

**ORGANIZATION OF PROTECTION OF HUMAN RIGHTS AND  
RIGHTS OF INSURANCE EMPLOYEES AND OTHERS**

**v**

**PUBLIC ENTERPRISES REFORM COMMISSION AND OTHERS**

SUPREME COURT

DR. SHIRANI BANDARANAYAKE, J.

DISSANAYAKE, J.

SOMAWANSA, J.

FR 385/2003

JUNE 11, 2007

JULY 16, 19, 31, 2007

*Fundamental rights – Article 12, Constitution – Executive or administrative action? – Tests? – Conversion of Public Corporations and Government Owned Business undertakings into Public Companies Act – No. 23 of 1987*

The two petitioners – trade unions – which represented all the employees of the 2nd respondent Sri Lanka Insurance Company Ltd (SLIC Ltd) and the 3rd petitioner an employee of SLIC Ltd, had contended that the decision of the 2nd respondent SLIC Ltd., to retire employees who have reached the age of 55 years on the basis of the letters of retirement already issued and or on the basis of criteria other than fitness of the employee to work would be an infringement of Article 12 (1). It was also contended that the right of employees of the 2nd respondent to extension of service beyond the age of 55 years was a right enjoyed not only when it was a State owned corporation but also when it was converted into a share based public company under Act 23 of 1987, and that the employees have always had the right to request for extension of service after 55 years up to 60 years of age.

The respondent contended that, the refusal of the petitioners' extension of service do not constitute executive or administrative action.

**Held:**

*Per Dr. Shirani Bandaranayake, J.*

"The constitutional guarantee of fundamental rights are directed against the State and its organs, however there is no definition of executive or administrative action in the Constitution, its definition is postulated by the decisions of this Court which have been arrived at after several deliberations at various stages through majority and dissenting judgment".

- (1) Except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated there are no share of 2nd respondent SLIC Ltd., held by the Government – SLIC Ltd., did not have a single Director representing the Government in its Board of Directors. No financial assistance is being provided to the 2nd respondent SLIC Ltd., by the Government and it does not enjoy a State conferred or State protected monopoly.
- (2) It is evident that the 2nd respondent – SLIC Ltd. is not an instrumentality or an agency of the Government and there is no deep and pervasive Government control over the 2nd respondent – since the signing of the share sale and purchase agreement on 11.04.2003.

Per Dr. Shirani Bandaranayake, J.

"The percentage of the share capital of the relevant institution held by the Government the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action, as a consideration of all the circumstances it is apparent that there is no state control over the 2nd respondent and it is not an instrumentality or an agency of the Government".

**APPLICATION** under Article 126 of the Constitution on a preliminary objection taken.

**Cases referred to:-**

- (1) *Leo Samson v Sri Lanka Air Lines Ltd and others* 2001 Sri LR 914
- (2) *Ajay Hajia v Khalid Mujib* AIR 1981 SC 487
- (3) *S. C. Perera v U. G. C.* FRD Vol. 103
- (4) *Velmurugu v Attorney-General* 1981 1 Sri LR 406
- (5) *Mariadas v Attorney-General* FRD Vol. 11 397
- (6) *Ratnasara Thero v Udugampola Superintendent of Police* 1983 1 Sri LR 461
- (7) *Gunawardane v Perera* 1983 1 Sri LR 305
- (8) *Wijetunga v Insurance Corporation* 1982 1 Sri LR 1
- (9) *Chandrasena v Paper Corporation* FRD Vol 11 281
- (10) *Rajaratne v Air Lanka Ltd.* 1987 2 Sri LR 128
- (11) *Rajanathan State Electricity Board Jaipur v Mohanlal* AIR 1967 SC 1857
- (12) *Sukhder Singh v Bhagatram* AIR 1975 SC 1331

- (13) *In re R. D. Shetty International Airport Authority of India* All IR 1979 SC 1628
- (14) *Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd and others* 2001 1 Sri LR 365

*Batty Weerakoon with Chamantha Weerakoon Unamboowe* for petitioner.  
*S. L. Gunasekera with Priyantha Jayawardena* for 2nd respondent.  
*Nerin Pulle, SSC* for 1st and 3rd to 6th respondents.

December 12, 2007

**DR. SHIRANI BANDARANAYAKE, J.**

The 1st and 2nd petitioners are two trade unions, duly registered under the Trade Union Ordinance, which represent all the employees of the 2nd respondent and the 3rd petitioner was an employee of the 2nd respondent. The petitioners stated that the employees of the 2nd respondent have always had the right to request for extensions of service after the age of 55 years up to 60 years of age. This, according to the petitioners, had been the practice from the time of the establishment of the Insurance Corporation of Sri Lanka. The petitioners alleged that the right of employees of the 2nd respondent to extensions of service beyond the age of 55 years was a right they enjoyed not only when it was a state owned Corporation, but also when it was converted into a share-based Public Company under Act, No. 23 of 1987. Accordingly the petitioners submitted that by the decision of the 2nd respondent to retire employees, who have reached the age of 55 years on the basis of the letters of retirement already issued and/or on the basis of criteria other than fitness of the employee to work considering the health and service record, irremediable loss would be caused to the said employees and would be an infringement of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

When this matter was taken for hearing several preliminary objections were raised by the learned Senior State Counsel for the 1st, 3rd, 4th, 5th and 6th respondents and the learned Counsel for

the 2nd respondent. Learned Senior State Counsel, accordingly took up the following preliminary objections:

01. The refusal of the petitioners, extensions of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution; and
02. This application is time barred.

Learned Counsel for the 2nd respondent, whilst associating himself entirely with the aforementioned preliminary objections also raised the following preliminary objections:

03. The 1st and 2nd petitioners are Trade Unions which do not have corporate personality and therefore have no fundamental rights guaranteed to them by the Constitution;
04. the 3rd petitioner had made an application to the Labour Tribunal which granted him compensation in a sum of Rs. 260,850/- and that order was set aside in appeal by High Court of the Western Province and therefore he is not entitled to any relief in terms of section 31B(5) of the Industrial Disputes Act;
05. Since there is no allegation whatsoever of the violation of a fundamental right of any person by the 2nd respondent, the petitioners cannot be granted any relief against the 2nd respondent; and
06. Article 126 only permits a petitioner to make an application in respect of the violation of a fundamental right of such petitioner and relief only in respect of such petitioner.

At the hearing it was agreed that out of the aforementioned preliminary objections only the items No. 01, 02 and 03 would be taken into consideration.

**The refusal of the petitioners extension of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution.**

Learned Senior State Counsel contended that on several grounds it is evident that this application should be dismissed *in*

*limine*, as the impugned decision of the 2nd respondent to refuse extensions of service to its employees and more specifically to the 3rd petitioner, is clearly a decision outside the scope of executive or administrative action in terms of Article 126 of the Constitution. Accordingly his position was that the 1st and 3rd to 6th respondents have no control as the 2nd respondent has ceased to be an agency of the Government.

Learned Senior State Counsel specifically submitted that since 11.04.2003, upon the signing of the Share Sale and Purchase Agreement, the Government of Sri Lanka ceased to have any control and/or authority in the management of the 2nd respondent. Moreover, since 11.04.2003 there was not even a single Director representing the Government in the Board of Directors of the 2nd respondent Company.

The contention of the learned Counsel for the petitioners in this regard was based on the submission made by the 2nd respondent in its objections at paragraph 3.1, where it was stated that,

*"The entire case of the petitioners..... is founded upon the alleged conduct of the 2nd respondent in refusing extensions of service to the 3rd petitioner and other unnamed and unidentified employees of the 2nd respondent.... which according to the petition itself occurred in June 2003 while the 'privatization' took place in April 2003".*

Based on the aforementioned position, learned Counsel for the petitioners contended that this statement projected a patently false position. It had been the understanding of the petitioners that the infringement of their fundamental right in terms of Article 12(1) of the Constitution had commenced with the privatization of the Sri Lanka Insurance Corporation Ltd., and was revealed to the petitioners only by the 1st respondent's letter dated 07.07.2003 (P26). Accordingly the petitioners' contention was that the sale of the State's 90% of shares of the 2nd respondent by the Government through the 1st respondent under the Public Enterprises Reform Commission Act, that necessary steps to protect the rights of the employees of the Company to security of service, which included the right to be considered for yearly extensions of service after they had completed 55 years of age

(as amended later to 57 years), has not been taken.

Having stated the position taken by the respondents and the petitioners let me now turn to consider whether the refusal of the petitioners' extension of service constitute executive or administrative action within the meaning of Article 126 of the Constitution.

The 2nd respondent's affidavit is quite revealing in this regard as it contains the relevant details pertaining to pre 2003 and post 2003 position. Accordingly, the 2nd respondent was initially incorporated in terms of the Insurance Corporation Act, No. 2 of 1961 and was known as the Insurance Corporation of Ceylon. The status of the 2nd respondent had changed in 1993 as it was converted into a company incorporated under the Companies Act in terms of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987. Since the conversion, the 2nd respondent was known as the Sri Lanka Insurance Corporation Ltd.

A Director of the 2nd respondent had averred in his affidavit that since the said incorporation in 1993 until 11.04.2003, the 2nd respondent was wholly owned by the Government of Sri Lanka.

The contention of the respondents was that this position changed on 11.04.2003 with the Government of Sri Lanka entering into an agreement for the sale of shares of the 2nd respondent with Milford Holdings (Pvt.) Ltd., Greenfield Pacific E. M. Holdings Ltd., The Distilleries Company of Sri Lanka Aitken Spence and Co. Ltd., and Aitken Spence Insurance (Pvt.) Ltd. (2R1). Accordingly the Government of Sri Lanka had sold 45 million shares representing 90% of the issued share capital of the 2nd respondent on 11.04.2003 to Milford Holdings (Pvt.) Ltd and Greenfield Pacific E. M. Holdings Ltd. in terms of the agreement 2R1. Under the said agreement, provision was also made to give an option to the permanent employees of the 2nd respondent to purchase the balance 10% of the issued shares of the 2nd respondent. Such quantity of shares, which were not purchased by the said employees were to be purchased by the said Milford Holdings (Pvt.) Ltd., and Greenfield Pacific E.M. Holdings Ltd., and until such

time the said shares were purchased by the employees of the 2nd respondent and/or the said two Companies, the Government of Sri Lanka were to retain ownership of the said 5 million shares. Further, provision was made in the said agreement that the Government of Sri Lanka,

*"shall have no special right to the Company (i.e. the 2nd respondent) (including without limitation the right to nominate Directors of the Company), but the seller (i.e. the Government of Sri Lanka) be entitled to exercise the voting rights attached to such employee shares."*

Accordingly out of the said balance of 10% of shares, 0.1229% (61,441 shares) were opted to be taken as shares by the employees and 9.8336% (4,916,807 shares) were purchased by the Millford Holdings (Pvt.) Ltd., the proceeds of which had been distributed among the employees. The balance 0.0435% (21,750 shares) was retained by the Secretary to the Treasury in respect of disputed claims to shares and the shares, which would be allocated to employees against whom disciplinary inquiries were pending, in the event of them being exonerated. The said Director of the 2nd respondent had further averred in his affidavit that after 11.4.2003 when 90% of the issued share capital of the 2nd respondent was sold to the aforementioned two Companies, the Government of Sri Lanka ceased to have any control in the management of the 2nd respondent (except to the extent that it had the voting powers ordinarily enjoyed by any shareholder of a Company of limited liability) and did not even have a Director representing it on the Board of Directors of the 2nd respondent.

On a consideration of the aforementioned circumstances, the question arises as to whether the 2nd respondent can be regarded as an agency and/or institute or instrumentality of the Government after 11.04.2003. Supporting his contention that since 11.04.2003, the 2nd respondent had ceased to be an agency or an instrumentality of the Government, learned Senior State Counsel relied on the decision in *Leo Samson v Sri Lankan Air Lines Ltd. and Others*<sup>(1)</sup>.

In that matter the petitioners had complained of the termination of service and posting of an officer as Manager, Kuwait by the Sri Lanka Air Lines Ltd., which in their view was violative of Article 12(1)

of the Constitution. A preliminary objection was raised on behalf of the Sri Lanka Air Lines Ltd., that consequent to the shareholder agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka, the impugned acts do not constitute executive or administrative action. Further it was stated that the amended Memorandum and Articles of Association, the business of the Company was to be conducted by a Board of Directors having 7 members, 4 of whom were appointed by the Government and the other 3 members were appointed by Emirates, which number included the Managing Director. It was held by a Divisional Bench of this Court that on a consideration of the provisions of the Memorandum and Articles of Association and the shareholders Agreement that the control and authority over the business of the Company was vested in the investor. Applying the test of government agency or instrumentality, and referring to the decision of Bhagwati, J. (as he then was) in *Ajay Hasia v Khalid Mujib*<sup>(2)</sup>, Ismail, J. in his judgment (*supra*) stated that,

*"... it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement... that the Government has lost the 'deep and pervasive' control exercised by it over the Company earlier. The action taken by Sri Lankan Airlines cannot now be designated 'executive or administrative action'."*

The Constitutional guarantees of fundamental rights are clearly directed against the state and its organs *S. C. Perera v University Grants Commission*<sup>(3)</sup>. According to Article 17 of the Constitution,

*"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....."*

However, there is no definition of executive or administrative action in the Constitution. Its definition is postulated by the decisions of this Court, which has been arrived at, after several deliberations at various stages through majority and dissenting judgments *Velmurugu v Attorney-General*<sup>(4)</sup>, *Mariadas v Attorney*



*Generaf*<sup>(5)</sup>, *Ratnasara Thero v Udugampola, Superintendent of Police*<sup>(6)</sup>, *Gunawardene v Perera*<sup>(7)</sup>.

The decision in *Wijetunga v Insurance Corporation*<sup>(8)</sup> could in this context be cited as a case in point, where serious consideration was given to the question of the relationship between the then Insurance Corporation and the State. Referring to this question Sharvananda, A.C.J. (as he then was) stated that,

*"Is it a Department of Government or servant or instrumentality of the State? Whether the Corporation should be accorded the status of a Department of Government or not must depend on its Constitution, its powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions. For determining the integral relationship between the State and the Corporation we have to examine the provisions of the statute by which the Corporation has been established."*

In *Wijetunga's* case (*supra*), the Supreme Court, after considering the provisions of the Insurance Corporation, Act, No. 2 of 1961, took the view that even if the functional test or governmental control test is applied, the Corporation cannot be identified as an organ of the State and its action cannot be designated 'executive or administrative' action in terms of Articles 17 and 126 of the Constitution.

Following the decision in *Wijetunga v Insurance Corporation* (*supra*), a similar view was taken in *Chandrasena v Paper Corporation*<sup>(9)</sup>, where it was held that, in terms of Act, No. 49 of 1957, the Paper Corporation was not an instrumentality of the government for the action in question to come within the scope of 'executive or administrative action'.

In *Rajaratne v Air Lanka Ltd.*<sup>(10)</sup>, Atukorale, J. referred to several decisions of our Supreme Court and of the Indian Supreme Court in deciding that Air Lanka was an agent or organ of the Government and its action could be designated as executive or administrative action for the purpose of granting relief in terms of Article 126 of the Constitution.

Considering the test applicable in determining, whether a particular institution would come within the meaning of executive or administrative action in terms of Article 126 of the Constitution, it would be of paramount importance to examine, briefly the decisions in *Rajanthan State Electricity Board, Jaipur v Mohanlal*<sup>(11)</sup>, *Sukhder Singh v Bhagatram*<sup>(12)</sup> and *Ajay Hasia v Khalid Mujib Schravardi* (*supra*).

In *Rajanthan State Electricity Board, Jaipur* (*supra*) the question, which arose was whether the Rajanthan Electricity Board was an authority within the meaning of 'other authorities' in terms of Article 12 of the Indian Constitution. Article 12 of the Indian Constitution states that,

*"In this part, unless the context otherwise, requires, 'the State' includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."*

Considering the question at issue Bhagwati, J. (as he then was), delivering the majority judgment held that the phrase 'other authorities' included all statutory authorities on whom powers are conferred by law.

In *Sukhder Singh v Bhagatram Sardar* (*supra*) the question which arose was whether the Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12 of the Indian Constitution. Considering the issue at hand, Mathew, J., expressed the view that, in order to answer the question, it would be necessary to ascertain for whose benefit the Corporations were carrying on their business and stated that,

*"When it is seen from the provisions of that Act that on liquidation of the Corporation, its assets should be divided among the shareholders, namely, the Central and State governments and others, if any, the implication is clear that the benefit of the accumulated income would go to the Central and State governments."*

The position taken by Mathew, J., in Sukhder Singh (*supra*) was cited with approval by Bhagwati, J., (as he then was) in *Ajay Hasia v Khalid Mujib* (*supra*), where the Court considered whether a society registered under the Societies Registration Act is an 'authority' falling within the definition of 'state' in terms of Article 12 of the Indian Constitution. In the process of considering this question, Bhagwati, J., (as he then was) summarised the relevant tests, which were culled out from the decision in *R. D. Shetty International Airport Authority of India*<sup>(13)</sup> stating that,

*"These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution."*

The said tests as stated by Bhagwati, J. (as he then was) are as follows:

- (a) ... if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government;
- (b) where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character;
- (c) it may also be a relevant factor ... whether the Corporation enjoys monopoly status which is the State conferred or State protected;
- (d) existence of 'deep and pervasive' State control may afford an indication that the Corporation is a State agency or instrumentality;
- (e) if the functions of the Corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government; and
- (f) specifically, if a department of the Government is transferred to a Corporation it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

Having stated the Indian decisions in relation to the matter in issue and specially the tests identified by the Indian Supreme Court, let me now turn to consider the question in hand pertaining to this application.

As stated earlier, except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated, there are no shares of the 2nd respondent held by the Government. In Leo Samson's case (*supra*), where this Court had held that the acts of Sri Lankan Airlines Ltd. do not constitute executive or administrative action, Emirates had acquired only 26% of the shares although they had agreed to purchase 40% of the shares of Air Lanka.

Moreover, in terms of the amended Memorandum and Articles of Association of the Sri Lankan Airlines Ltd., the business of the Company was to be conducted by a Board of Directors having seven (7) members out of which four (4) were approved by the government.

Learned Senior State Counsel for the 1st and 3rd to 6th respondents submitted that the 2nd respondent did not have a single Director representing the Government in the Board of Directors of the 2nd respondent. Furthermore, it was stated that, no financial assistance is being provided to the 2nd respondent by the Government and that it does not enjoy a State conferred or State protected monopoly status.

In the circumstances, on the basis of the test stipulated in International Airport Authority of India (*supra*), it is evident that the 2nd respondent is not an instrumentality or agency of the Government and there is no deep and pervasive Government control over the 2nd respondent since the signing of the Share Sale and Purchase Agreement on 11.04.2003 (2R1).

Our attention was also drawn to the decision in *Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd. and Others*<sup>(14)</sup> where this Court had held that the State had the effective ownership and control over the Sri Lanka Insurance and Robinson Hotel Co. Ltd.

It is to be clearly borne in mind that *Jayakody (supra)* was decided in 2001, prior to the privatization of the 2nd respondent Corporation. For the purpose of the present application what is relevant would be the Share Sale and Purchase Agreement dated 11.04.2003 (2R1) which clearly stipulates that except for the 0.0435% of share retained by the Secretary to the Treasury, the rest of the shares were purchased by the 2nd respondent.

Thus it is to be noted that since 11.04.2003, the character of the the then Sri Lanka Insurance had been changed from its previous status and a comparison suggestive of State control based on the position of the 2nd respondent prior to 11.04.2003 cannot be considered for the purpose of this application.

The percentage of the share capital of the relevant institution held by the Government, the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution, in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action contemplated in terms of Article 126 of the Constitution. On a consideration of all the circumstances of this application it is apparent that there is no State control over the 2nd respondent and it is not an instrumentality or an agency of the Government.

In such circumstances I uphold the preliminary objection raised by the learned Senior State Counsel for the 1st and 3rd to 6th respondents with which the learned Counsel for the 2nd respondent associated himself entirely that the refusal of the petitioners' extensions of service does not constitute executive or administrative action within the meaning of Article 126 of the Constitution.

Since the said preliminary objection has been upheld I see no reason to indulge in an examination of the other preliminary objections raised by learned Counsel for the respondents.

For the reasons stated above, this application is dismissed *in limine*.

I make no order as to costs.

**DISSANAYAKE, J.**                    - I agree.

**SOMAWANSA, J.**                    - I agree.

*Application dismissed.*