

CANNOSA INVESTMENTS LIMITED
V.
EARNEST PERERA AND OTHERS

SUPREME COURT,

H. A. G. DE SILVA, J., DHEERARATNE, J. AND RAMANATHAN, J.,

S. C. APPLICATION 12/90,

MAY 18, 21, 23, JUNE 06, JULY, 02, 10, 27, AUGUST 29,

SEPTEMBER 07, 14, 18, 20 AND 21 1990.

Fundamental Rights - Executive and administrative action - Right to run casino - Search Warrant - Section 5(1) of the Gaming Ordinance - Acting in pursuance of judicial order - Mala fides - Wrongful exercise of judicial discretion.

Under Section 5(1) of the Gaming Ordinance a Magistrate has to be satisfied upon written information on oath and after such further inquiry as may be necessary, that there is good reason to believe that the place to be searched is kept or used as a common gaming place. It is only then the magistrate can issue a search warrant.

Even if a search warrant is improperly obtained from a magistrate for a collateral purpose and mala fide there is no infringement of a fundamental right. Where the action complained of is in consequence of the wrongful exercise of a judicial discretion even on false material furnished to a judge maliciously, such action will not attract the provisions of Article 126 of the Constitution. The violation must be by administrative or executive action.

Cases referred to:

1. *Leo Fernando v. Attorney-General* [1985] 2 Sri LR 341.
2. *Kumarasinghe v. Attorney-General* SC Minutes of 06.09.1982.
3. *Dayananda v. Weerasinghe* 2 FRD 292.
4. *Dharmatilake v. Abeyanayake and Others* SC 156/86 - SC Minutes of 15.12.1988.
5. *Velmurugu v. Attorney-General* IFRD 180.
6. *Perera v. U.G.C.* 1 FRD 103.
7. *Wijetunga v. Insurance Corporation* [1982] 1 Sri LR 374.
8. *Saman v. Leeladasa and Another* [1989] 1 Sri LR 1.

APPLICATION under Article 126 of the Constitution for violation of fundamental rights.

H. L. de Silva PC with *E. D. Wickramanayake, A. Tittawela* and *Kushan de Alwis* for petitioner.

Faiz Mustapha PC with *S. Mahenthiran, S. Kongahage* and *Mahanama de Silva* for 4 and 5 respondents.

Upawansa Yapa, Deputy Solicitor General with *Kolitha Dharmawardena, S.C.* and *Kalinga Indatissa S.C.* for the other respondents.

Cur. adv. vult.

October 10, 1990.

H. A. G. DE SILVA, J. read the following judgment of the Court:

This is an application by the petitioner for relief under Article 126 of the Constitution.

The petitioner is a company registered in Hong Kong and claims the right to run a casino styled "Le Casino" located at the Galadari Meridien Hotel on the roof top floor.

The petitioner alleges that on the 6th April, 1990 at about 8.30 p.m. a party of Policemen which included the 4th and 5th respondents entered the said casino and took into custody several persons, equipment, furniture and money which were in the premises. The petitioner made inquiries from the Magistrate's Court and was informed that the Police had obtained a search warrant for the purpose of entering the premises. However the Magistrate has since informed this Court that she had issued the search warrant inadvertently without compliance with Section 5(1) of the Gaming Ordinance, (cap. 59) which stipulates that a Magistrate has to be satisfied upon written information on oath and after such further inquiry which may be necessary that there is good reason to believe that the place to be searched is kept or used as a common gaming place.

It was also submitted by counsel for the petitioner that the 4th and 5th respondents had acted mala fide for a collateral purpose in collusion with a business rival of the petitioner company by the name of Leisure World. It was submitted that these respondents had concealed from the Magistrate the fact that the casino was located within the premises of Galadari Meridien and had obtained the search warrant by falsely describing it as a social club. The case for the petitioner company was that the application for a search warrant, the search itself and the institution of criminal proceedings had been effected, not with the objective of enforcing the law, but to advance the business interests of Leisure World.

Learned counsel for the petitioner states that no mala fides or impropriety was imputed to the Magistrate. He submitted that as the Magistrate had acted honestly and in the purported exercise of a jurisdiction which she possesses, the order issuing a search warrant was a judicial act and therefore outside the scope of Article 126 of the Constitution. He went on to argue however that the execution of the search warrant by the 4th and 5th respondents was not so protected, inasmuch as it had been secured and executed mala fide and therefore constituted "executive action" within the meaning of Article 126.

However, counsel for the respondents contended that as the 4th and 5th respondents had entered upon the casino in obedience to a search warrant issued by the Magistrate, such action being in pursuance of judicial process did not constitute "executive or administrative" action within the meaning of Article 126 of the Constitution. Counsel contended that in any event mala fides did not convert such action into "executive or administrative action" and that the question of mala fides was irrelevant in so far as these proceedings were concerned.

The preliminary question for determination in this case is whether the entry by the 4th and 5th respondents upon the casino constitutes "executive or administrative action" within the meaning of Articles 17 and 126 of the Constitution. These read as follows:

Article 17 — "Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter".

Article 126 (1) — "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV".

Learned counsel for the petitioner relied upon the judgment of this Court in *Leo Fernando v. Attorney-General* (1) and submitted that Police Officers who acted in pursuance of a judicial order would be immune from liability for the violation of a fundamental right only if they acted in good faith, not knowing the Magistrate's order to be invalid. His principal

contention was that where there was mala fides on the part of the Police Officer, such acts would not be outside the reach of Article 126 of the Constitution.

We shall now consider some of the decisions of this Court which have a bearing on this issue. In *Kumarasinghe v. Attorney-General* (2) reported in Fundamental Rights and the Constitution. (supra) Wimalaratne, J stated as follows:

“I am of the view that there has been a violation of the fundamental right guaranteed by Article 13(2) of the Constitution but this violation has been more in consequence of the wrongful exercise of judicial discretion as a result of a misleading police report. Although we are unable to grant the petitioner the relief prayed for, we award him costs in a sum of Rs. 750/-, payable by the respondents”.

The approach of Justice Wimalaratne was followed in the case of *Dayananda v. Weerasinghe* (3). Ratwatte, J stated :

“The question that arises for consideration is whether, though the remand orders were made by a judicial officer, the petitioner is entitled to relief on the ground, as alleged by him that the remand orders were made as a result of the wrongful acts of the 1st and 2nd respondents”.

Justice Ratwatte went on to state that —

“I do not think it is necessary to consider the allegations of the petitioner that the 1st and 2nd respondents were actuated by malice and ill will towards him. The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special

jurisdiction of the Supreme Court under Article 126 of the Constitution even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion".

In the case of *Dharmatileke v. Abeyanayake and others* (4) the petitioner complained of violations of the fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution. The petitioner had gone to the police station in response to a message from the O.I.C. and was arrested by a Sergeant under a warrant issued by the High Court. The petitioner was a senior public servant and the warrant had been issued for a failure to attend the High Court as a prosecution witness. There had been an exchange of words between the petitioner and the Police sergeant prior to the arrest. The petitioner alleged she had not been informed of the reason for her arrest. The petitioner had been remanded on the application of the Police for 15 days whereas she could have been produced before the High Court the very next day. The Court held that this had been deliberately done by the 1st respondent Police Officer. She was granted relief under Article 13(1) as she had not been informed of the reason for her arrest. The petitioner however did not obtain any relief for wrongful detention and remand as this was in consequence of a judicial order.

On a consideration of the above cases it would appear to be well established that where an action complained of is in consequence of the wrongful exercise of a judicial discretion even on false material furnished to a Judge maliciously, such action will not attract the provisions of Article 126 of the Constitution.

Finally, we shall examine the decision in the case of *Leo Fernando vs. Attorney-General* (1). The petitioner was seated in the well of the Magistrate's Court witnessing a case involving two other parties but pertaining to the estate of which the petitioner was the Superintendent. The Attorney-at-Law appearing for one of the parties had informed Court that the

petitioner had intimidated his client's wife. The Magistrate had thereupon ordered the detention of the petitioner in the Court cell. The petitioner complained of the violations of fundamental rights guaranteed under the Constitution.

Colin Thome, J. having made an exhaustive analysis of the liability of Judges in respect of delict and under the Criminal Law, referred to the interpretation given by this Court to the term 'executive or administrative' action in the cases of *Vel-murugu v. Attorney-General* (5), *Perera vs. U.G.C.* (6) and *Wijetunga v. Insurance Corporation* (7). He cited with approval the observation of Sharvananda, J. (as he then was) in *Wijetunga's* case to the following effect:—

"The question whether the Insurance Corporation is or is not virtually a department of the State or servant of the Government would depend on the provisions of the Insurance Corporation Act, No. 2 of 1961. Hence, we have to analyse this to determine the nature of its function, precise degree of control by the government and whether the amount of control establishes the identity of the Corporation as a part of the Government".

His Lordship concluded that —

"The principle emerging from the judgements is that the test is the nature of the function and degree of control". (vide page 357)

Applying therefore the function and control test, Colin Thome, J. held that as the Magistrate was not subject to Government or Ministerial control his judicial order was not subject to review under Article 126 of the Constitution. His Lordship did not consider the liability of the other respondents independent of that of the Magistrate and dismissed the application against all respondents.

Justice Ranasinghe (as he then was) while agreeing that the order of the Magistrate was a judicial order and that the Mag-

istrate was immune from liability went on to consider the liability of the Prisons Officer. His Lordship pointed out that the Prison Officer had acted entirely in obedience to a direction given by the Magistrate and that it had not been urged that he was influenced by any improper motive. Referring to the decision in *Kumarasinghe v. Attorney-General* (2), Ranasinghe, J noted that the Court had not granted relief in that case for a violation as it had been more the consequence of a wrongful exercise of judicial discretion as a result of a misleading report (page 374) and held that the petitioner's claim must fail. But Ranasinghe, J went on to make the following observation:

"The position of an officer of the State, who in the course of carrying out an order made by a Judge in the exercise of his judicial functions violates the fundamental right of a person, is that he would be free from liability if in doing so, he has acted in good faith, not knowing that the said order is invalid". (vide page 374).

On an analysis of the above cases it would appear that the liability for violation of fundamental rights in consequence of judicial orders had been settled by the decisions of this Court, in *Kumarasinghe v. Attorney-General* (2), *Dayananda v. Weerasinghe* (3), and *Dharmatilleke v. Abeyanayake and Others* (4).

This Court, in all these cases has not severed the liability of Ministerial officers as *distinct* from the judicial order to which the act complained of was referable. Ranasinghe J, has approved the test adopted in *Kumarasinghe v. Attorney-General* (2), and as such his views expressed in regard to the liability of a Ministerial Officer who acts *mala fide* in execution of a judicial order appear to be obiter. 9

We therefore prefer to rest our decision on, the view hithertofore expressed by this Court that a violation arising in consequence of a judicial order even if maliciously obtained, would not attract liability under Article 126 of the Constitu-

tion. The obiter dicta of Ranasinghe, J. would merit consideration by a Fuller Bench.

In the case of *Saman v. Leeladasa and another* (8) Amerasinghe, J (with His Lordship Ranasinghe, C. J. agreeing) followed the opinions hitherto expressed by this Court and held that the basis of the liability of the State for violations of fundamental rights by its officers was *sui generis* and not delictual. Seizing upon this, learned counsel for the petitioner advanced the argument that the fact that a ministerial officer acts in carrying out the order of a Court is relevant only when determining the liability of the State Officer in the sphere of tortious liability of the State for the act of the officer in respect of the violation of a fundamental right.

In *Saman's* case the petitioner stated that when he was in prison, he had occasion to bathe at a water tank situated close to his cell. He was assaulted by a Prisons Officer stating that he had no right to bathe there at that time. He complained that the fundamental right guaranteed to him under Article 11 of the Constitution had been violated on the ground that the assault constituted torture or cruel inhuman or degrading treatment. State Counsel who represented the State sought to argue that the act of assault was an unauthorised act and that therefore the State was not liable. Hence, the question arose as to the principles upon which the State could be held liable for the acts of an officer where such acts had not been expressly authorised. Amerasinghe, J followed the views previously expressed by this Court and held that it was a *sui generis* liability and that therefore the issue could not be resolved by the application of the principle of master and servant liability in the law of torts. He held that, on that basis of liability, the act complained of was sufficiently connected with the performance of the lawful functions of the Prison Officer concerned and as such the State was liable. Fernando, J whilst differing as to the basis of the liability of the State, nevertheless held that the State was liable on the facts of that case.

Hence, it would appear that the question which arose in that case did not relate to the distinction between executive or administrative action and a judicial act but as to whether the act complained of was sufficiently proximate to the performance of the Officer's functions and the views expressed in regard to the basis of State liability related to that particular question. We are confronted with a different issue in this case and there is no reason to depart from the view hitherto taken by this Court on this issue.

In view of the opinion we have already formed that the question of malice is irrelevant, we do not propose to comment on the facts relied upon by the petitioner in inviting us to draw any inference that the conduct of the 4th and 5th respondents have been motivated by malice.

We wish to observe however that Magistrates and Police Officers alike should pay scrupulous attention to the observance of the statutory pre-condition for the issue of process conferring investigative powers on the Police. For the above reasons we dismiss the application. We make no order for costs.

H. A. G. DE SILVA, J. — I agree.

DHEERARATNE, J. — I agree.

RAMANATHAN, J. — I agree.

Application dismissed.