes a series of incidents which gave ample opportunity to the Police Officers concerned to appreciate the correct position and to take appropriate action in respect of what was essentially a civil dispute. It was their conduct which aggravated it and when criminal acts were alleged they chose to apply pressure only against the petitioners. They have used their power unreasonably or for an improper purpose even though they may not be guilty of intentional dishonesty. Such conduct is *mala fide* even though no moral obliquity is involved - Wade on Administrative Law Fifth Edn. 391 ; Principles of Administrative Law, Jain 4th Edn. 562.

In all the circumstances, I am satisfied that the charge against the 2nd, 3rd and 4th respondents has been established as required by law. The 2nd respondent has filed the main defence in these proceedings and the other respondent-Police Officers have stated that they accept and abide by the averments in that defence. In the light of their conduct and the common defence taken by them I am of the view that all of them are jointly and severally liable for violating the rights of the petitioners.

I determine that the 2nd, 3rd and 4th respondents have in the purported exercise of statutory power infringed the rights of the petitioners under Article 12 (1) of the Constitution by executive or administrative action, and that they along with the State are liable for such infringements. However, Mr. Subasinghe, P. C. informed us at the hearing that the 3rd respondent has since died and as such I shall make no order for relief against him.

Taking into account the harassment and the pain of mind suffered by the petitioners at the hands of the Police whenever they asserted their claim to the land in dispute and having regard to the duty of the State to lay down guidelines against such excesses as established in these

proceedings, I hold that the petitioners are entitled to Rs. 5,000 as compensation and Rs. 1050 as costs from the 2nd and 4th respondents and the State jointly and severally.

The available evidence does not establish that the 1st respondent has violated the fundamental rights of the petitioners. Thus on 6.6.87 he visited the scene along with the 2nd respondent in connection with the 1st petitioner's complaint. On 25.6.87 he ordered the 2nd respondent to proceed to the scene and investigate the complaint of the 5th respondent. These were acts performed by the 1st respondent as the superior officer of 2nd, 3rd and 4th respondents but none of these acts were calculated to interfere with the rights of the petitioners. The petitioners allege that on 6.6.87 the 3rd respondent said that they had orders from the 1st respondent. The 1st respondent has denied having given the order referred to and even if an order had been given I am not satisfied that the 1st respondent intended thereby to direct his subordinates to commit any unlawful acts. I therefore dismiss the application against the 1st respondent without costs.

Even though the 5th respondent benefitted from the acts of the Police I hold that she is not liable for the infringement of fundamental rights of the petitioners. This Court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights or even otherwise, where in the interest of justice it becomes necessary to deprive a respondent of the advantages to be derived from executive acts violative of fundamental rights e. g. an order for the payment of damages or for the restoration of property to the petitioner. Article 126 (4) provides that "the Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) or this Article.....". The power of this Court to grant relief is thus very wide. Such power has been expressly conferred to make the remedy under Article 126 (2) meaningful.

However, in the absence of proof of impropriety or connivance by the 5th respondent in the wrongful acts of the 2nd, 3rd and 4th respondents and particularly in view of the fact that the dispute between the parties is now before the District Court, I do not consider it necessary to make any order against her. Accordingly, the application against her is dismissed without costs.

The 6th respondent has only visited the scene on his traffic rounds having seen the 4th respondent there and the petitioners have not claimed any relief against him. I dismiss the applications as against him without costs.

MARK FERNANDO, J. –I agree.

DHEERARATNE, J. –I agree.

Application upheld against 2nd, 3rd and 4th respondents.

Application against 1st, 5th and 6th respondents dismissed.
