WICKREMATUNGA
v.
ANURUDDHA RATWATTE AND OTHERS

SUPREME COURT
AMERASINGHE, J.,
WIJETUNGA, J. AND
GUNASEKERA, J.
S.C. APPLICATION NO. F.R. 228/96
NOVEMBER 7TH, 1997.

Fundamental Rights – Agreement for dealership in petroleum products – Termination of agreement – Articles 12 (2) and 14 (1) (g) of the Constitution – Executive or Administrative action – Distinction between "Private" and "Public" law matter.

The petitioner was a "Dealer" in petroleum products appointed by the 2nd respondent Ceylon Petroleum Corporation subject to terms and conditions contained in an agreement made on 16.3.1988. He was carrying on business at the Lanka Filling Station, Narahenpita. According to the petitioner, on 12.1.1996 agents of the Corporation arrived at the Filling Station and ordered the employees of the petitioner to leave the premises. On hearing about it, the petitioner visited the Filling Station when he was served with a letter stating that his appointment as a Dealer had been terminted. The Corporation pleaded the following grounds in defence of the termination.

(a) The agreement was terminated for good cause as set out in the affidavit of the Corporation including alleged misconduct, lapses and malpractices on the part of the petitioner, in violation of the terms and conditions of the agreement.

(b) The agreement was terminable for default without notice and without assigning any reason whatsoever.

(c) The activities of the Corporation did not constitute "Executive or Administrative action" within the ambit of Articles 17 and 126 of the Constitution.

(d) The termination of the agreement was a matter of "private" and not "public" law; hence it was not subject to constitutional restrictions relating to the fundamental rights and freedoms.

Held:

1. The Corporation had no cause to terminate the agreement; the alleged malpractices were totally without foundation; and the allegations of misconduct and lapses have not been borne out by the documents produced in support of the allegations.

2. The power to terminate the agreement without notice and without assigning any reason did not mean that the terms of the agreement permitted the Corporation to terminate the agreement merely because it was minded to do so. A public corporation must act in good faith and act reasonably. The concept of unfettered discretion is inappropriate to a public authority.

3. Having regard to the degree of state control over the Corporation and the nature of its functions and powers, the Corporation is an instrumentality or agent of the government subject to constitutional restraints pertaining to fundamental rights and freedoms.

4. "Law" in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct. In the context, whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements, in particular to those set out in Article 12 even in the sphere of contract; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, the aggrieved party cannot be confined to his remedy under the law of contract.

5. The termination of the agreement was arbitrary, discriminatory on account of political opinion and violative of the petitioner's rights under Articles 12 (2) and 14 (1) (g) of the Constitution.

Cases referred to:

1. *Westminster Corporation L. & N.W. Railway* (1905) A.C. 426, 430.
2. *Sevenoaks DC v. Emmett* (1979) 39 P & CR 404.
3. *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) A.C. 997, 1032, 1053, 1061.
4. *Village of Arlington Heights v. Metropolitan Housing Development Corporation* 429 U.S. 252, 97 S.Ct. 555, 50 L. Ed. 2d. 450 (1977).
5. *Ramana v. International Airports Authority of India* AIR 1979 S.C 1628.
6. *Ajay Hasia v. Khalid Mujib Air* 1981 S.C. 487.
7. *Burton v Wilmington Parking Authority* 365 U.S. 715, 815, S. Ct. 856, 6L. Ed. 2d. 45 (1961).
8. *Flagg Brothers Inc., v. Brooks* 436 U.S. 149, 98 S. Ct. 1729 56 L. Ed. 2d 185 (1978).
9. *Terry v. Adams* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953).
10. *Rahuma Umma v. Berty Premalal Dissanayake* (1996) 2 Sri L.R 293.
11. *Deshapriya and another v. Municipal Council, Nuwara Eliya and others* (1995) 1 Sri LR 362.
12. *Faiz v. Attorney-General and others* (1995) 1 Sri L.R 372.
13. *Upaliratne v. Tikiri Banda and others* (1995) 1 Sri L.R 165.
14. *Marsh v. Alabama* 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).
15. *Evans v. Newton* 382 U.S. 296, 86 S. Ct. 486, 15 L Ed. 2d. 373 (1966).
16. *Jackson v. Metropolitan Edison Co.* 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).
17. *Memphis Light, Gas and Water Division v. Craft* 436 U.S. 1, 98 S. Ct. 1554, 56L. Ed. 2d. 30 (1978).
18. *Dahanayake v. De Silva* (1978 - 79 - 80) Sri L.R 47, 53 - 54.
19. *Sukhdev Singh v. Bhagatram* A.I.R 1975 S.C. 1331.
20. *Somi Prakash v. Union of India* A.I.R 1981 S.C. 212.
21. *Rendell - Baker v. Kohn* 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed 2d. 418 (1982).
22. *Kuruppuge Don Somapala Gunaratne and others v. Ceylon Petroleum Corporation and others* S.C. Application No. 99/96, S.C. Minutes 31 July 1996.
23. *Ratmalana Electorate Development Foundation v. Ceylon Petroleum Corporation and others* S.C. 97/96, S.C. Minutes 1 August, 1997.
24. *Basheshar Nath C.I.T. Delhi and Rajasthan* (1959) Supp. I S.C.R 528, 551.
25. *Perera v. Jayawickrema* (1985) 1 Sri L.R 285, 301.
26. *Wijenayake v. Air Lanka* (1990) 1 Sri L.R 293.
27. *Wijeratne v. The People's Bank* (1984) 1 Sri L.R 1, 10, 13.
28. *Roberts and another v. Ratnayake and Others* (1986) 2 Sri L.R 36.
29. *C. K. Achutan v. State of Kerala* A.I.R 1959 S.C. 490.
30. *Akbar Ahad v. State of Orissa* 1971 Orissa 207.
31. *Bal Krishnan v. The State of Himchal Pradesh and others* A.I.R 1975 Himchal Pradesh 10, 34.
32. *Radhakrishna Agrawal v. Bihar* (1977) 3 S.C.R. 249.
33. *SmithKline Beecham Biologicals S.A. and another v. State Pharmaceutical Corporation and Others* (1997) 3 Sri L.R 20.

34. *Lugar v. Edmonson Oil Co.* Inc. 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d., 482 (1982).
35. *Yick Wo v. Hopking* 118 U.S. 356 (1886).
36. *Plyler v. Doe* 457 U.S. 202; 102 S. Ct. 2382, 72 L. Ed. 786 (1982).
37. *Palihawadana v. Attorney-General F.R.D.* Vol. 1, 1.
38. *Jayanetti v. Land Reform Commission* (1984) 2 Sri L.R 172, 184.
39. *Shelly v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).
40. *Amzathul Zareena and others v. The National Housing Development Authority S.C. Application* 283 – 293/94 S.C. Minutes 22 June, 1995.
41. *Nanayakkara v. Bandusena and others S.C. Application* 572/95 S.C. Minutes 1 February, 1996.
42. *Peiris v. De Silva and others S.C. Application* 221/95 S.C. Minutes 27 March, 1996.
43. *Gunasinghe v. Divisional Superintendent of Post Office, Matale,* S.C. Application 4/96 S.C. Minutes 26 July 1996.
44. *Gunaratne and others v. Ceylon Petroleum Corporation and others* S.C. Application No. 99/96 S.C. Minutes 31 July, 1996.
45. *Gamini Atukorale and others v. De Silva (I.G.P.) and others* (1996) 1 Sri L.R 280.
46. *Priyangani v. Nanayakkara and others* (1996) 1 Sri L.R 399.
47. *Athukorala v. Jayaratne and others* (1996) 2 Sri L.R 413.
48. *Krishna Mining Co. (Ceylon) Ltd., v. Janatha Estates Development Board and others* (1996) 2 Sri L.R 209.
49. *Chandrasena v. Kulatunga and others* (1996) 2 Sri L.R 327.
50. *Tennakoon v. De Silva (I.G.P.) and others* (1997) 1 Sri L.R 16.
51. *Manage v. Kotakadeniya* (P. Ms. General) and others (1997) 1 Sri L.R 204.
52. *F.C.I. v. Kamedhenu Cattlefeed Industries* (1993) 1 S.C.C. 71.
53. *Srilekha Vidarthi v. State of U.P.,* A.I.R (1991) S.C. 537, 550.

APPLICATION for relief for infringement of fundamental rights.

Romesh de Silva, PC with *Geethaka Gunawardena* for the petitioner.

K. Sripavan DSG for the 1st and 4th respondents.

Faisz Musthapha, PC with *Kushan de Alwis* and *Sanjeewa Jayawardena* for the 2nd respondent.

A. A. de Silva with *G. D. Piyasiri* for the 3rd respondent.

Cur. adv. vult.

December 17, 1997.

AMERASINGHE, J.

The second respondent, the Ceylon Petroleum Corporation, (hereinafter referred to as the 'Corporation') appointed the petitioner a "Dealer" in petroleum and petroleum products at the Lanka Filling Station, 570, Elvitigala Mawatha, Narahenpita, (hereinafter referred to as "the Filling Station"). The terms and conditions of the appointment were set out in a written document made on the 16th of March, 1988 (hereinafter referred to as 'the Agreement').

Although since 1988 the petitioner had been paying by cheque for the items purchased from the Corporation, on the 11th of July, 1995, the Area Manager of the Corporation had telephoned the petitioner and informed him that the credit facilities hitherto enjoyed by him would no longer be available.

The petitioner, therefore, continued to function as a Dealer, purchasing the products with cash. On the 12th of January, 1996, agents of the Corporation – the petitioner states it was a "large group"; the Manager (Marketing) of the Corporation says there were only three officials of the Corporation, including the Area Manager – arrived at the Filling Station and ordered the employees of the petitioner to leave the premises. When he heard of this, the petitioner went to the Filling Station. The petitioner was then given a letter by the Area Manager of the Corporation stating that his appointment as a Dealer had been terminated. The petitioner states in his affidavit, that, he left the Filling Station. The Manager (Marketing), in paragraph 14 of his affidavit states that the premises were "handed over to the Area Manager without protest". The Corporation in its written submissions states: "The petitioner's agents had relinquished the possession of the filling station peacefully without protest". The petitioner was required by clause 29 of the agreement to hand over peaceful possession of the premises upon termination of the agreement. As every law abiding citizen respecting the rule of law ought to do, the petitioner left his rights to be decided by a court of law.

On the 9th of February, 1996, the petitioner filed a petition in the Supreme Court alleging that his fundamental rights had been violated. Leave to proceed was granted on the 14th of February, 1996,

in respect of the alleged violations of Articles 12 (2) and 14 (1) (*g*) of the Constitution.

Article 12 (2) states: 'No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds . . ."

The Corporation denies the petitioner's averment that the Agreement was terminated on political grounds. It states that the Agreement was terminated for "good and lawful cause". In response to the petitioner's averment that "no complaint whatsoever was made against him and . . . (that) he received no reprimand from the (Corporation) for his work from 1988 to 1996 January 12th", the Manager (Marketing) of the Corporation specifically denied the petitioner's averment and referred to the fact that "the petitioner had issued several cheques to the (Corporation) . . . which had been returned dishonoured. . ."; and this he says was "much to the financial prejudice of the. . . Corporation". There were seven such cheques; three of them were issued in 1989, two in 1991 and the third in 1994. The Corporation explained that if dishonoured cheques are issued, and the Corporation nevertheless, "in order to ensure that the public is not inconvenienced by the interruption in supply", supplies the errant Dealer with petroleum, "then the (Corporation) incurs the risk of suffering in the event of continued default. Therefore, . . . as a result of a dealer issuing cheques which are dishonoured, the (Corporation) suffers considerable financial prejudice . . ."

The petitioner states that "If ever a cheque was dishonoured the amount of the dishonoured cheque was paid immediately to the (Corporation)." This has not been denied by the Corporation. The case of the petitioner was not one in which he had been supplied petroleum while he was indebted and in which there was a "risk . . . of continued default". In the circumstances, in my view, the allegation of "much . . . financial prejudice" caused to the Corporation by the issue of seven dishonoured cheques over a five-year period, when cash settlements were promptly made, is an unwarranted allegation.

The petitioner further points out that no cheque was dishonoured after 1 December, 1994; that he had continued to transact business with the Corporation without any complaint from the Corporation about his creditworthiness but that on the 11th of July, 1995, without any

reason being given, the facility afforded him to pay by cheque was withdrawn.

The petitioner appealed against the decision to Her Excellency the President. Although the matter had been referred to the Ministry responsible for the Corporation, no action had been taken on the matter, except the acknowledgement of the receipt of the petitioner's appeal. The Corporation sought to justify ignoring the appeal to the President: It maintained that, although clause 2A of the agreement states that "Delivery of petroleum products by the Corporation to the dealer shall be against payment in cash or on such other terms and conditions as the Corporation may, from time to time, determine and intimate by letter to the dealer . . .", yet payment by cash is the "principal form of payment"; "the facility afforded to the petitioner whereby he could pay for his pruchases by cheque instead of cash was a concession granted to him and cannot be claimed as of right."

Admittedly, the decisions to grant the facility was a matter of discretion. Yet, in my view, it was not an arbitrary discretion: It was a discretion to be exercised reasonably, fairly and justly and not exercised merely because the Corporation was minded to do so. The facility granted to the petitioner was a valuable one and its withdrawal should not have been made unless the Corporation had some rational basis for doing so. Even if it had grounds each time a cheque was dishonoured, the Corporation had accepted the cash payments that had been promptly made and continued the facility. There was no cause for complaint between December, 1994 and July, 1995. What was the basis for suddenly withdrawing the facility? Even if the Corporation was not bound to give the petitioner reasons for the withdrawal of the facility, in my view the failure to do so in the circumstances of this case, which I have referred to, point to arbitrariness.

It was submitted by the Corporation that "Even if the statement of the petitioner that the credit facility made available to him was withdrawn by the (Corporation) without a just cause is correct . . . the petitioner cannot seek relief . . . regarding the withdrawal as the same was done on 11. 7. 1995 . . . (and the petitioner has therefore) not come within the time period specified by Article 126 (2) of the Constitution to seek relief regarding the said withdrawal". The relief claimed by the petitioner is with regard to the termination of the

agreement resulting in his not being able to function as a Dealer, and not in respect of the withdrawal of the facility. The withdrawal of the facility is a part of the historical background of the decision of the Corporation that is challenged, namely the termination of the agreement; it is an evidentiary source. The petitioner relies upon it as one of a sequence of events that sheds light on the Corporation's alleged invidious purpose in terminating the agreement.

From the Corporation's point of view, the question of dishonoured cheques was brought in by the Manager (Marketing) to refute the specific allegation of the petitioner that no complaint against him and no reprimand had been made against him from 1988 to January 12, 1996. The Corporation has not established that there was any complaint or reprimand at any time with regard to the matter of dishonoured cheques.

The Corporation also relied on the matter of the dishonoured cheques to justify the termination of the agreement, citing in support the clause of the agreement that stated as follows: "Failure to pay and settle in full all monies due to the Corporation . . . will entitle the Corporation to terminate the agreement without any notice whatsoever." As we have seen, at the time of the withdrawal of the facility, the petitioner was not guilty of having failed to pay and settle any monies due to the Corporation. Indeed, there had been no occasion for complaint on that account during the period of about six months immediately before the withdrawal of the facility. In the absence of an explanation as to why the facility was continued for so many months after the last default without complaint or warning, I am unable to accept the explanation of the Corporation that the sudden withdrawal was related to the defaults committed earlier, for they are too remote and far removed from the termination of the facility to be regarded as the cause for the withdrawal of the facility.

The petitioner's application relates to the termination of the Agreement that brought to an end his occupation and business as a Dealer in petroleum and petroleum products. The petitioner alleged that the sudden termination, without any warning or notice or any reasons being assigned was on account of discrimination on grounds of political opinion. The first and second respondents deny this and state that in terms of clause 12B of the agreement ". . . the Board of Directors may by resolution passed at a meeting of the Board of Directors

terminate the agreement without notice and without assigning any reason whatsoever". The termination was based on a decision of the Board. The Manager (Marketing) explained that the decision of the Board was based upon his recommendation to terminate ". . . the petitioner's dealership on account of various shortcomings in the administration of the outlet including under-delivery of petroleum to consumers and failure to comply with instructions". In its written submissions, the Corporation states as follows:

> "19. In view of the numerous irregularities and offences which had been perpetrated by the petitioner in violation of the terms and conditions of the dealership agreement, the Marketing Manager (sic) of the (Corporation) submitted a Board Paper to the Board of Directors of the (Corporation) recommending the termination of the dealership agreement with the petitioner.
>
> 20. It is respectfully submitted that this measure had become necessary and indeed imperative in view of the highly unsatisfactory record of the petitioner involving the negligent, careless and irresponsible conduct of the dealership operation conducted by the petitioner.
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> 21. In view of the foregoing circumstances, the Board of Directors of the (Corporation) took cognizance of the recommendation made by the Marketing Manager (*sic.*) and passed a resolution to terminate the dealership of the petitioner in terms of clause 12B of the dealership agreement".

There is no evidence that the Board was furnished with any information other than the information contained in the Board Paper. All that is stated in the Board Paper about the petitioner's alleged misconduct is as follows:

> "1. Mr. C. Wickramatunga holds the dealership at the Corporation Controlled Lanka Service Station at Elvitigala Mawatha, Colombo.
>
> 2. In our routine checks in the past, we have observed many shortcomings in the administration and operation of the outlet. Such lapses could be described as under-delivering, suspected malpractices and failure to heed instructions.

3. Disciplinary action could not be taken due to reasons beyond our control.

4. Some of these lapses warranted disciplinary action."

In response to the petition alleging a violation of the petitioner's fundamental rights, the Corporation not only sought to justify the withdrawal of the facility to pay by cheque, but also referred to the fact that the failure to "pay and settle in full all monies due to the Corporation (entitled) the Corporation to terminate the agreement without any notice whatsoever". However, no reference is made in the Board Paper to this matter, despite the fact that the Marketing Manager in his affidavit places great importance on the need for Dealers to issue cheques that will be honoured and draws attention to the fact that clause 2C entitles the Corporation to terminate the agreement without any notice if there is a failure on the part of the Dealer to "pay and settle in full all monies due to the Corporation".

The right to terminate the agreement without notice was contingent upon the condition that the Dealer had failed to pay and settle in full all monies due to the Corporation. The petitioner alleged, and the Manager (Marketing) in his affidavit accepted the fact, that on the date the Board Paper was submitted, which was also the date of the decision of the Board, namely the 11th of January, 1995, the petitioner had deposited a sum of Rs. 444,470 with the Corporation as payment for petroleum products which the Corporation did not deliver to the petitioner. Additionally, the petitioner had to be reimbursed for 10,750 litres of diesel and 4,900 litres of petroleum. The Corporation did, by its cheque dated the 24th of January, 1996, reimburse the petitioner a sum of Rs. 677,190.80 (after, it states, deducting Rs. 50,000 to defray water and electricity dues); but the critically important matter is that at the date of the termination of the agreement, the condition stated in clause 2C, namely that the Dealer shall have failed to pay and settle in full all monies due to the Corporation, was not satisfied: if he owed Rs. 50,000, it was not owed to the Corporation, but to the suppliers of water and electricity – the Ceylon Electricity Board and the National Water-supply and Drainage Board. The bills were issued in the name of the Corporation; but that is another matter. As between the petitioner and the Corporation, if there was a debtor at the relevant date it was not the petitioner, but the Corporation. In the circumstances, the Corporation had no cause to terminate the agreement in terms of clause 2C.

The petitioner states that he was for the first time "confronted with allegations of misconduct, mismanagement and/or fraud" when such allegations were made in the affidavit of the Manager (Marketing), to which was annexed the Board Paper. He goes on to state: "The (Corporation) has never ever complained and/or put me on notice of any allegation of misconduct, mismanagement and/or fraud as set out in (the Manager's) affidavit. I am totally unaware of any allegation contained in the (affidavit of the Manager (Marketing)) and I further state that the said allegations are false and false to the knowledge of the deponent of the said affidavit of the (Corporation) and has been fabricated for the purpose of this case".

The allegations against the petitioner mentioned in the Board Paper are vague. However, the Manager (Marketing), endeavoured to explain what he meant. He stated that the petitioner "had been advised to ensure that under delivery of petroleum does not occur to the prejudice of consumers. However, the petitioner had continued to indulge in this default. I annex hereto marked 2R5, true copies of several 'retail outlet inspection reports' and a report form prepared by officers of the (Corporation) who had inspected the petitioner's retail outlet, from time to time, and who had detected the commission of the aforesaid irregularities".

2R5 comprised six reports: The first is dated 30th March 1990. It is an inspection report relating to eighteen specified items and one other "miscellaneous" category. Additionally, there is a "Remarks and Action to be taken by Dealer" column. In that column it has been observed that the calibration was "found not in correct order. Adjusted and resealed". There is no suggestion that the petitioner was in any way responsible for the defect: item 16 relates to the checking of the calibration of pumps and the verification of seals. There is no finding that the seals had been tampered with. There was a mechanical defect that had been corrected by the inspecting officer who then resealed the pump. There is a report dated 11 January, 1991. Evidently, it had been reported to the Area Manager (West) that there was *over delivery*. After checking the dispensing pumps, the Engineer reported that they were "not over delivering as reported to you". There are four Retail Outlet Reports, similar in form to the 1990 report, dated the 11th of June, 1991, the 3rd of June, 1992, the 26th of November 1992 and the 15th of September, 1993. In all four reports, with regard to calibration, something it seems was found to be "slightly" deficient on each occasion in one or more dispensing pumps. There is no

finding that the seals were tampered with or that the petitioner was in any way responsible for the defect on any occasion. There had been a mechanical defect that had been corrected each time by the inspecting officer who had then resealed the adjusted pump or pumps.

In the circumstances, I am of the view that the allegation that the petitioner was guilty of "malpractices and failure to heed instructions" is totally without foundation. Moreover, it is significant that the Corporation has not produced any report, showing even mechanical defects, let alone grounds for "stern disciplinary action", since September 1993, although when it terminated the agreement in January 1996, it alleged a failure on the part of the petitioner to discharge his duties in the recent past. The statement by the Manager (Marketing) that the petitioner "had been advised to ensure that under delivery of petroleum does not occur to the prejudice of consumers. However, the petitioner had continued to indulge in this default;" his allegation that there were "many shortcomings in the administration and the operation of the outlet"; and that the petitioner was guilty of "under-delivering, suspected malpractices and failure to heed instructions", have not been borne out by the documents he has produced in support of his averments and allegations of misconduct. I have no hesitation in rejecting as false his averments and allegations relating to the so-called "lapses" of the petitioner.

In attempting to justify its action, the Corporation placed great reliance on its authority under Clause 12B of the agreement which states as follows: "If the Dealer does not in the opinion of the General Manager perform his duties and obligations as a Dealer of petroleum products of the Corporation faithfully, diligently and efficiently or if he defaults in complying with the terms, covenants and conditions of this agreement . . . the Corporation shall be entitled to terminate this agreement without any notice whatsoever. The Corporation shall also be entitled to terminate this agreement after three month's notice in writing to the dealer and the Dealer is entitled to terminate this agreement after three month's notice in writing given to the Corporation . . . Notwithstanding the above the Board of Directors may by a resolution passed at a meeting of the Board of Directors terminate the agreement without notice and without assigning any reason whatsoever".

There was nothing to show what the opinion of the General Manager was. The agreement was terminated without three months notice. It was terminated without any notice and without any reason assigned for such termination except the vague allegation that the petitioner had not been conducting his business in the recent past in keeping with the Corporation's expectations. Admittedly, in terms of the agreement, the Board of Directors of the Corporation were entitled to terminate the agreement without notice and without assigning any reason. This does not mean that the terms of the agreement permitted the Corporation to terminate the agreement merely because it was minded to do so. The Corporation seems to have assumed that so long as it terminated the agreement in accordance with the terms of the agreement, its position was unassailable: In my view, the averments in the affidavit of its Manager (Marketing) giving reasons for the actions of the Corporation, both with regard to the withdrawal of the cheque facility and the cancellation of the agreement show a complete misapprehension of the legal duties of the Corporation: It is well settled that a public body, like the Ceylon Petroleum Corporation – a statutory public corporation –, must act in good faith and act reasonably: *Westminster Corporation L. & N.W. Railway*[1]. Such a body must act upon "lawful and relevant grounds of public interest . . .": H. W. R. Wade & C. F. Forsyth, *Administrative Law,* 7th Ed. p. 392. The fact that the action in question was controlled by a contract makes no difference : the Corporation was nevertheless obliged to act reasonably and 'within the limits of fair dealing': *Sevenoaks DC v. Emmett*[2] cited in Wade & Forsyth, *ibid.* It was also obliged to ensure that its powers were exercised in a manner that did not erode the guarantees of fundamental rights and freedoms recognized and declared by the Constitution. I shall refer to these matters again, later on. The question I wish to deal with at this point is the wholly erroneous belief that there is anything like untrammelled discretion when public authorities are conducting their activities. When, as in section 5H of the Ceylon Petroleum Corporation Act, a Government Department or one of its agents or instrumentalities, is said to have 'absolute discretion' it merely means that it is that body and no other that can decide the matter: it does not mean that that body is empowered to do as it may will. A private person is in a different situation. He or she may with impunity act as wished, even, perhaps, out of malice or in a spirit of revenge. "But a public authority may do none of these things unless it acts reasonably and in good faith upon lawful and relevant grounds of public interest. . . . The whole conception of unfettered

discretion is inappropriate to a public authority, which possesses power soley in order that is may use them for the public good": Wade & Forsyth, op. cit. at p. 392.

As for the failure to give reasons, Wade & Forsyth, op. cit. p. 402 observe: "Reasonableness does not require reasons to be stated. The only significance of withholding reasons is that if the facts point overwhelmingly to one conclusion, the decision-maker cannot complain if he is held to have had no rational reason for deciding differently, and that in the absence of reasons he is in danger of being held to have acted arbitrarily". See also *Padfield v Minister of Agriculture, Fisheries and Food*[3].

At the time of the termination of the agreement and the taking over of the Filling Station, the petitioner was not given reasons for the termination of the agreement except that it was alleged that in the recent past he had not been conducting his business in accordance with the expectations of the Corporation. However, there were reasons given by the Manager (Marketing) in response to the petition and affidavit of the petitioner in the matter before this Court. As we have seen, in the proceedings before this Court no rational basis for the termination of the agreement has been adduced. As a result, in my view, the Corporation has failed to establish its claim that the termination of the agreement was for just cause. The allegation of the petitioner that the Corporation had not only acted arbitrarily, but that it had discriminated against him invidiously on account of political opinion has not been successfully challenged.

In terms of the provisions of the agreement, of which the Manager (Marketing) was aware, indeed he quotes them in support of his action and that of the Corporation, it was *the Board* that had to decide by resolution to terminate the agreement with the petitioner. The Board Paper submitted by the Manager (Marketing) after stating that "some of" the petitioner's alleged "lapses warranted stern disciplinary action", went on to state as follows: "Before *such action* was taken *we* inserted a press notice in English and Sinhala dailies on the 11th August, 1995, calling for prospective dealers". (The emphasis is mine).

Five months before the Board could take a decision, the Manager (Marketing), and perhaps others, as the word "we" suggests, had decided that the petitioner's agreement should come to an end; and

steps had been taken before the Board had met on the 11th of January, 1996, to appoint the third respondent to take over the Filling Station. All that the Board was told about the third respondent was as follows: "Miss R.M.S. Ratnayake of No. 1, Punchivilathawa, Vilathawa, Bingiriya, has satisfied all the requisite qualifications to be appointed as a dealer". Nevertheless, the focus of attention in the Board Paper was the appointment of the third respondent: The caption of the Board Paper was: "Appointment of a New Dealer at Lanka Service Station, Elvitigala Mawatha, Narahenpita, Colombo". The Manager (Marketing) stated that the third respondent was "interviewed by a qualified panel of the [Corporation] and found to be suitable". He explained that ". . . it is the practice of the [Corporation] and indeed an imperative step, to appoint a new dealer in the event of an existing dealership being cancelled. This step is imperative on account of the need to ensure that the supply of petroleum to the public and the transport industry remains uninterrupted".

The Filling Station concerned was not the only one in the country or in Colombo; and so, the plea that it was "imperative" that the third respondent or some other person should have immediately taken over from the petitioner to ensure that supplies to the public, ought, perhaps, to be taken with a pinch of salt. Be that as it may, a definite opinion had been formed by the Manager (Marketing) and others, whoever they may have been, that the petitioner's agreement must be terminated; and such an opinion had been formed at least before the advertisement was inserted in August, 1995. In my view, the words "before *such action* was taken" clearly indicate that there was at least an expectation that the Board might, if not a confident assumption that the Board would, terminate the agreement. If at that stage – five months before the Board's decision – it was believed by the Manager (Marketing) and others that petitioner's agreement must be terminated, why was the petitioner not given three months' notice prior to the termination of the agreement in terms of clause 12B of the agreement? Why was the alternative procedure of termination without notice based upon a resolution of the Board of Directors – a procedure obviously intended to provide for urgent action to deal with a serious situation that might have unexpectedly emerged – resorted to? Departures from the normal procedural sequence affords evidence that improper purposes are playing a role in the decision-making process: See *Village of Arlington Heights v Metropolitan Housing Development Corporation*[4]. Why was the petitioner not told what the charges against him were

and called upon to make an explanation, especially when, as the conduct of the Corporation showed, there was no urgency? Because, as we have seen, there were no justifiable charges to make.

As we have seen, the Corporation failed to satisfactorily explain why the petitioner was treated in the way he was. The petitioner states that the explanation is that he was discriminated against on account of political opinion. It was stated by the petitioner that "the Chairman and all Directors of the . . . Corporation are appointed by the first respondent, the Hon. Minister of Irrigation, Power and Energy; . . . the Chairman and the Directors are all political appointees and are politically aligned to the party presently in power, namely the People's Alliance; . . . the Chairman of the (Corporation) is Mr. Anil Obeysekera . . . who is a long-standing supporter of the Sri Lanka Freedom Party and is serving on various Committees and bodies of the Sri Lanka Freedom Party for a considerable period of time; . . . the said Anil Obeysekera is a strong supporter of the Sri Lanka Freedom Party; . . . the Directors of the (Corporation) are Mr. Anil Obeysekera, Mr. I. M. Senarathne Illankoon, Mr. S. M. R. Samarakoon, Mr. Sunil Amaratunga, Mr. Jayaratne . . . (who) were appointed by the first respondent (the Minister) on or after the present government came to power; . . the decision purporting to terminate the dealership and to take over the (Filling Station) are solely motivated by politics as an act of revenge against the petitioner who is a strong supporter of the United National Party; . . . the petitioner is the brother of Mrs. Hema Premadasa; . . . the petitioner had associated closely with the late President Ranasinghe Premadasa; In the circumstances . . . the take over of the (Filling) Station (was) merely on political grounds".

The petitioner alleged that the first respondent, the Minister responsible for the Corporation "influenced and/or pressurized and/or ordered and/or directed and/or caused the (Corporation) to terminate the dealership and to take over possession of the premises".

A Minister appoints the Chairman and Directors to discharge certain duties and functions. It behaves such persons to act in a cautious, responsible and lawful manner in keeping with the Minister's expectations of correctness of behaviour and conduct. If such persons appointed by a Minister betray his trust and do not fulfill the Minister's expectations, the Minister cannot, in my view, merely by reason of the fact that the persons were appointed by him or her, be held

blameworthy for their disappointing behaviour or conduct. Much less is his responsibility for the activities of employees of the Corporation appointed, not by the Minister, but by the Board. The first respondent admits that he appointed the Chairman and Directors of the Corporation; but he states that the Agreement was terminated by the Board of the Corporation and that he "does not interfere with the day-to-day administration of the . . . Corporation". Section 7 of the Ceylon Petroleum Corporation Act empowers the Minister to give the Board general or special directions in writing after consultations with the Board. There was no evidence that the Minister gave the Board any directions on the matter of the termination of the Agreement. I have no hesitation in accepting the Minister's averments.

The petitioner's averment that Mr. Anil Obeysekera, the Chairman of the Corporation, and Mr. I. M. Senaratne Ilankoon, Mr. S. M. R. Samarakoon, Mr. Sunil Amaratunga and Mr. Jayarathne, Directors of the Corporation, were "appointed by the first respondent on or after the present government came to power" is admitted by the Manager (Marketing) in his affidavit. The Chairman and Managing Director of the Corporation, Mr. Anil Jayantha Obeysekera, in his affidavit, states that he "without reservation adopt(s) and subscribe(s) to the averments contained in the affidavit deposed to by Mr. Saliya Unamboowe, Manager, Marketing, of the 2nd respondent Corporation". The petitioner's averment's in his affidavit of the 8th of February, 1996, that "the Chairman and Directors are all political appointees and are politically aligned to the party presently in power, namely the People's Alliance"; that the Chairman was "a long-standing" and "strong" supporter of the Sri Lanka Freedom Party and is serving on various Committees and bodies of the Sri Lanka Freedom Party for a considerable period of time", are denied by the Manager (Marketing) for the reason that he was "unaware" of the correctness of these allegations. The Manager (Marketing) denied that the agreement was terminated for political reasons and stated that the termination was for "good and lawful cause".

In his affidavit, dated the 29th of April, 1996, the petitioner stated that Mr. Obeysekera, "although having occasion to deny the [averments of the petitioner in his affidavit of the 8th of February, 1996, relating to Mr. Obeysekera's alleged political affiliations and activities] has not resolved to do so in his affidavit". Although Mr. Obeysekera did not in his affidavit of the 9th of April, 1996, deny

the petitioner's averments with regard to Mr. Obeysekera's political affiliations and activities, he denied that "the termination of the petitioner's dealership was politically motivated and/or actuated by any extraneous or collateral considerations". Mr. Obeysekera stated that the termination of the agreement "was necessitated for the reasons enumerated in the affidavit deposed to by the Manager, Marketing, of the 2nd respondent Corporation"; and that "the action taken against the petitioner is entirely referable to the petitioner's conduct and the unsatisfactory manner in which he had operated his dealership, and it cannot be maintained that the termination of his dealership was not related to a legitimate objective".

The fact that the Chairman and Directors of the Corporation were appointed by the Minister after the present government came into power, and the fact that the Chairman and the Directors supported a political party whose opinions the petitioner did not share does not necessarily lead to the conclusion that the Chairman and Directors were motivated by political considerations in terminating the agreement with the petitioner. In that connection it is pertinent to observe that if the Chairman and Directors were politically motivated, the petitioner has failed to explain why no action was taken against him from the time they were appointed till January, 1996. In the circumstances, I am of the view that the allegation that the Chairman and the Directors of the Corporation was politically motivated has not been established by the petitioner.

As we have seen, the Manager (Marketing), stated in his Board Paper that "Disciplinary action could not be taken due to reasons beyond our control". This has not been explained by the Manager (Marketing). If it is to be surmised that no action could be taken because the petitioner was a supporter of the political party in power, it does not explain why no action was taken for a considerable period of time after another party came into power – a decisive fact, as we have seen, that redounds to the advantage of the Chairman and the Directors in making my decision whether they were politically motivated. In my view, disciplinary action was not taken because there were no grounds for such action and no other. However, the petitioner, who had carried on business as a Dealer since 1988, found himself in trouble in 1995. The petitioner has an explanation for his woes: In his affidavit dated the 29th of April 1996, the petitioner states that when Mr. H. A. Samaraweera, the Manager (Marketing) retired in

March, 1995, Mr. Saliya Unamboowe was appointed Acting Manager (Marketing). About two months later, Mr. Unamboowe was appointed Manager (Marketing). The petitioner states that Mr. Unamboowe "is a supporter of the People's Alliance and has in fact actively worked in support of the People's Alliance". The averments regarding Mr. Unamboowe's political affiliations have not been denied.

As we have seen, on the 11th of July, 1995, the cheque facility was abruptly withdrawn without good cause. On the 12th of January, 1996, the petitioner's occupation as a Dealer was brought to an end with equal suddenness due to a decision of the Board of the Corporation based upon a paper prepared by the Manager (Marketing) in which he sought the approval of the Board to "terminate the dealership of (the petitioner) and cancel the authority granted to him (under the Ceylon Petroleum Corporation Act and clause 12B of the Agreement) to sell, supply and distribute (certain petroleum and petroleum products.)" although he had no grounds for making the recommendation to terminate the agreement. In fact, as we have seen, although it was the Board that could have decided to terminate the Agreement, the Manager (Marketing), and perhaps some others, had five months before the matter was submitted to the Board decided on what the fate of the petitioner would be and by advertisement sought applications from persons for filling the vacany created by the departure of the petitioner from his Filling Station. The Manager (Marketing) explained that the steps were taken to ensure that there would be no breakdown in supplies of petroleum: but as I have pointed out that was not the only source of petroleum in Colombo: Moreover, if it was known five months earlier that there were valid reasons to terminate the agreement, there was no reason why the normal procedure of giving three months' notice, rather than the extraordinary procedure of summary termination after a resolution of the Board was resorted to: as I have pointed out, as a matter of law, such a step gave rise to a presumption that wrong motives were at work in the decision-making process.

I have no doubt in my mind that the Manager (Marketing) was the moving force behind the termination of the petitioner's agreement and that he was motivated by political considerations. The Corporation appointed him, believed without question his allegations against the petitioner, accepted his recommendations on the question of the termination of the agreement, and decided to speak principally

through him for the Corporation in the matter before us. The only affidavit filed by the Corporation other than the affidavit of the Manager (Marketing) is that of the Chairman of the Corporation. His affidavit was submitted as a document annexed to the affidavit of the Manager (Marketing); and in that affidavit the Chairman of the Corporation states: "I have perused all and singular the several averments contained in the petition and affidavit filed by the petitioner . . . and without reservation adopt and subscribe to the averments contained in the affidavit deposed to by Mr. Saliya Unamboowe, Manager, Marketing, of the . . . Corporation". The Chairman states that he considered the averments in the petitioner's petition and affidavit. Even though he may have, for whatever reason, not investigated the reasons for the recommendations in the Board Paper submitted by the Manager (Marketing) the Chairman, who had an opportunity of calling upon the Manager (Marketing) to clarify his allegations against the petitioner, has decided to accept unequivocally whatever the Manager (Marketing) has stated. In the circumstances, in my view, the Corporation must assume full responsibility for the actions of the Manager (Marketing), who, for the reasons I have given, acted irrationally, in an arbitrary, capricious and invidious manner for political reasons. The Corporation's claim, made through the Manager (Marketing) that the termination was for "good and lawful cause" is in the circumstances, unacceptable.

So much for the facts in the light of the agreement and the legal framework within which the Corporation operated.

I turn now to the "executive or administrative action" issue. The protection for individual rights and liberties contained in the constitution apply only to the actions of certain governmental entities. Articles 17 and 126 of the Constitution require that an aggrieved party must establish that challenged party's activities constituted 'executive or administrative action'. The Corporation submitted that the termination of the agreement was not 'executive or administrative action' within the meaning of Articles 17 and 126 of the Constitution and that the petitioner's application should be rejected. Did the Corporation's activities involve sufficient governmental action so that they are subjected to the values and limitations reflected in the Constitution? Were there sufficient contracts between the government and the Corporation to justify subjecting the Corporation to constitutional limitations? Or is the Corporation incapable of violating the Constitution because it is

not a part of the government? There is no precise formula that has been fashioned that can be applied for recognition of state responsibility on account of 'executive or administrative action'. Owing to the very "largeness" of government, there are a multitude of relationships between government and institutions, and private persons; many permutations and combinations of factual situations are possible. The resolution of the question whether the alleged wrongdoer was capable of 'executive or administrative action' should abide the necessity of deciding the question in a particular case. There are several matters that might be considered in a case; *Ramana v. International Airports Authority of India*[5]; *Ajay Hasia v. Khalid Mujib*[6]. The decision would be reached by 'sifting facts and weighing circumstances', and having regard to the aggregate of relevant facts pertaining to that case: See *Burton v. Wilmington Parking Authority*[7]; *Flagg Brothers Inc., v. Brooks*[8]; *Ramana* (supra) at p. 1642. Justice Frankfurter said: "The vital requirement is State responsibility – that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power . . ."; *Terry v. Adams*[9]. Where there is an infusion of State power, even the conduct of persons which might otherwise have been regarded as falling outside the ambit of the commands and restrictions of the Constitution, may be held to be 'executive or administrative action': The phrase 'executive and administrative action' has been given a liberal interpretation: *Rahuma Umma v. Dissanayake*[10]; *Deshapriya and another v. Municipal Council, Nuwara Eliya*[11]; *Mohomed Faiz v. Attorney-General*[12]; *Upaliratne v. Tikiri Banda and others*[13].

The fact that a natural or corporate person engages in an activity which could be performed by the State will not in itself subject such person to constitutional limitations, for the State could engage virtually in any activity. On the other hand activities or functions which are traditionally associated with sovereign government and are operated almost exclusively by government entities, may be regarded as public functions: A person who performs such functions may, therefore, be subject to Constitutional limitations: *Marsh v. Alabama*[14]; *Evans v. Newton*[15]. Likewise, if such functions are akin to traditional State functions, it may be indicative of the fact that the person exercising such functions must be subject to constitutional limitations. *Ajay Hasia v. Khalid Mujib* (supra). Each case must depend on its own circumstances: In *Jackson v. Metropolitan Edison Co.*[16] concerned the conduct of a privately owned company that supplied electricity. A customer's service was terminated without a final hearing to determine

the status of her account with the company. She asserted that the company was required to give her notice and a hearing in the same manner as would a governmental agency which would terminate State benefits to her. The US Supreme Court found no State action involved in the operation of this utility even though it was given virtually a monopoly status and licensed by the State. In a later case, however, the Court held that utility companies that are operated by government agencies are required to provide their customers with fair notice and billing review procedures prior to termination of service if state law provides for such termination only "for cause": *Memphis Light, Gas and Water Division v. Craft*[17].

Matters relating to petroleum do not come within traditional governmental functions. Nevertheless, matters concerned with the sale and distribution of petroleum are regarded as matters of national importance. This was referred to repeatedly in the affidavit of the Manager (Marketing) and in the submissions made by the Corporation to emphasize the need for an uninterrupted, efficient supply of petroleum to the public. He said the Corporation was engaged in a "vital industry which is essential to the country's economy". In *Dahanayake v. De Silva*[18], Samarakoon, CJ said ". . . Petroleum has ceased to be a mere consumer item of private trade and is now the concern of governments at both national and international levels . . ."

Petroleum was once sold and distributed by private persons. However, in 1961, those functions were entrusted by the Government to the Corporation by the Ceylon Petroleum Corporation Act, No. 28 of 1961. (References that follow to "sections" are references to the 1961 Act as amended by the Ceylon Petroleum Corporation (Amendment) Act No. 5 of 1963). In *Dahanayake v. de Silva* (supra), Samarakoon, CJ said: "Political ideology at the time considered that, petroleum being an essential service for the community, it should be the responsibility of and the sole business of the Government of the country . . ."

Being an essential public function, why was it not entrusted to a Government Department?

At about the same time, neighbouring countries were experiencing much the same problems as we were and resorting to means that at the time were regarded as appropriate. Matthew, J. in *Sukhdev*

Singh v. Bhagatram[19], explained: "The tasks of government multiplied with the advent of the welfare state and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialized and highly technical character. At the same time 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate Corporations which would operate largely according to business principles and be separately accountable. The public Corporation, therefore, became a third arm of the government".

Whatever the reason or reasons for the creation of public corporations may have been, this much is clear: The creation of such institutions were not intended to and did not provide the government with an opportunity of evading its obligations: In particular, the State cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to persons, natural or juristic. As Matthew, J. observed in *Sukhdev Singh, (supra)* "The fact that these corporations have independent personalities in the eye of the law does not mean that they are not subject to the control of Government or that they are not instrumentalities or agencies of the State for carrying on business which otherwise would have been run by the State departmentally. If the State had chosen to carry on these businesses through the medium of Government departments, there would have been no question that actions of these departments would be 'State' actions. Why then should actions of these corporations be not State actions?": See also *Somi Prakash v. Union of India*[20].

Contacts between the Corporation are also relevant: In my view, the fiscal aspects of the Petroleum Corporation need to be considered, for, in my view, they show a symbiotic relationship between the Corporation and Government: The initial capital of the Corporation was paid to it out of the Consolidated Fund of the State (section 23; cf *Ajay Hasia,* supra). The approval of the Minister responsible for the Corporation is necessary for the Board of the Corporation to increase the capital (section 24 (1)) or to borrow money (section 24 (2) & (3)); to invest funds (section 25); and to issue, transfer, deal with, redeem or cancel Corporation Stock (section 26 (2)). The Minister of Finance in respect of certain Corporation Stock, and with the concurrence of the Minister responsible in the case of other Corporation Stock,

guarantees the repayment of the principal of, and the payment of interest on Corporation Stock, Parliament being informed of such guarantee. Sums required for the fulfillment of such a guarantee may with the prior approval of Parliament, be paid out of the Consolidated Fund: (section 27); surplus revenue must be paid into a general reserve, not exceeding the amount determined by the Minister, the balance being paid to the Treasury to be credited to the Consolidated Fund (section 29). The accounts of the Corporation are audited by an auditor appointed by the Minister in consultation with the Auditor-General, and transmitted to the Auditor General; The report of the Auditor-General and a statement by the Corporation and its activities during the financial year to which the report relates and of the activities which are likely to be undertaken in the next financial year are to be submitted to the Minister who is required to lay such reports before Parliament: (section 31).

The special favours granted to the institution by the State, as distinguished from benefits derived by the Corporation from generalized government services, such as police protection, is also a relevant matter as showing contact as well as symbiotic relationship: *Burton v. Wilmington Park Authority*, (supra); The Corporation is exempted from income tax: (section 33). It is also exempted from stamp duty and registration fees (section 67). The Corporation is also vested with special powers of acquiring or requisitioning property for its use: (section 34) and the Minister is empowered by a vesting order to effect the compulsory transfer of property to the Coporation: (section 35).

The interest of the State in the Corporation's personnel matters, is another matter to be considered: See per Justice White in *Rendell-Baker v. Kohn*[21]. Although the general supervision, control and administration of the affairs and business of the Corporation is vested in the Board of Directors: (section 15), the Minister appoints the Board of Directors, one of whom is appointed in consultation with the Minister of Finance, and the Minister may, without assigning a reason, remove any Director from office: (section 8). The remuneration of Directors is determined by the Minister with the concurrence of the Minister of Finance (section 9). The Chairman and Vice-Chairman of the Board are appointed by the Minister who may remove them without assigning a reason: (section 17). The prior approval of the Minister is required

for the appointment and removal by the Corporation of the General Manager: (section 18). Section 7 states:

> (1) "The Minister may, after consultation with the Board of Directors, give such Board general or special directions in writing as to the exercise of the powers of the Corporation, and such Board shall give effect to such directions.
>
> (2) The Minister may, from time to time, direct in writing the Board of Directors to furnish to him, in such form as he may require, returns, accounts and other information with respect to the property and business of the Corporation, and such Board shall carry out every such direction.
>
> (3) The Minister may, from time to time, order all or any of the activities of the Corporation to be investigated and reported upon by such person or persons as he may specify, and upon such order being made, the Board of Directors shall afford all such facilities, and furnish all such information, as may be necessary to carry out the order."

The Minister may, with the concurrence of the Minister of Finance, by an Order specify or determine (*a*) the maximum spot price or rate; (*b*) the minimum spot price or rate; (*c*) the spot price or rate; (*d*) the maximum amount or percentage of discount or rebate; and (*e*) the formula fixing the price, at which petroleum shall be sold, supplied or delivered: the Order may set out the terms and conditions for such sale, supply or delivery; (section 66).

In my view, there is 'deep and pervasive State control', indicating that the Corporation is a state agency or instrumentality: See *Ajay Hasia,* (supra).

There is further evidence that the Corporation and Government are entangled and entwined: although the Corporation is empowered to employ such officers and servants as may be necessary for carrying out the work of the Corporation: (section 6 (*b*)), yet officers in the public service, with the consent of such officers and of the Secretary to the Treasury may be temporarily or permanently appointed to the Corporation: (section 19). In my view, the way in which public servants could be appointed to the Corporation suggests that government employees and Petroleum Corporation employees were essentially the same, doing the same thing, namely, serving the public as servants of the public, and not merely as employees of some person, personal or corporate. This view is underlined by the fact that all officers and servants of the Corporation are deemed to be public servants within

the meaning and for the purpose of the Penal Code: (section 20); and its employees would, like other public servants, be liable for offences under the Bribery Act, No. 11 of 1954: (section 21). As in the case of official acts generally, no suit or prosecution lies against the Minister, the Corporation or its officers done in good faith: (section 74). No writ against person or property may be issued against any member of the Corporation in any action brought against the Corporation: (section 75).

It has been held that whether a Corporation enjoys a monopoly status conferred by the State is a relevant factor: See *Ramana*, (supra); but cf. *Jackson Metropolitan Edison Co.* (supra). The right to "import, export, sell, supply or distribute" petrol, kerosene, diesel oil and furnace oil is vested "exclusively in the Corporation": (section 5B). The right to explore for, and exploit, produce and refine petroleum is vested "exclusively in the Corporation": (section 5D). The establishment and maintenance of equipment or facilities for the exploration, exploitation, production, refinement, storage, sale, supply or distribution of petroleum other than by the Corporation is prohibited except with the written authority of the Minister: (section 5F). No person other than the Corporation may export, sell, lease, transfer, hypothecate, alienate or dispose of any equipment or facilities for the exploration, exploitation, production, refinement, storage, sale, supply or distribution of petroleum: (section 5H). Authority may be granted or terminated by the Minister or the Board at their "absolute discretion" to persons to do any of the things over which the Corporation has been given a monopoly on terms and conditions determined by the Minister or Corporation in their "absolute discretion": (section 5H).

Having regard to these matters in the aggregate, I cannot but conclude that the Petroleum Corporation of Ceylon is an instrumentality or agent of the Government. I am fortified in arriving at that conclusion by the fact that the Supreme Court has on more than one occasion so regarded the Corporation; its public character requires that it be treated as an institution subject to the Constitutional commands and restraints pertaining to fundamental rights and freedoms; *Dahanayake v. De Silva* (supra); *Kuruppuge Don Somapala Gunaratne and others v. Ceylon Petroleum Corporation and others*[22].

Learned Counsel for the third respondent cited *Ratmalana Electorate Development Foundation v. Ceylon Petroleum Corporation and others*[23] in support of his submission that when the Corporation terminated the appellant's Agreement, it was a matter of 'private' and not 'public' law and therefore, the petitioner was not entitled to invoke the jurisdiction of the Court relating to fundamental rights.

In the *Ratmalana Electorate Development Foundation* case, the Petroleum Corporation had, pursuant to a decision of the Board, terminated the agreement of a Dealer and taken possession of his 'Filling Station'. The appellant alleged *mala fides,* a violation of legitimate expectations and a violation of the principles of natural justice, and applied to the Court of Appeal for a writ to quash the decision of the Corporation. The majority, (Anandacoomaraswamy and Gunawardene, JJ. Dheeraratne, J. dissenting), citing Wade, *Administrative Law,* 5th Ed. p. 550, held that the power of termination was derived from the contract and was a matter of 'private law' and outside the scope of 'prerogative remedies'. The Court's attention had been drawn to *Kuruppuge Don Somapala Gunaratne and others v. Ceylon Petroleum Corporation and others,* (supra) in which it had been held by Fernando, Dheeraratne and Anandacoomaraswamy JJ., that where the Petroleum Corporation had, pursuant to a decision of the Board, terminated an agreement with a Dealer and taken possession of his 'Filling Station' without notice to the Dealer, and without sufficient reasons, and taking into account irrelevant considerations, it violated the Dealer's fundamental rights of equality before the law and equal protection of the law guaranteed by Article 12 (1) of the Constitution. The Court held that "passing the impugned resolution was 'administrative or executive action', although it involved a contract". The majority in *Ratmalana Electorate Development Foundation* said that in *Kuruppuge Don Somapala Guneratne* "The Court was dealing with the case of a violation of Fundamental Rights under Article 12 (1) of the Constitution. However in the instant case the position is different as this court has to consider the writ jurisdiction of the Court of Appeal".

In this connection, it is pertinent to observe that Das, CJ. in *Basheshar Nath C.I.T. Delhi and Rajasthan*[24], observed that Article 14 of the Indian Constitution (which states: The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India), "combines the English doctrine of the rule of law with the equal protection clause of the 14th Amendment". In

Kuruppuge Don Somapala Guneratne and others v. Ceylon Petroleum Corporation and others (supra), Fernando, J. rejecting the view that "law" in Article 12 meant a statute said: "I take the broader view that the principle of equality before the law embodied in Article 12 is a necessary corollary of the concept of the Rule of Law which underlies the Constitution *(Perera v. Jayawickrema*[25]*)*". Perhaps the recent proliferation of applications relating to alleged violations of Article 12 of the Constitution may be explained by the fact that the Article combines the elements of the rule of law and the elements of the 14th Amendment of the American Constitution? It is unnecessary for the purpose of deciding the matter before me to consider whether it is possible to precisely demarcate public and private law and whether judicial review under the two procedures should be regarded as mutually exclusive and so on: On those matters, see Wade and Forsyth, op. cit., esp. Chapter 18. It seems to me that posing the question whether a matter is a 'public' or 'private' law matter before deciding whether it is a matter that is justiciable having regard to the provisions of the Constitution is an unsatisfactory approach to the question: the labels "public" or "private", if there is any worth in doing so, might be affixed after the matter has been decided, having regard to the facts in the light of the law. How does one define "public" and "private", and how does one distinguish between "public" for fundamental rights purposes and "writ" purposes? In my view, that kind of sterile debate will only result in the waste of the Court's time and aggravate the problem of the law's delay.

The Corporation denied that its conduct brought it within the restraints imposed by the Constitution relating to fundamental rights and freedoms. It submitted that the alleged grievance of the petitioner was misconceived, since the termination of the agreement was a matter of contract relating to the commercial activity of the Corporation and not an 'executive or administrative action' which alone, in terms of Articles 17 and 126 of the Constitution could give a petitioner a right to seek relief in respect of the alleged infringement of the fundamental rights and freedoms recognized and declared by the Constitution: It was submitted that, although acts of the State at the threshold stage or at the stage of entering into a contract might attract the Constitutional guarantees of equality and equal protection of the law, yet, where there was a contract in force, Article 12 of the Constitution would apply only if the rights and liabilities are imposed by statute: "law" in Article 12 should not be interpreted to include

administrative schemes: *Wijenaike v. Air Lanka*[26]; see also *Wijeratne v. The People's Bank*[27]; *Roberts and another v. Ratnayake and others*[28]; *C. K. Achutan v. State of Kerala*[29]; *Akbar Ahad v. State of Orissa*[30]; *Bal Krishnan v. The State of Himchal Pradesh and others*[31]; *Radhakrishna Agarwal v. Bihar*[32].

Article 12 (1) of the Constitution states: "All persons are equal before the law and are entitled to the equal protection of the law". I am unable to agree that "law" in Article 12 is confined to Acts of Parliament: See *Kuruppuge Don Somapala Gunaratne and others v. Ceylon Petroleum Corporation and others* (supra). In my view, it includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities and functionaries in their conduct: See *SmithKline Beecham Biologicals S.A. and another v. State Pharmaceutical Corporation and others*[33]. In *Lugar v. Edmonson Oil Co. Inc.*[34], Justice Brennan for the U.S Supreme Court articulated the basic test to determine when the deprivation of a right may be fairly attributable to the State:

> "First, *the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . .* Second, *the party charged with the deprivation must be a person who may fairly be said to be a State actor. This may be because he is a State official, because he has acted together with or has obtained significant aid from State officials or because his conduct is otherwise chargeable to the State".*

The emphasis is mine.

If the rules of conduct contain provisions that are Constitutionally impermissible (e.g. because they discriminate against persons on the grounds of race, religion, language, caste, sex, political opinion or place of birth or are otherwise invidiously discriminatory, or contain irrational classifications), they must be declared unconstitutional. Likewise, if such provisions are ex facie lawful, not invidiously discriminatory, and rational in the matter of classification, but in their application violate the Constitutional restraints and guarantees relating to fundamental rights and freedoms declared and recognized by the Constitution, the action of the authority concerned must be declared unconstitutional: For instance, if they are applied in an invidiously

discriminatory manner, or in a capricious, unreasonable or arbitrary manner; *Yick Wo v. Hopkins*[35] ; *Plyler v. Doe* [36]. This Court has consistently proceeded on that basis from the time of *Palihawadana v. Attorney-General*[37]; see also *Jayanetti v. Land Reform Commission*[38].

I agree that the action inhibited by Article 12 is only such action as may fairly be said to be that of the State, and that Article 12 erects no shield against merely private conduct, however discriminatory or wrongful: cf. *Shelly v. Kraemer*[39]. However, I am unable to agree with the view advanced by learned counsel for the second and third respondents, that in the sphere of contracts, public authorities and functionaries do not have to conform to Constitutional requirements, and in particular those set out in Article 12: They cannot, in my view, avoid their Constitutional duties by attempting to disguise their activities as those of private parties.

This Court has always said or acted on the assumption that government departments and agencies, institutions and persons performing public functions or clearly entwined or entangled with government, must comply with the provisions of Article 12: See e.g. *Amzathul Zareena and others v. The National Housing Development Authority*[40]; *Nanayakkara v. Bandusena and others*[41]; *Peiris v. de Silva and others*[42]; *Gunasinghe v. Divisional Superintendent of Post Office, Matale*[43]; *Gunaratne and others v. Ceylon Petroleum Corporation and others*[44]; *Gamini Atukorale and others v. de Silva (IGP) and others*[45]; *Priyangani v. Nanayakkara and others*[46]; *Athukorala v. Jayaratne and others*[47]; *Krishna Mining Co. (Ceylon) Ltd. v. Janatha Estates Development Board and others*[48]; *Chandrasena v. Kulatunge and others*[49]; *Tennekoon v. de Silva (IGP) and others*[50]; *Manage v. Kotakadeniya (Post Ms. General) and others*[51]; *SmithKline Beecham Biologicals S.A. and another v. State Pharmaceutical Corporation and others* (supra); see also *F. C. I. v. Kamedhenu Cattlefeed Industries*[52]. I would have refrained from burdening my judgment with any citations on this matter, but for the fact that leraned counsel for the Corporation has raised the matter.

The drawing of a distinction between cases in which there is a contract and those in which the matter is at a threshold stage or at some stage before the making of a contract is, in my view, artificial, narrow and inappropriate. In my view, where there is a breach of

contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, there is no justification in law for holding that only one of the available remedies can be availed of and that the other consequently stands extinguished. Nor can it be correctly said that the aggrieved party must be confined to his remedy under the law of contract, unless there is a violation of statutory obligations: *SmithKline Beecham Biologicals S.A. and another v. State Pharmaceutical Corporation* (supra). In *Srilekha Vidarthi* v. *State of U.P.*[53], the Supreme Court of India considered the contracts of public bodies *vis-a-vis* Article 14 of the Indian Constitution (which deals with the fundamental rights of equality before the law and equal protection of the law). Verma, J. (as he then was) speaking for the Court, said:

> "The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of the scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act even in contractual matters. There is a basic difference between the acts of the State which must invariably be in the public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of commercial matters for regulating the conduct of State activity."

I therefore hold that "when (the Ceylon Petroleum Corporation) enters into contracts for services for the sale and distribution of petroleum products, it does so as agent of the State": *Dahanayake v. De Silva* (supra) at p. 53–54; If the Corporation arbitrarily terminates the contract of a Dealer, the Court would declare that the Corporation has violated Article 12 of the Constitution: *Kuruppuge Don Somapala Gunaratne and others v. Ceylon Petroleum Corporation and others,* (supra). In the matter before me it has been established that the Agreement was terminated on account of political opinion. Therefore I hold that the Corporation has violated Article 12 (2) of the Constitution: Cf. *Gamini Atukorale and others v. de Silva and others,* (supra); *Athukorala v. Jayaratne and others,* (supra).

The petitioner was granted leave to proceed with his application, in which he alleged that Article 14 (1) (*g*) of the Constitution was violated. Article 14 (1) (*g*) states: "Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise". The petitioner was unable to engage himself in his business or occupation as a Dealer in petroleum as a direct result of the unlawful termination of his Agreement with the Corporation. Had he been able to obtain petroleum from some source other than the Corporation, the act of the Corporation may not, in my view, have been held to have violated Article 14 (1) (*g*). However, as we have seen no person can sell, supply or distribute petroleum unless such person is authorized to do so by the Corporation: (section 5E Ceylon Petroleum Corporation Act); indeed, nor can a person even establish or maintain any equipment or facilities for the sale, supply or distribution of petroleum without authorization: (section 5F CPC Act).

In the circumstances, I hold that the Corporation violated Article 14 (1) (*g*) of the Constitution.

The petitioner prayed that the Court be pleased to make order "that there has been a violation of the fundamental rights of the petitioner".

For the reasons explained in my judgment, I declare that–

(*a*) the first respondent, Honourable Anuruddha Ratwatte, Minister of Irrigation, Power and Energy, has not violated any provision of the Constitution;

(*b*) the second respondent, the Ceylon Petroleum Corporation, has violated Articles 12 (2) and 14 (1) (*g*) of the Constitution.

The petitioner prayed that the Court be pleased to make order "annulling and/or setting aside the decision to terminate the distributorship and/or dealership of the petitioner", and to "annul or set aside the decision to take possession of" the Filling Station (570, Elvitigala Mawatha, Narahenpita, Colombo 5), and to make order directing the respondents to hand over the said premises to the petitoner.

For the reasons explained in my judgment, the decision to terminate the agreement with the petitioner and the consequential expulsion of the petitioner from the premises situated at 570, Elvitigala Mawatha, Colombo 5, was unconstitutional and therefore of no force or avail. There is no need for setting aside the decision of the Corporation to terminate the agreement. Nor is it necessary to set aside consequential actions by the Corporation, including the taking over of the premises referred to or authorizing the third respondent to take over those premises and act as a Dealer at that place. An act that is unconstitutional is invalid and of no legal effect: it is devoid of legal force; and it is of no value; it amounts to nothing and is of no efficacy. Therefore, the Ceylon Petroleum Corporation is bound to take such steps as are necessary to reinstate the petitioner in the place at which he was carrying on his business or occupation as a Dealer before the unlawful termination of the agreement. However, for the removal of any doubt, I make order and direct the Ceylon Petroleum Corporation to forthwith reinstate the petitioner as a Dealer at 570, Elvitigala Mawatha, Colombo 5, under and in terms of the Memorandum of Agreement made on the 16th of March, 1988, between the Corporation and the petitioner.

The implementation of the decision of this Court would necessarily mean that the person who was appointed by the Corporation to take over and carry on business as a Dealer at 570, Elvitigala Mawatha, Colombo 5, would be displaced. The person who would be displaced has been named as the third respondent in these proceedings, she has been duly noticed, written submissions have been filed on her behalf, and she has been represented by learned counsel who has been heard by the Court. I have taken due account of all that has been said on her behalf. Therefore, in determining reliefs, I am not burdened by the constraints imposed by the circumstances in *Kuruppuge Don Somapla Gunaratne* (supra).

The petitioner prayed that "the Court be pleased to make order awarding the petitioner damages in a sum of Rs. 25 million or any other sum as to your Lordships' Court may seem just". The petitioner filed a statement from his Accountants with regard to the "Turn Over of G.P. Enterprises" for the years 1992/93, 1993/94 and 1994/95. They relate to a "Filling Station" and a "Service Station". What is "G.P. Enterprises" ? There is no reference to it in the petition or in any

affidavit of the petitioner or of any one else. Damages must be established by evidence. They have not been established.

However, for the infringement of his fundamental rights under Article 12 (2) and 14 (1) (*g*) of the Constitution, I consider it just and equitable that the Corporation should pay the petitioner a sum of Rs. 100,000 as a solatium. I recognize not only the fact that as in *Kuruppuge Don Somapala Gunaratne* (supra) the Corporation acted arbitrarily, but also that in the matter before me (*a*) it was motivated by political considerations – a ground specifically identified and explicitly condemned by the Constitution; and that (*b*) Article 14 (1) (*g*) was also violated.

I make order that a sum of Rs. 100,000 be paid by the Ceylon Petroleum Corporation, the second respondent, to the petitioner as a solatium for the infringement by the Corporation of the petitioner's fundamental rights and freedoms.

The petitioner prayed for costs. I make order that the second respondent, the Ceylon Petroleum Corporation, shall pay the petitioner a sum of Rs. 25,000 as costs.

WIJETUNGA, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.