MERCANTILE HOTEL MANAGEMENTS LIMITED
v.
HOTEL GALAXY (PVT) LTD AND OTHERS

COURT OF APPEAL.
B. E. DE SILVA, J. AND T. D. G. DE ALWIS, J.
C.A. 1379/84 – D.C. COLOMBO No. 4806/Z.
JANUARY 28, FEBRUARY 26, 27 AND 28, 1985.

Revision – Enjoining Order entered pending disposal of application for interim injunction in suit for declaration of right to operate and manage hotel – Validity of vacation of enjoining order – Inter partes order – Non-disclosure of material facts – Exceptional circumstances.

By an agreement entered into between the plaintiff and 1st respondent company of which the 2nd and 3rd respondents were Directors, the 1st respondent had handed over the Hotel Galaxy to the plaintiff who commenced commercial operations therein on 24.8.1983. On or about 30.8.1984 the 2nd and 3rd respondents acting for the 1st respondent entered the hotel with several thugs and disrupted the operations of the hotel. They forcibly ejected the plaintiff and took over the files, records, cheques and cheque books and cash of the hotel. The General Manager of the plaintiff made a complaint to the Police and proceedings were instituted in the Primary Court. Counsel for the plaintiff moved for an interim order under s. 67 (3) of the Primary Courts Procedure Act. The Judge refused this and directed the parties to file affidavits after which he would consider the matter.

The plaintiff then filed the present suit in the District Court with an application for an interim injunction. The Court entered an enjoining order which however it vacated on the application of the respondents on the ground that the failure to disclose the refusal of the Primary Court Judge to enter an interim order was a material non-disclosure. The plaintiff moved in revision and the three main questions were :–

(1) Was the enjoining order entered inter partes because the respondents were present when the order was made and their Counsel had filed the proxy of the 1st respondent and made submissions ?

(2) Were there exceptional circumstances to warrant the intervention of the Court in revision ?

(3) Was the non-disclosure material and lacking in good faith ?

Held –

(1) The enjoining order was not one made inter partes because Counsel who had filed the proxy of the 1st respondent had no proxy from the 2nd and 3rd respondents and had no right to appear for them. Hence the Court could set aside its own order.

(2) The respondents had acted in a very high handed manner in evicting the plaintiff who was in lawful possession of the hotel, and forcibly taking possession and removing cash and other documents of the plaintiff. The material before court disclosed exceptional circumstances which warrant the intervention of the Court in revision.

(3) In an application for an interim injunction parties must disclose all material facts and act with the utmost good faith but here there had been no wilful suppression of such facts and the circumstances did not justify vacation of the enjoining order on this ground.

Cases referred to :

(1) *Krishnapillai v. Shanmugarajah and Others [1980] 2 SLR 23.*

(2) *Rasheed Ali v. Mohamed Ali [1981] 2 SLR 33.*

(3) *Atukorale v. Samynathan (1939) 41 NLR 165 ; 14 C.L.W. 109.*

(4) *Lebbaythamby v. The Attorney-General (1964) 70 CLW 53.*

(5) *Suranimala v. Grace Perera (1964) 67 CLW 37.*

(6) *Ranasinghe v. Henry (1896) 1 NLR 303.*

(7) *Sinnathangam v. Meera Mohaideen (1958) 60 NLR 394.*

(8) *In the matter of the Insolvency of Hayman Thornhill (1895) 2 NLR 103.*

(9) *Sabapathy v. Dunlop (1935) 37 NLR 113.*

(10) *Amarasekera v. Cannangara (1939) 41 NLR 333.*

(11) *Evans v. Bartlam [1937] 2 All ER 636.*

APPLICATION in Revision of the Order of the District Court of Colombo.

H. W. Jayewardene, Q.C. with *H. L. De Silva, P.C., R. Chula De Silva* and *S. Mivanapalana* for the petitioner.

Dr. Colvin R. De Silva with *Faiz Mustapha, D. Phillips* and *Saumya De Silva* for 1st respondent.

Eric Amerasinghe, P.C. with *Faiz Mustapha* for the 2nd and 3rd respondents.

Cur. adv. vult

April 30, 1985.

B. E. DE SILVA, J.

The plaintiff-petitioner has filed this application and moved to have the order of the learned District Judge dated 8.10.84 vacated. The plaintiff filed action against the respondents for a declaration that the plaintiff is entitled to operate and manage the hotel which is the subject of this action and also prayed inter alia for an interim injunction

as set out in the plaint pending the determination of that action. Upon the material set out in the plaint and affidavits and other exhibits the learned District Judge issued notice of the plaintiff's application for an interim injuction and also entered an enjoining order restraining the respondents from committing the acts referred to in paragraph E of the prayer to the plaint. Thereafter the respondents filed papers to set aside this enjoining order. The learned District Judge after hearing parties by his order dated 8.10.84 vacated the enjoining order. This application is filed by the plaintiff to set aside the order of the learned District Judge dated 8.10.84 vacating the enjoining order.

The facts material to this application are as follows :

The plaintiff and the 1st respondent are companies duly incorporated under the Companies Ordinance. The 2nd and 3rd respondents are Directors of the 1st respondent and own and control the shares of the 1st respondent. The 1st respondent is the owner of a building situated in the premises in suit in which the plaintiff established a hotel called and known as 'Hotel Galaxy'. On or about 7.7.83 the plaintiff and the 1st respondent entered into the agreement P 1 which agreement provided inter alia that the plaintiff was appointed managing agents of this hotel for a period of 6 years subject to the terms and conditions set out in P 1 the agreement.

In terms of the said agreement the 1st respondent handed over the hotel to the plaintiff and the plaintiff commenced commercial operations on 24.8.83. On or about 30.8.84 the 2nd and 3rd respondent acting together and in collusion and the 1st respondents acting through its directors the 2nd and 3rd respondents wrongfully and unlawfully brought into the said hotel several thugs and disrupted the operations of the hotel and caused disorder therein. On hearing of the aforesaid events the General Manager of the plaintiff Mr. Samarakoon visited the said hotel and several thugs acting on the instructions of the 2nd respondent forcibly ejected the General Manager of the hotel. The General Manager Mr. Samarakoon then made a complaint to the police a copy of which is marked P 3. The police referred this matter for an order under Section 66 of the Primary Courts Procedure Act.

At the inquiry before the Primary Court counsel for the plaintiff moved for an interim order under Section 67 (3) of the Primary Courts Procedure Act. The learned Primary Court Judge after hearing counsel for the parties refused to make an interim order at that stage and

stated that he would consider this matter and requested the parties to file affidavits. Vide the order of the Primary Court Judge dated 31.8.84 (A 20). Thereafter the plaintiff filed action X 1 in the District Court against the respondents for a declaration that the plaintiff is entitled to operate and manage the said hotel without interference by the respondents their servants and agents and also prayed inter alia for an interim injunction restraining the respondents from interfering with the plaintiff's management of the hotel. This application was made ex parte and supported by several exhibits.

At the hearing of this application the respondents were present and counsel who appeared for the respondents filed proxy of the 1st respondent. Counsel for the respondents drew the attention of court to paragraph 10 of the agreement P 1 which provided that all matters in dispute between the parties arising out of this agreement should be referred to arbitration. Counsel for the respondents submitted that court had no power to issue an injunction without referring the matters to arbitrators for a settlement. After hearing counsel for the parties upon a consideration of the matters set out in the plaint and affidavit and the other exhibits the learned District Judge made order to issue notice on the respondents of the plaintiff's application for an interim injunction and also entered an enjoining order in terms of paragraph E of the prayer to the plaint. Vide the order of the learned District Judge dated 4.9.84 (X 3).

Upon notice being issued the respondent filed petition and affidavit (X 4) along with exhibits and moved that the enjoining order be vacated for the reasons set out therein. The respondents pleaded inter alia that the plaintiff did not carry out its duties and obligations under the agreement with the 1st respondent that Samarakoon the Manager of the plaintiff had sought an interim order seeking restoration of the rights of management in proceedings before the Primary Court and that the learned Magistrate had refused the interim order sought for. Vide the order of the learned Magistrate (A 20) of 31.8.84. The respondents further pleaded that the plaintiff had obtained an enjoining order by –

(*a*) non disclosure of material relevant facts.

(*b*) wilful suppression of material facts.

(*c*) by pleading false and malicious material so as to cause prejudice to the respondents' legal right and has acted mala fide.

The plaintiff filed objections to this application. Vide plaintiff's petition and affidavit (X 2 and X 2 A) with several exhibits and moved that the applicaton for vacation of the enjoining order be dismissed. The application of the respondents for vacation of the enjoining order was inquired into by the learned District Judge. The learned District Judge by his order dated 8.10.84 (X 8) vacated the enjoining order holding that the plaintiff had suppressed material facts in obtaining the enjoining order. The learned District Judge held that the plaintiff had failed to disclose in his application that he had applied for an interim order under Section 67 (3) of the Primary Courts Procedure Act which application the learned Magistrate had refused. That was a material fact which the plaintiff should have disclosed. That in applications of this nature the plaintiff had to act with utmost good faith and the plaintiff had failed to do so and in the circumstances he vacated the enjoining order.

At the hearing of this application learned counsel for the plaintiff and respondents had made several submissions on matters relevant to this application. The main objections of counsel for the respondents were–

(1) that this was not a case in which the court should vacate the order of the learned District Judge in the exercise of the revisionary powers as the plaintiff has failed to place in his application exceptional circumstances to warrant the exercise of the revisionary powers of this court.

(2) that the issue of an enjoining order was a matter in the discretion of court and once the court had exercised this discretion and vacated the enjoining order this was not a matter with which the court should interfere by way of revision.

(3) that the plaintiff had failed to disclose material facts when he made the application for an interim injunction. That as there was a non disclosure of material facts the court should not interfere with the order of the learned District Judge.

(4) that the proceedings in which the enjoining order was made was not inter partes proceedings and it was competent for the learned District Judge to vacate the enjoining order in the exercise of his discretion.

I shall now deal with the submissions made by counsel for the parties. Learned counsel for the plaintiff submitted that the proceedings upon which the enjoining order was made were inter partes proceedings and court had thereafter no power to set aside its own order. Learned counsel for the plaintiff drew the attention of court to the proceedings X 3. These proceedings reveal that when the plaintiff made an application for an interim injunction the respondents had been present and counsel appeared for them. Counsel for the respondents had taken notice of the plaintiff's application and had objected to that application for the issue of an interim injunction and drew the attention of court to clause 10 of the agreement P 1 which required the parties to refer to arbitration all matters in dispute arising from the agreement P 1. It was submitted by counsel for the plaintiff that in the circumstances the proceedings in which the enjoining order was entered were inter partes proceedings.

The attention of court was drawn to the decision in *Krishnapillai v. Shanmugarajah and Others* (1) where in an applicaiton for an interim injunction it was held that the provisions for notice contained in s. 54 (3) of the Judicature Act No. 2 of 1978 and in Section 666 of the Civil Procedure Code can be waived by the party for whose benefit it has been provided by the legislature. The respondents waived notice when counsel appeared for them and made submissions that the interim order should not issue.

The fact that counsel for the respondent had appeared in court cannot render it as an appearance for the purpose of objecting to the application for an injunction. Unless the proceedings are unequivocal that the respondents had waived their rights to notice of objections they cannot be regarded as having waived notice. In this case although counsel had filed the proxy of the 1st respondent he had no proxy from the 2nd and 3rd respondents and had thus no right to appear for them. Upon a consideration of the proceedings X 3 I am unable to agree with the submissions of counsel for the plaintiff that the proceedings upon which the enjoining order was entered are inter partes proceedings which precluded the court from setting aside its own order.

I shall now turn to the submission of counsel for the respondents that the plaintiff is not entitled to relief by way of revision as no exceptional circumstances had been pleaded which warrant the court to exercise its revisionary powers. Counsel for the respondents drew

clause (1) of Article 19 enact various fundamental freedoms ; sub-clause (1) guarantees freedom of speech and expression, sub-clause (*b*) . . . . . Now the freedom guaranteed under these various sub-clauses of clause (1) of Article 19 are not absolute freedoms but they can be restricted by law, provided such law satisfies the requirements of the applicable provisions in one or the other of clauses (2) to (6) of that Article. The common basic requirement of the saving provision enacted in clauses (2) to (6) of Article 19 is that the restriction imposed by the law must be reasonable. If, therefore, any law is enacted by the legislature which violates one or other provision of clause (1) of article 19, it would not be protected by the saving provision enacted in clauses (2) to (6) of that Article ; if it is arbitrary or irrational, because in that event the restriction imposed by it would *a fortiori* be unreasonable..

The third Fundamental Right which strikes against arbitrariness in State action is that embodied in Article 21. This Article . . . . . guarantees the right to life and personal liberty in the following terms :

> '21. No person shall be deprived of his life or personal liberty except according to procedure adopted by law.'

This Article also came up for interpretation in *Maneka Gandhi's Case (supra)*. Two questions arose before the Court in that case :

> One was as to what is the content of the expression 'personal liberty' ;
>
> And the other was as to what is the meaning of the expression except according to procedure established by law . . . .

But so far as the second question is concerned, it provoked a decision from the Court which was to mark the beginning of a most astonishing development of the law. It is with this decision that the court burst forth into unprecedented creative activity and gave to the law a new dimension and a new vitality. Until this decision was given, the view held by the court was that Article 21 merely embodied a facet of the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by executive action unsupported by law. It was intended to be no more than a protection against executive action which had no authority of law. . . . . But in *Maneka Gandhi's*

Case (supra) which marks a watershed in the history of development of Constitutional Law in our country, this Court for the first time took the view that Article 21 affords protection not only against executive action but also against legislation and any law which deprives a person of his life or personal liberty would be invalid unless it prescribes a procedure for such deprivation which is reasonable, fair and just. The concept of reasonableness, it was held, runs through the entire fabric of the Constitution and it is not enough for the law merely to provide some semblance of a procedure but the procedure for depriving a person of his life or personal liberty must be reasonable, fair and just. It is for the court to determine whether in a particular case the procedure is reasonable, fair and just and if it is not, the court will strike down the law as invalid. . . . . Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21."

I have quoted in extenso from the judgment of Bhagawati, J., to show the basis and reasoning behind his thinking that the Indian Constitutional system is founded on the Rule of Law and that in any system so designed it is impossible to conceive of arbitrary legislation or arbitrary executive action without violating the guarantee of equality. In the absence of such a golden triangle as constituted by such Articles as 14, 19 and 21 of the Indian Constitution and in my view of the incompetency of our courts to pronounce on the validity of arbitrary legislation our Constitution does not, in view, lend authority or support for giving the extended meaning or the dimension envisaged by Bhagawati, J., to the concept of equality predicated by our Article 12. It is to be borne in mind that the principles enunciated by a Judge have to be understood in the context of the facts therein ; any case even a locus classicus is an authority for what it decides on the facts. "Dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law, unless these dicta really form integral parts of the train of reasoning directed to the real question decided" – *per* Lord Haldane in *Cornelius v. Phillips* (21). With all respect to Bhagawati, J., it appears to me that the cases in which he gave expression to his liberal view of equality exhibited elements of discrimination and the ratio decidendi of the several decisions was that such differential treatment offended the equality clause. In *Bachan Singh's Case (supra)* the question in issue was the

constitutionality of the death penalty provided under Section 302 of the Indian Penal Code read with Section 354 (3) of the Indian Criminal Procedure Code.

The first case in which Bhagawati, J., gave the new dimension to the concept of equality and departed from the accepted doctrine of classification was *Royappa v. State of Tamil Nadu (supra).* In the course of his judgment in that case with which Chandrachud and Krishna Iyer, J.J., agreed, Bhagawati, J. stated as follows :

"Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right, because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words Article 14 is a genus whilst Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of Bose J., a way of life and it must not be subject to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a postivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. . . . . Articles 14 and 16 strike at arbitrariness in State action to ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative

reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible consideration, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice ; in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

Royappa's Case (supra) was a case of alleged discriminatory treatment. The petitioner filed the petition under Article 32 of the Constitution challenging the validity of his transfer from the post of Chief Secretary, first to the post of Deputy Chairman, State Planning Commission and then to the post of Officer on Special Duty on the following grounds, namely (1) It was contrary to the proviso to rule 4 (2) of the Indian Administrative Services Rules of 1954 and Rule 9 (1) of the Indian Administrative Services (Pay) Rules 1954. (2) It was a violation of Articles 14 and 16 of the Constitution, as the post of Deputy Chairman, State Planning Commission and officer on Special Duty were inferior in rank and status to the Chief Secretary ; and (3) It was made in mala fide exercise of power, not on account of exigencies of administration or public service.

According to the facts on the transfer of the petitioner from the post of Chief Secretary, one Sabanayagam who was undoubtedly junior to the petitioner was promoted as Chief Secretary, and was confirmed in that post.

Analysing the first ground of challenge Bhagawati, J. held that Rule 4 (2) of the Indian Administrative Rules had no application but he held the challenge under Rule 9 (1) of the Indian Administrative Services (Pay) Rules was better founded.

Rule 9 in so far as material provided that –

"no member of the service shall be appointed to a post other than a post specified in Schedule III unless the State Government. . . makes a declaration that the said post is equivalent in status and responsibility to a post specified in the Schedule."

If the State Government wants to appoint a member of the Indian Administrative Service to a non-cadre post created by it, it cannot do so unless it makes a declaration setting out which is the cadre post to which such non-cadre post is equivalent in status and reponsibility.

The making of such a declaration is a sine qua non of the exercise of power under sub-rule (1). It has a purpose behind it and that is to ensure that a member of the Indian Administrative Service is not pushed off to a non-cadre post which is inferior in status and responsibility to that occupied by him and to enable him to know what is the status and responsibility of his post in terms of cadre posts and whether he is placed in a superior or equal post or he is brought down to an inferior post. If it is the latter, he would be entitled to protect his rights by pleading violation of Article 311 or Articles 14 and 16 of the Constitution, whichever may be applicable. On the facts, the court held that the appointment of the petitioner to the post of Deputy Chairman was in contravention of Rule 9 (1), as the State Government had failed to apply its mind and objectively determine the equivalence of the post of the Deputy Chairman, when it appointed the petitioner to the post of Deputy Chairman. But the court held that since the petitioner had without protest accepted the appointment, he could not be permitted to challenge the appointment. The court held also that the appointment of the petitioner to the post of Officer-on-Special-Duty suffered from the same infirmity. There was thus no compliance with the mandatory requirements of Rule 9 (1) and the appointment of the petitioner to the post of Officer-on-Special-Duty was accordingly liable to be held invalid for contravention of that sub-rule. But it is significant that Bhagawati, J. held that –

> "*We cannot in this petition under Article 32 give relief to the petitioner by* striking down his appointment to the post of Officer on Special Duty, *as mere violation of Rule 9 (1) does not involve infringement of any fundamental right. . .* "

Then he proceeded to take up the last two grounds of challenge together for consideration as in his view the third ground of challenge viz. mala fide exercise of power was really "in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16." He then proceeded to discuss the merits of these grounds and it was in the course of his analysis that he made the comment on Articles 14 and 16 quoted above. He added :

> "Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principle applicable alike to all similarly situated and it must not be guided by any extraneous or

irrelevant consideration, because that would be a denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous, and outside the area of permissible consideration, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice. In fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

The petitioner was transferred first to the post of Deputy Chairman and then to the post of Officer-on-Special-Duty and in his place Sabanayagam who was admittedly junior to him, was not only promoted but also confirmed. The result of the confirmation of Sabanayagam as First Secretary was that the petitioner, though senior, competent and permanent was excluded from the post of Chief Secretary. The petitioner contended that his transfer from the post of Chief Secretary first to the post of Deputy Chairman and then to the post of Officer-on-Special-Duty coupled with the promotion and confirmation of Sabanayagam in the post of Chief Secretary, was clearly arbitrary and in violation of Articles 14 and 16. The court held that it is not possible to hold on the material on record that the post was inferior in status and responsibility to the post of Chief Secretary and therefore it could not be said that the petitioner was arbitrarily or unfairly treated or that equality was denied to him when he was transferred from the post of Chief Secretary and in his place Sabanayagam, his junior was promoted and confirmed. The challenge based on Articles 14 and 16 therefore failed.

• Turning to the ground of challenge based on mala fide exercise of power, the court held that mala fides had not been established and rejected the contention of the petitioner.

In *Royappa's Case (supra)* unequal treatment was the basic issue in the case. The petitioner's allegation was that while he, should have been appointed as Chief Secretary, he had been overlooked and Sabanayagam, his junior, was appointed over him and that this discrimination resulted from the arbitrary or mala fide exercise of power by the Respondent.

Within the framework of the facts in *Royappa's Case (supra)* Bhagawati, J's reasoning that Article 14 strikes at arbitrariness and mala fide administration in order to ensure equality of treatment or

non-discrimination cannot be faulted. It was not necessary for him to pronounce on the question whether arbitrary or mala fide exercise of power which does not produce unequal treatment is violative of Articles 14 and 16. The complaint in that case was unequal treatment or discrimination. Whatever Bhagawati, J. said on the hypothetical or abstract question, was, with all respect to that eminent Judge, obiter

Counsel also relied on the case of *Maneka Gandhi v. Union of India* (*supra*). In that case the petitioner's (Maneka Gandhi's) passport was impounded by an order dated 2nd July 1977. Thereupon she filed a writ petition under Article 32 of the Constitution to challenge that order. The challenge was founded on the following grounds : –

(1) To the extent to which Section 10(3)(*c*) of the Passport Act 1967, authorised the passport authority to impound a passport "in the interest of the general public"; it is violative of Article 14 of the constitution, since it confers vague and undefined powers on the passport authority.

(2) Section 10 (3) (*c*) is void as conferring an arbitrary power since it does not provide for a hearing of the holder of the passport before the passport is impounded ;

(3) Section 10 (3) (*c*) is violative of Article 21 of the Constitution, since it does not prescribe 'procedure' within the meaning of that Article and if it is held that the procedure has been prescribed, it is arbitrary and unreasonable, and

(4) Section 10 (3) (*c*) offends Article 19 (1) (*a*) and (*g*) of the Constitution.

The Passport Act of 1967 was enacted in 1967 in view of the decision of the Supreme Court in *Satwant Singh Sawhney v. Ramarathnam*, (22). The position which obtained prior to the coming into force of this Act was that there was no regulation governing the issue of passports for leaving the shores of India and going abroad ; the issue of passports was entirely within the discretion of the executive and this discretion was unguided and unchallenged. By that decision, the Supreme Court, by a majority, held inter alia that the discretion vested with the executive in the matter of issuing or refusing passports was violative of Articles 14 and 21 and hence the order refusing a passport for the petitioner was invalid. In view of the reasoning in this decision, Section 10(3)(*c*) of the Passport Act of 1967 was enacted to provide –

"If the Passport Authority thinks it necessary so to do in the interest of the sovereign integrity of India, friendly relations with any foreign country, and in the interest of the general public, an order impounding the passport could be made."

Bhagawati, J. held that the law is well settled that when a statute vests unguided and unrestricted power on an authority to affect the right of a person without laying down any policy or principle which is to guide the authority in the exercise of this power, it would be affected by the vice of discrimination, since it would leave it open to the authority to discriminate between persons and things similarly situated and be violative of the equality clause contained in Article 14. He said that it is difficult to say that the discretion conferred on the Passport Authority was arbitrary or unfettered. It was argued that the words, "in the interest of the general public to impound a passport" were vague and indefinite. He held that the words "in the interest of general public" had a clear and well-defined meaning and cannot be said to be vague or indefinite. He concluded that the power conferred on the Passport Authority under Section 10(3)(*c*) cannot be regarded as discriminatory and does not fall foul of Article 14.

In the course of his judgment Bhagawati, J. however reiterated what he said in *Royappa's case (Supra)* on equality being antithetic to arbitrariness and added that–

"the principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14."

The question of any executive action did not arise in this case. The question that arose was regarding the validity of legislation which conferred certain discretionary powers on an officer.

Counsel cited the case of *The Manager, Government Branch Press v. Beliappa (supra)*. In this case the petitioner-respondent was a Class IV employee of the appellant. One of the terms of his contract was that his appointment was purely temporary and that it was liable for termination at the will and pleasure of the appellant, without assigning any reason, and without notice. The appellant served a notice on the respondent that he was guilty of an irregularity and to show cause why disciplinary action should not be taken against him. But thereafter the

appellant terminated respondent's services with immediate effect as his appointment was temporary and terminable without notice and without assigning any reason. Respondent thereupon filed a writ petition under Article 226 in the High Court. The appellant reiterated his stand that the respondent's appointment was temporary and that according to the conditions in the contract of service it was liable to be terminated without notice. The respondent then filed further affidavit alleging hostile discrimination, that his juniors were retained in service and that his record of service was good. The High Court allowed the writ petition. In the appeal to the Supreme Court the appellant contended that Articles 14 and 16 of the Constitution are not attracted to the case of temporary employees and that the respondent could not complain against actions taken in accordance with the contract of service. The Supreme Court dismissed the appeal and held that if the services of a temporary government servant are terminated in accordance with the conditions of service, on the ground of unsatisfactory conduct or his unsuitability for the job and/or for his work being unsatisfactory, or for a like reason which marks him off as a class apart from other temporary servants who have been retained in service, there was no question of the application of Article 16. But if the services of a temporary government servant are terminated arbitrarily and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, questions of unfair discrimination may arise, notwithstanding the fact that in terminating his services the appointing authority was purporting to act in accordance with the terms of his employment. It was submitted on behalf of the respondent that while three named juniors who were in all respects similarly situated were continued in service the respondent was arbitrarily singled out for discriminatory treatment, although the respondent's record of service was good and at no time gave room for any complaint from his official superiors. The court held that the services of the respondent had been terminated without assigning any reason albeit in accordance with the conditions of his service, while three employees similarly situated, junior to Beliappa, in the same temporary cadre had been retained, and observed –

"The protection of Articles 14 and 16 (1) will be available even to such a temporary government servant, if he has been arbitrarily discriminated against and singled out for harsh treatment, in preference to his juniors similarly circumstanced. It is true that the

competent authority had a discretion under the conditions of service governing the employee concerned which terminated the latter's employment without notice. But, such discretion has to be exercised in accordance with reason and fair play and not capriciously. Bereft of rationality and fairness discretion degenerates into arbitrariness which is the very antithesis of the Rule of Law, on which our democratic polity is founded. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal protection and offend the equality clause in Articles 14 and 16 (1)."

agree with the judgment. The respondent was arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors similarly circumstanced, and hence there was an infringement of his Fundamental Right of equality but non sequitur, had the appellant arbitrarily terminated the service of the respondent in accordance with the term of his conditions of service and there was no question of discrimination such as the service of a similar junior officer being retained, that the petitioner could have maintained an action for breach of Article 14 of the Constitution.

We are referred to the case of *Ramana Dayaram Shetty v. International Airport Authority of India (supra)*. In this case tenders were invited by the Airport Authority for giving a contract for running a canteen at the Bombay Airport. The invitation for a tender included a condition that the applicant must at least have five years' experience as a registered second class hotelier. Several persons tendered. One who tendered was a person who had considerable experience in the catering business, but he was not a registered second class hotelier as required by the conditions in the invitation to the tender. Yet his tender was accepted because it was the highest. The contract given to him was challenged and the court held that the act of the Airport Authority was illegal, in that having regard to the constitutional mandate of Article 14, the Airport Authority was not entitled to act arbitrarily in accepting the tender but was bound to conform to the standard or norm laid down by it. It is to be noted that the proceedings in this case originated in the High Court on a petition under Article 226 of the Indian Constitution. Bhagawati,. J. delivering the judgment of the Supreme Court in appeal said –

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standard by which it professes its actions to be judged and it must scrupulously observe

those standards on pain of invalidation of an act in violation of them. The defined procedure . . . must be scrupulously observed. This rule though supportable also as emanating from Article 14, does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. It is indeed unthinkable that in a democracy governed by the rule of law the executive government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement . . . . The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure . . . . The rule also flows directly from the doctrine of equality embodied in Article 14."

"It is now well settled as a result of the decision of this court in *Royappa v. State of Tamil Nadu* and *Maneka Gandhi v. Union of India* (*supra*), that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory ; it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality."

Bhagawati, J. in this case emphasised that it must follow as a necessary corollary from the principle of equality enshrined in Article 14, that the State cannot arbitrarily choose any person it likes for entering into any relationship and discriminate between persons similarly circumstanced. I respectfully agree that if the standard or norm laid down by the government for entering into contracts with third parties is discriminatory it cannot stand the scrutiny of our Article 12. The constitutional limitation of Article 12 forbids the Government to act arbitrarily in selecting persons with whom to enter into contracts and discriminate against others similarly situate. There must be a relevant reason for preferring one tenderer to another.

The comments of Bhagawati, J. on the decision in *State of Orissa v. Harinarayan Jaiswal* (23) is relevant with regard to Mr. Silva's contention. In that case the respondent was the highest bidder in an

auction held by the Orissa Government, for the exclusive privilege of selling by retail country liquor. The auction was held pursuant to an order issued by the Government of Orissa in the exercise of the power conferred under section 29(2) of the Bihar Orissa Excise Act – 1915. Clause 6 of this order provided that –

> "no sale shall be deemed to be final unless confirmed by the State government who shall be at liberty to accept or reject any bid without assigning any reason therefor."

The government of Orissa did not accept any of the bids made at the auction and subsequently sold the privilege by negotiations with some other parties. The petitioner contended that the power retained by the Government to "accept or reject any bid without any reason therefore was an arbitrary power violative of Article 14 and 19(1) (*g*)." This contention was negatived by the Supreme Court. Commenting on the decision Bhagawati, J. observed :

> "The government was not bound to accept the tender of the person who offered the highest amount and if the government rejected all the bids made at the auction, it would not involve any violation of Article 14 or 19 (1) (*g*) obviously for the reason there was no discriminatory treatment of any of the petitioners."

Mr. Silva basing his submission on Bhagawati, J's opinion contended that Article 12 embodies the principle of the Rule of Law and that the arbitrary action of the 2nd respondent is a violation of the equality provided for by that Article. Our Constitution is certainly founded on the Rule of Law. Administrative Law is the area where this principle is to be seen especially in active operation. The Rule of Law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law, no member of the Executive can interfere with the liberty or property of a subject except on the condition that he can support the legality of his action before a court of justice. Another meaning of the Rule of Law is that it implies the absence of wide discretionary powers in the government to encroach on personal liberty or private property rights or freedom of contract and that officials and Ministers are responsible for their unlawful acts to the ordinary courts, applying the ordinary principles of law and that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Absence of discretionary power is thus kept in check. The Rule of Law

requires that the courts should prevent such abuse. A third meaning of the Rule of Law is that disputes as to the legality of acts of government are to be decided by Judges who are wholly independent of the Executive. Another meaning is that law should be even handed between government and citizen.

The principle of equality before the law embodied in Article 12 is a necessary corollary to the high concept of the Rule of Law underlying the Constitution. By virtue of this provision, the Supreme Court is enabled to review and strike down any exercise of discretion by the Executive which exhibits discrimination. But as stated earlier, the Supreme Court is not vested with any jurisdiction to invalidate any statute which tends to discriminate or enables an authority to discriminate or act arbitrarily. On the other hand in India such legislation can be struck down by the court. If the Indian Supreme Court can strike down an arbitrary legislation, *a fortiori*, it can strike down any arbitrary executive action, as the executive cannot be in a better position than the legislature to act arbitrarily ; it is definitely subject to the constraints which legislation is subject to. Under our Constitution, unless the impugned arbitrary action of the Executive transgresses Atricle 12, the Supreme Court has no jurisdiction under Article 126 to annul it.

The gravamen of petitioner's complaint is miscarriage of justice resulting from abuse of power or non-observance of principles of natural justice, rather than discriminatory treatment. The audi alteram partem rule which mandates that no one shall be condemned unheard is one of the basic principles of natural justice. It is fundamental to fair procedure that the 2nd respondent should have heard the petitioner before he took such prejudicial action against the latter. He has violated this basic principle of fair procedure. He did not wait for and take into consideration the explanation (P 18 and P 19) of the petitioner in answer to the allegations against him. The hurry to take action against the petitioner cannot be appreciated. The motivation for it has to be surmised. Further none of the 2-4 respondents have chosen to fault the petitioner's explanation, probably for the reason that no fault can be found therein. He did not check from the 4th respondent, the Surveyor-General whether the petitioner had shown cause within the thirty days from the date of receipt of letter 'Q' dated 24th August, 1984. He never went through the personal file relating to the petitioner. He does not appear to have even bothered to find out

whether there was any material to justify his taking a decision which was so fateful to the petitioner. According to his affidavit he does not appear to have even asked the 3rd respondent to substantiate his allegations against the petitioner. It was not sufficient for the 2nd respondent to base his decision which gravely affected the petitioner on the mere request of the 3rd respondent. I agree with counsel for the petitioner that the petitioner was not granted a fair hearing. Certainly the conduct of the 2nd respondent is not calculated to enhance the reputation of the State for fairness. The powers of public authorities are essentially different from those of private persons. A private person may have unfettered discretion to regulate his affairs. But a public authority like the 2nd respondent is bound to act reasonably, in good faith and upon lawful and relevant grounds. He should observe the principles of natural justice when exercising his powers against any officer. The omission of the 2nd respondent is destructive to the claim of the State to Rule of Law or to the status of model employer.

There is abundant substance in petitioner's complaint that the 2nd respondent acted arbitrarily and capriciously. The 2nd respondent had depended too much on the 3rd respondent's arbitrary report, a report which is not based on any adverse entry after 1974 in the petitioner's confidential file. It is surprising that while minor complaints against the petitioner had been recorded in that file, the grave allegations made by the 3rd and 4th respondents are not supported by any entry therein. From the 2nd respondent's affidavit it is clear that the earlier order of transfer of the petitioner to the Public-Officers-Reserve was not upon any material placed before him by the Head of Department verifying the reasons why he should be placed on compulsory leave for general inefficiency and general incompetence. The 3rd and 4th respondents never confronted the petitioner with such charges and called for explanation from him before they chose to make serious complaints against him such as "causing considerable dissension within the administration", "causing serious problems", "placing obstacles in the way of the smooth functioning of the department"; "petitioner was a disruptive influence", "petitioner was involved in bitter conflicts with some of his good senior officers", "his conduct was contributory largely to stress and tension within the department." Fairness demands that the officer should have been given an opportunity to correct or contradict such charges.

In my view the 2nd respondent's decision to retire the petitioner compulsorily on the alleged ground of inefficiency is unreasonable and unjustifiable and lacked bona fides. True, a grave injustice had been inflicted on the petitioner. But, mere violation of law by the Executive does not amount to a violation of the Fundamental Right of equality postulated by Article 12. Rules of natural justice cannot be elevated to the status of Fundamental Rights. Natural justice is not a fundamental right in our country where the architects of our Constitution deliberately eschewed the "due process" found in the American Constitution. The petitioner has come to this court seeking relief against "the arbitrary dishonest and capricious act" of the 2nd respondent, but relief cannot be granted in proceedings under Article 126 in the absence of proof of hostile discrimination evidencing unequal treatment. In view of my conclusion that the petitioner has suffered a breach of only a non-fundamental right, and cannot therefore maintain this application, I do not proceed to discuss the merits of the other arguments of counsel for the petitioner, such as the applicability of the circular (R1) to the case of the petitioner and whether the relevant provisions of the Establishments Code have been observed etc.

Counsel for the petitioner correctly did not press the ground that the action of the respondents had infringed the petitioner's fundamental right of freedom to engage in any lawful occupation, as provided by Article 14(1) (*g*). The right of the petitioner to carry on the occupation of surveyor is not, in any manner, affected by his compulsory retirement from government service. The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the services of a worker are terminated wrongfully, it will be open to him to pursue his rights and remedies in proper proceedings in a competent court or tribunal. But the discontinuance of his job or employment in which he is for the time being engaged does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed by Article 14(1) (*g*) of the Constitution. It is not possible to say that the right of the petitioner to carry on an occupation has, in this case been violated. It would be open to him, though undoubtedly it will not be easy, to find other avenues of employment as a Surveyor. Article 14(1) (*g*) recognises a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice.

The compulsory retirement complained of, may at the highest affect his particular employment, but it does not affect his right to work as a Surveyor. The case would have been different if he had been struck off the roll of his profession or occupation and thus disabled from practising that profession.

It is with regret that I have to reject the petitioner's present application for the reason that it does not show a violation of a fundamental right for it to be maintainable under Article 26 of the Constitution, for, the record discloses an instance of grave miscarriage of justice resulting from blatant abuse of power by top officials. I must say that had the 2nd respondent not misused the powers delegated to him by the Cabinet and wrongly contrived to terminate the services of the petitioner prematurely on tenuous charges, the petitioner would not have been left with a stigma at the tail end of his career of efficient service which had earned him quick promotions.

dismiss the application, but the respondents shall bear their own costs.

RANASINGHE, J. – I agree.

ATUKORALE, J. – I agree.

TAMBIAH, J. – I agree.

DE ALWIS, J. – I agree.

WANASUNDERA, J.

This is an application by the petitioner under Article 126 of the Constitution, complaining of a violation of the fundamental right o the equal protection provision in Article 12 of the Constitution. The petitioner was a staff grade senior public officer holding the substantive post of Deputy Surveyor-General at the time he was compulsorily retired from service.

The 1st respondent to the petition is Major Montague Jayawickrema, the Minister of Public Administration and Plantation Industries. The 2nd respondent is Mr. D. B. I. P. S. Siriwardene, Secretary, Ministry of Public Administration. The 3rd respondent is Nanda Abeywickrema, Secretary, Ministry of Lands. The 4th respondent is S. D. F. C. Nanayakkara, the Surveyor-General. The Attorney-General has been joined as is required by the law and is named the 5th respondent.

The petitioner had worked in the Surveyor-General's Department from the date of his appointment to the public service in February 1957 as an Assistant Superintendent of Surveys. He rose in the Department to the position of a Deputy Surveyor-General. In March 1978 he was seconded for duty to the Academy of Administrative Studies. In 1979 he was appointed Head of the Operations Management Division of this institution. This institution underwent a transformation in November 1979 and became known as the Sri Lanka Institute of Development Administration (SLIDA). In May 1982 this institution underwent a further change and became a corporation. The petitioner functioned as a Co-ordinating Consultant, Projects and Operation, Management Division of SLIDA and later was appointed to the post of Additional Director, Training and Evaluation, while still on secondment as a public officer.

The petitioner has produced evidence to show that the governing authorities of these institutions, including the 2nd respondent, had greatly valued the petitioner's services at those institutions and commended him for them. However, on 6th July, 1983, his services at SLIDA had been summarily terminated and he was reverted to his position of Deputy Surveyor-General in the Survey Department, which comes under the Ministry of Lands and Land Development. Thereafter, by letter dated 24th August, 1984, the 2nd and 3rd respondents, purporting to act under Public Administration Circular 136, informed the petitioner that he was being transferred to the Public Officers' Reserve on the ground of inefficiency and incompetence and, by the same communication, called upon the petitioner to give his explanation within a period of 30 days why he should not be compulsorily retired or otherwise punished for general inefficiency. The petitioner has stated that on 25th September, 1984, which he says was within the permitted time limit, he sent his explanation in a letter addressed to the Secretary, Ministry of Lands and Land Development, through his immediate head, the Surveyor-General. However, on 27th September, the 3rd respondent informed the 2nd respondent that he had had no reply from the petitioner and on the same day the 2nd respondent has called for the relevant file and a few days later, by letter P 1 signed by the 2nd respondent and dated 2nd October, 1984, the petitioner was informed that he was being retired from the public service for general inefficiency. The petitioner was then only 51 years of age and had still

9 more years to reach the compulsory age of retirement. It is the petitioner's complaint that the action taken against him was the result of personal animosity on the part of the 1st respondent towards the petitioner, the 1st respondent being the Minister in charge of Public Administration and having authority over the petitioner in the petitioner's capacity as a public officer. The petitioner states that this animosity arose from certain actions of the petitioner in his capacity as the President of the Sri Lanka Tennis Association (SLTA) which had affected the 1st respodent, who is also a member of this Association. The petitioner states that the Sri Lanka Tennis Association is a private sports club and his membership in the club or its activities have no bearing whatsoever with the petitioner's official duties as a public officer.

The petitioner also states that the order of compulsory retirement was put in operation through the 2nd, 3rd and 4th respondents, who had or claimed to have varying degrees of supervisory control over the petitioner, and these respondents, while purporting to act as public officers, had in fact been acting at the behest and on the dictation of the 1st respondent, who was actuated by personal animosity and vindictiveness.

The petitioner alleges that he has been dealt with in flagrant violation of the due process of law and in disregard of rules relating to disciplinary control of public officers. He has added that as far as he is aware he is the only public officer who had been dealt with in this manner. He complains that this constitutes a violation of his fundamental right guaranteed by Article 12 (1) of the Constitution.

Apart from the *mala fides* imputed to the respondents which Mr. H. L. de Silva submitted is sufficient by itself to vitiate the disciplinary proceedings taken by the respondents, he contended further that, as there is a violation of a constitutional right flowing from the express provisions of the Constitution and from rules made thereunder and since an invidious distinction has been made between the petitioner and other public officers, this would be another ground for sustaining this petition even without proof of malice. Perhaps the strong feelings engendered by a sense of injustice may have compelled Mr. H. L. de Silva to place the issue of *mala fides* in the forefront of his case, but it seems to me that there are other approaches to this case.

The question of *mala fides* is a factual issue which has to be determined upon a consideration of the numerous affidavits submitted by and on behalf of the petitioner and the respondents respectively, on which there is a sharp conflict. The petitioner's accusations are undoubtedly of a serious nature which Mr. Aziz did his best to meet. The factual evidence on the issue of *mala fides* has special relevance to the motives and the circumstances providing the opportunity for the respondents to take action against the petitioner. It would also contain the grounds for such action, but to complete the picture a further element has to be considered and that is the nature of the disciplinary procedure that was adopted and the validity of such procedure in relation to fundamental rights. There is therefore more than one issue in this case, particularly the one relating to the validity of the disciplinary procedure, that can be decisive of this petition. It is fortunate therefore that I find that this petition can be resolved on a single legal issue, making it also unnecessary for me to reach a decision on the factual question. For the purpose of answering this legal issue, it would first be necessary to examine carefully the relevant constitutional and legal provisions under which disciplinary action was taken against the petitioner.

The constitutional provisions relating to disciplinary control and dismissal of public officers show that public officers who serve the State can be divided into at least five different categories. Each such category is governed by a different set of provisions regarding their appointment, tenure, disciplinary control and removal. For the purposes of this judgment, I shall confine myself to the class of public officers referred to in Article 55 of the Constitution to which the petitioner belongs. In the first instance, these officers come within the authority of the Cabinet of Ministers. The Cabinet is also the sole authority that can provide for and determine all matters relating to this class of public officers, such as the formulation of schemes of recruitment and codes of conduct for such public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and delegation of the powers of appointment, transfer, dimissal and disciplinary control of such public officers. The constitution allows the Cabinet to delegate control over those public officers to another authority. For this purpose the Constitution has established a Public Service Commission, which can share these administrative duties with the Cabinet. The Public Service

Commission can itself delegate its functions to other authorities. These constitutional provisions, by providing this system of delegation, ensure a large measure of flexibility in their operation.

At present the Cabinet has reserved to itself the power of dismissal and disciplinary control of four types of public officers of this category. The power of disciplinary control and dismissal over all the other public officers of this category has been delegated to the Public Service Commission. The Public Service Commission has in turn delegated control over staff grade officers in a Ministry to the Secretary of each such Ministry. Mr. H. L. de Silva has submitted that the petitioner's case falls into this category. There has also been a specific delegation by the Public Service Commission to the Secretary, Public Administration, of control over all staff grade officers not in Ministries and staff officers in the combined Services. Control over non-staff members has been delegated to each Head of Department.

At this stage it is necessary to look at the various administrative rules and provisions containing the procedures for disciplinary action against public officers. The standard procedures are contained in the Establishments Code, which compilation as its name indicates is the basic enactment on these matters. The relevant Chapter is XLVIII of Volume II of this Code, which contains the rules of Disciplinary Procedure.

According to the petitioner, he falls under the main provision of section 2:2:1 of this chapter and the power of dismissal and disciplinary control over him has been delegated by the Public Service Commission to the Secretary of each Ministry. The Public Service Commission had itself been vested with this authority upon a delegation made to it by the Cabinet of Ministers.

The procedure for the retirement for general inefficiency by the Cabinet of Ministers or by a Secretary to a Ministry is dealt with in section 23. The required procedural steps are the following : The Secretary must, in the first instance, obtain reports on the officer's work and conduct from the Department in which he has previously served. The Secretary must then inform the officer in writing of the grounds on which it is proposed to retire him for general inefficiency and request the officer to show cause in writing within a stipulated period against the proposed action. On receiving the officer's explanation, the Secretary must forward the case with his own report

thereon to the Cabinet of Ministers, through his own Minister. The Minister must also make his own observations on the matter. If the Cabinet considers that the offence is one that should be dealt with as falling under Schedule "A", it will call upon the officer to explain why he should not be compulsorily retired. If, on the other hand, the Cabinet considers that the offence is of a type that should be regarded as one falling under Schedule "B", it will refer the matter back to the Secretary concerned with a direction that it should be so dealt with.

Admittedly the above procedure has not been followed in this case. The affidavits of the 2nd and 3rd respondents indicate that they have taken steps under an alternate procedure contained in Public Administration Circular No. 136, and they have sought to justify the retirement of the petitioner on this basis.

Public Administration Circular No. 136 (2R1) had been issued by the 2nd respondent as the Secretary, Ministry of Public Administration and Home Affairs. It is dated 17th April, 1979 and addressed to all Secretaries of Ministries and Heads of Departments.

The Circular is titled "Public Officers' Reserve". Paragraph 1 is worded as follows :–

"The Government has decided to set up a Public Officers' Reserve comprising the following categories of officers :

A – those redundant to the needs of the individual departments ; and

B – (i) those who on account of such reasons as inefficiency and incompetence, are not effective members of the Department ;

(ii) those who on account of engagement in anti-Government activities, are not effective members of the Department."

Paragraph 2 states :

"The Reservists will be subjected to the following conditions :–

(i) Reservists in category 'A' will be granted their increments during the Reserve period ;

(ii) Reservists in category 'B' will be granted increments only after examination of each case by the Ministry of Public Administration and Home Affairs ;

(iii) All Reservists will be placed on compulsory leave."

The regulations that follow relate to the procedure for taking action. This would have normally, according to the Constitution, been laid down by the Cabinet as part of its policy-making powers. But, although the above impression is sought to be conveyed, it is the Secretary, Public Administration, who seems to take over from this point onward. Paragraphs 3 to 10 are worded as follows :–

"3. To enable me to implement this decision I shall be glad, if, in respect of all officers falling under the categories 'A' and 'B' in para 1 of this Circular, in all Departments under your Ministry, you would forward a Reservist Report as in Annex 1. It should be sent in duplicate to me and with a copy to D.S.T. using half sheets (one side only) in respect of each employee.

4. The Reservist Report should clearly indicate, as provided, whether the Reservist falls under category 'A' or category 'B' (i) or category 'B' (ii).

5. When an officer in category 'A' is transferred to the Reserve, his post will thereafter not be filled except with the authority of the Treasury as funds for such a post will be frozen.

6. In respect of category 'B' Reservists, the transferring Department should forward to this Ministry a full confidential report on the reasons for the request for transfer.

7. In respect of category 'B' Reservists, the reasons for the transfer requests should be clearly indicated in cage 12 of Annex 1, i.e. whether on account of such reasons as ineffiency and incompetence on the one hand or on account of engagement in anti-government activities on the other hand.

8. Where under category 'B' (i) an officer's transfer is requested on account of such reasons as inefficiency and incompetence, the Head of Department should take action under Section 24:1 and 24:2 of Chapter XLVIII of the Establishments Code. Thereafter however, instead of himself taking action in terms of 24:3, he should forward all papers with his observations to reach me within two months of the Reservist Report.

9. Where under category 'B' (ii) an officer's transfer is requested on account of engagement in anti-Government activities, the Head of Department should forward to reach me within one month of the

Reservist Report, a draft charge sheet with full particulars of all acts of omission and commission, oral and documentary evidence relied on etc. to be served by me on the Reservist concerned.

10. The Reservist Reports should be sent to reach me by 30th June, 1979."

Annexure 1 contains the form of the Reservist Report referred to in paragraph 3.

When Circular 136 is scrutinised, it is found that it reveals a number of infirmities and weaknesses both inherent and in regard to the context in which it has been issued. Some of them are of a fundamental nature.

It would have been noted that this Circular has been issued by the Secretary, Public Administration and Home Affairs. The only reference to the Government is in the first line of the Circular to the effect that "the Government has decided to set up a Public Officers' Reserve". The other paragraphs in the Circular, and certainly those from 3 to 10, are statements made by the Secretary and there is no reference to those being decisions of the Government. The date of issue of this Circular is also material. It is dated 17th April, 1979. In contrast to this, the Establishments Code, which was admitted in evidence before us, states that it is "issued by the Secretary to the Ministry of Public Administration under the authority of the Cabinet of Ministers".

Let us again contrast Volume II of the Code. It is dated 8th April, 1981, which is subsequent to the Circular and begins with the following introductory paragraphs :–

"This Volume of the Establishments Code deals with the disciplinary control of all public officers other than public officers referred to in Articles 41, 51, 52, 54 and 114(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka and members of the Army, Navy and Air Force.

2. The provisions of this volume have been approved by the Cabinet of Ministers in terms of Article 55 (4) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

3. The new print of Volume II replaces the existing Volume II dated 22.04.1974 and shall come into force with effect from 7th September, 1978."

There is no reference to the Circular in the Establishments Code, which is an authoritative enactment issued by the Cabinet of Ministers and subsequent to the Circular. The Code has also been designed to apply to all classes and categories of Public officers falling under Article 55. The Circular, on the other hand, has a reference to the Code, there by admitting the validity of the Code. The only portion of the Circular that can pass muster is the bare establishment of a Public Officers' Reserve for which at least there is Cabinet authority.

Although at the beginning the 2nd respondent relied on the Circular alone, it must have dawned on him and his legal advisers that reliance on the circular alone may not justify the procedure followed in this case. Later, in the course of the proceedings, the 2nd respondent filed a second affidavit disclosing certain documents which show that in 1981 the Attorney-General himself had expressed doubts about the validity of the acts of the Secretary, Public Administration, in respect of this Circular.

In deference to this opinion steps were then taken to feed the Secretary, Public Administration, with the necessary authority. Document 2R3 filed with this affidavit is the relevant Cabinet decision. it bears the date 11th February 1981 and is as follows :–

> "Cabinet Paper No. 151 of 1981, a memorandum by the Minister of Public Administration on 'Public Officers Reserve' was considered and it was decided that the Public Service Commission delegates the powers of transfer, dismissal and disciplinary control of Public Officers in the Public Officers' Reserve to the Secretary, Ministry of Public Administration in conformity with the Attorney General's advice referred to in the memorandum."

In clarification, the Deputy Solicitor-General informed us that the Attorney-General had expressed the opinion that the Secretary, Public Administration, had no delegated authority to deal, in any manner, with Public Officers in the Reserve until a delegation to such effect was granted to him by the proper authority. Such a delegation had to be effected in two stages. First, by a delegation by the Cabinet to the Public Service Commission and, secondly, by a delegation by the Public Service Commission to the Secretary, Public Administration.

Consequent to 2R3, the Secretary, Public Service Commission, in turn, sent letter 2R3A to the Secretary, Ministry of Public Administration, notifying the delegation of the powers of the Commission over the Public Officers' Reserve to the Secretary, Public

Administration. This letter is dated 2nd April 1981. This, and not 17th April 1979, the date of the Circular, would thus be the effective date of the delegation. Incidentally a slight difference in wording between 2R3 and 2R3A may be noted and could be of some consequence While by 2R3 the Cabinet sanctioned a delegation by the Public Service Commission to the Secretary, Public Administration, of "the powers of transfer, dismissal and disciplinary control of public officers *in the Public Officers' Reserve,*" the actual delegation by the Public Service Commission to the Secretary, Public Administration, states that it is a "delegation of powers relating to the transfers, dismissal and disciplinary control of officers *reported to the Public Officers' Reserve.*"

I am inclined to agree with the opinion of the Attorney-General that Circular 136 issued on 17th April 1979 by the Secretary, Public Administration, in so far as it relates to the provisions of paragraphs 5 to 10, had been issued without proper legal authority and is therefore void.

Now, whatever be the effect of the attempted rectification, the terms of the subsequent delegation cannot have the effect of automatically and retroactively validating Circular No. 136. Nor has this Circular been subsequently reissued.

Mr. H. L. de Silva has submitted further that this Circular was intended to provide for the establishment of a Public Officers' Reserve as an interim measure to weed out and render inactive all unwanted public officers following upon the change of Government and the coming into operation of the present Constitution. He has drawn our attention to paragraph 10, which gives 30th June 1979 as the final date for sending the Reservists' Reports, and to items 3, 10 and 11 of Annexure 1, which has also given the date 31st May 1979 as the material date for the purpose of the particulars that have to be furnished. These items are strongly suggestive of Mr. de Silva's contention and this insistence and reference to a deadline in May 1979 in the Circular has not been satisfactorily explained by the respondents.

It will also be observed from the wording of the paragraphs of the Circular that they appear to deal with merely the transfer to the Reserve and not with the larger question of disciplinary proceedings. Briefly the procedure contemplated by the Circular is for the Secretary of the relevant Ministry to forward to the Secretary, Public Administration, the Reservist's Report duly perfected. This is in effect

a request for the transfer of the officer concerned. Paragraph 6 contemplates the Department that has requested the transfer to send to the Ministry of Public Administration "a full confidential report on the reasons for the request for transfer." This probably could be done within the two months' period referred to in paragraph 8.

When a request has been made for transfer on the ground of inefficiency and incompetence, paragraph 8 provides for an inquiry before further action is taken. The proposed inquiry is under section 24 : 1 and 24 : 2 of Chapter XLVIII of the Establishments Code. According to these provisions of the Code, this has to be taken by the Head of the Department. The Code however has been varied by the Circular to the extent that the final decision has now to be taken by the Secretary, Public Administration, and the Head of Department has to forward to him all the relevant papers along with his observation.

The other provisions of the Establishments Code indicate that the delegated disciplinary authority over the class of officers, such as the petitioner, is the Secretary to his own Ministry and this Secretary himself has to make the necessary inquiries and report to the Cabinet of Ministers. When the provisions of paragraph 8 of the Circular refer to sections 24 : 1 and 24 :2 of the Code, it is not clear whether it is intended that these sections should apply in the normal way or whether section 24 is incorporated by reference in the Circular and that section has to be adapted and modified to fit into the provisions of the Circular. Whatever view we take, the Circular appears *prima facie* to be inconsistent with the constitutional and other provisions lawfully made under constitutional powers and would, therefore, be *ultra vires*. If the provisions of section 24 are to be applied in the normal way, then, as Mr. H. L. de Silva submitted, this is an indication that the Circular is not intended to apply to the category to which the petitioner belongs, but to a lower category of officers. Whereas the Code promulgated by the Cabinet has divided the public officers into several categories, this Circular has sought to erase those divisions and to go by a common standard, namely, the lowest common denominator where the Head of the Department is the immediate disciplinary authority.

It is unnecessary to pursue the question as to whether the Circular could or could not have been revalidated and if a fresh circular had tc be issued what its contents should be. In the absence of a prescribed or applicable procedure, the provisions of the Establishments Code. *mutatis mutandis* must therefore continue to apply.

The Establishments Code is the basic document relating to procedures of disciplinary action against public officers. It has been formulated by the Cabinet of Ministers under Article 55 (4) of the Constitution in whom such a power is reposed. This formulation has the characteristics of a policy decision as it deals with the broad principles and procedures governing disciplinary action against officers of practically the entire public service in this country. The particular weight to be attached to this Code could be judged from the fact that public officers in this country under the new constitutional provisions have now been brought entirely within the domain of the Executive. Any complaints from public officers relating to their appointment, transfer, dismissal or disciplinary control, cannot be entertained by the ordinary courts and decisions of the Cabinet, the Public Service Commission, or their delegates in regard to any of the above matters cannot be canvassed in a court of law – Article 55 (5). The only matter that a public officer can take to the courts – and that only to the Supreme Court under Article 126 – is a violation of a fundamental right and no other. The administration of the public service is now an internal matter of the Executive. It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority.

In my view, in the present case the 2nd, 3rd and 4th respondents have acted not in terms of the applicable Code, but under a mistaken belief that they were free to act on some arbitrary procedure. Here we have a case not of the mere fallibility of officers engaged in the ordinary business of administration or who operate given Codes of rules, regulations or practices, but the case of a formulation of policy by highly placed officials involving the arrogation to themselves of the constitutional powers vested in the Cabinet of Ministers and the disregard wittingly or unwittingly of a duly formulated existing Code of Procedure providing protection to public officers. These actions on the part of the respondents are not the erroneous actions of some minor public officials operating at the peripheral level of the administration, but are intentional acts, though misguided, operating, if not at a policy-making level, at least at a level where their acts have the nature

and characteristics of policy decisions. They are departures from the norm and constitute unequal treatment within the meaning of Article 12.

The present case can be contrasted with a case where there is a mere error or mistake in the working of a Code or regulations which had been duly enacted. Admittedly such an error or mistake cannot give rise to a violation of a fundamental right, though it can constitute a violation of an ordinary right unless that Code or regulations themselves have been purposely formulated so as to work in a discriminatory way.

In *Harrikisson v. Attorney-General of Trinidad and Tobago* (24) the Privy Council dealt with such a situation. The petitioner, who was a school teacher, was transferred from one school to another without giving him the three months' notice which was required by the Rules. The powers of transfers, appointment and disciplinary control of teachers had been vested in the Public Service Commission by the Constitution. However, by a constitutional amendment this power was transferred to a Commission called the Teaching Service Commission.

The Teaching Service Commission had, by Gazette notification, adopted as their own the Public Service Commission Regulations which related to transfers. The relevant regulations were as follows :–

"134. Every application for an appointment on transfer in the Teaching Service shall be addressed to the Director through the Permanent Secretary on the prescribed form . . ."

"135. (1) Where the Commission proposes to transfer a teacher . . . the Commission shall, except where the exigencies of the Teaching Service do not permit, make an order of transfer in writing and shall give not less than three months' notice to the teacher who is to be transferred. (2) Where a teacher has applied for a transfer to a particular public school and the Commission proposes to transfer the teacher, but not to the particular school, the Commission shall, except where the exigencies of the Teaching Service do not permit, make an order of transfer in writing and shall give not less than three months' notice to such teacher. (3) A teacher who is aggrieved by an order made under paragraph (1) or (2) may make representation to the Commission for a review of the order in accordance with paragraph (4). (4) Where a teacher desires to make representation to the Commission for a review of an

order made under paragraph (1) or paragraph (2), such teacher, within 14 days of the receipt of the order, shall give notice in writing to the Permanent Secretary . . . and shall submit with the notice his representations in writing. (5) The Permanent Secretary shall, within seven days of the receipt of any representation made to him in writing under paragraph (4) forward such representation together with his comments . . . thereon to the Commission. (6) The Commission shall consider the representations of the teacher and the Permanent Secretary . . . submitted to it under paragraphs (4) and (5) and shall record its decision in writing."

"136. Notwithstanding that a teacher in respect of whom an order has been made under paragraph (1) or (2) of regulation 29 has made representation under paragraphs (5) and (6) of the said regulation the teacher shall assume his duties on transfer pending the review of the order by the Commission."

The appellant however considered that the transfer was intended as a punishment for allegations he had made of improprieties at the first school and that the exigencies of the Teaching Service did not justify his transfer on less than 3 months' notice. He applied to the High Court under section 6 of the Constitution for a declaration that there had been a violation of his fundamental rights in "property" and of his right to equality before the law and equal protection of the law. The appellant had however chosen not to avail himself of an administrative review procedure provided by the regulations.

In regard to the equality provisions, the Privy Council said :

"These regulations define the legal rights enjoyed by the appellant in relation to his transfer from one post to another in the Teaching Service. It is in exercise of these rights that he is entitled to the protection of the law."

It also said :

". . . . What the appellant was entitled to under this paragraph was the right to apply to a court of justice for such remedy (if any) as the law of Trinidad and Tobago gives to him against being transferred from one post to another against his will. There is nothing in the material before the High Court to give any colour to the suggestion that he was deprived of the remedy which the law gave him. On the contrary he deliberately chose not to avail himself of it."

Speculating on what could be the position if the appellant had availed himself of his remedy under the regulations, the court went on to add :

> "Strictly speaking this makes it unnecessary for their Lordships to decide whether, if the appellant had followed the procedure laid down in the regulations, and the commission, after considering his representations and those of the Permanent Secretary, had adhered to their decision to order him to be transferred to Palo Seco Primary School, the High Court would have had any jurisdiction to quash the commission's order, not, as their Lordships have indicated, under section 6 of the Constitution, but upon an application for certiorari. Those hypothetical circumstances correspond more closely with those which the Court of Appeal assumed to exist since they were unaware that there were regulations applicable to the appellant which gave him a right to seek a review by the commission of the order of transfer."

This was a case, as stated earlier, where action was taken under a valid set of regulations and even if there had been some irregularity in the application of those regulations, this would not have amounted to a violation of the fundamental right of equality. In contrast, the case before us is one where the authorities had acted arbitrarily without a valid set of rules of procedure or in disregard of the Code contemplated by the Constitution and formulated by the Cabinet of Ministers. This Code constitutes the norm and embodies the necessary safeguards to protect the rights of public officers. It constitutes the state of the law on this matter and is and should be applicable, without exception, to all public officers of the class or category to which the petitioner belongs. Any departure in a particular case from this basic norm, which is of general application, would be a deprivation of the protection given by the law and must be regarded as unequal treatment and a violation of Article 12(1) of the Constitution.

Recent trends in the Supreme Court of India on the interpretation of the equality clause in the Indian Constitution were brought to our notice, but it is unnecessary for me to enter into a discussion, interesting though it be, of these developments for the purpose of this judgment. Suffice it is to say that in a number of recent Indian decisions the Indian Supreme Court appears to have taken the view that it is prepared to hold that even a mere departure from defined

procedures would be sufficient to constitute a violation of the fundamental right of equality under Article 14. However, as stated above, it has become possible for me to base my judgment on grounds other than this and it is therefore not necessary to rely on this line of reasoning. I would however like to set out as a matter of interest a quotation from the judgment in *Ramana Dayaram Shetty v. International Airport Authority of India (supra)* which is as follows :

> "2(*a*) It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The defined procedure, even though generous beyond the requirements that bind such agency, must be scrupulously observed. This rule, though supportable also as emanating from Article 14, does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."

In the course of the arguments an incidental question came up for discussion, namely, whether in order to establish discrimination under Article 12 there must be actual evidence to show that other persons had been differently treated, compared to the petitioner. It was suggested that in this case there was no evidence of other persons of the same category being treated or placed in a more advantageous position than the petitioner.

Admittedly a comparison is necessary. In the case of an individual or office, which is singular, the notional comparison would be with the norms or the protection legally applicable to that person or office. In the case of a person in a group, it would be the norms or protection applicable to the group, and in the case of a group or category, the issue would really be the reasonableness of the classification itself. The suggested view is therefore based on a misconception and is not supported either by law, logic or practice.

It would be observed that Article 12(1) does not use the word "discriminate". It merely sets out the concept of equality. The term "discriminate" is used however in Article 12(2), which is subsidiary to Article 12(1), and what this provision does is to prohibit a classification in terms of the specified items which, in the absence of such a provision, may have been a permissible classification under Article 12(1). Article 12(1) is cast in much broader terms than 12(2) both in concept and content. Any departure from the norm which is the law of the land, whether or not it be understood in the specific sense of the term "discrimination" used in Article 12(2), would *prima facie* amount to a violation of Article 12(1). But Article 12(1) does not forbid reasonable classification. In this connection the courts have held that a law may be constitutional even though it relates to a single individual who is in a class by himself.–*Dalmia's Case* (25).

Take the example of legislation. In this country we have the mechanism of deciding the constitutionality of legislation at the Bill stage or pre-enactment stage, but in the U.S. and in India the constitutionality can be decided at any time after enactment. In such cases, when there is a conflict of the legislation with the fundamental rights, this issue is generally decided on a notional basis and not necessarily by showing that the impugned legislation is discriminatory in relation to any real individual 'A' or 'B'. Where impugned legislation or executive action is based on a classification, which is generally the case, again matters are generally decided on a notional basis, that is, whether one class is placed advantageously or disadvantageously in relation to the other. Innumerable cases indicate this, although in some cases where the necessary evidence is forthcoming the actual names of an individual or individuals who may have been treated more advantageously may be given. This however is not one of the criteria in deciding the matter – rather a matter of evidence and procedure. One can contemplate many situations, classifications and even government posts which are singular and have no parallel and in such cases the proposed test cannot be applied and if applied would mean that even some of the highest officers of the State will be relegated to a position where they would be denied the constitutional remedy under Article 126. The application of that test would also mean that the very first instance in the application of a law, regulation or rule or

executive action, however illegal and discriminating it may be, cannot give rise to a cause of action for lack of comparison and an aggrieved person would be again shut out from coming to court under Article 126. The equality clause of the Constitution must by its very nature be all-embracing and of universal application, subject only to the principle of classification. The proposed test has nothing to do with the principle of classification nor does it purport to have any rational relation to the object sought by the impugned act or legal provisions. Such a view, far from advancing the protection of the fundamental rights which are enjoined on us, lets in an irrational and irrelevant factor into the process of interpretation and this would result in cutting down considerably the wide scope of the equality clause.

This brings me to the next question as to whether or not such discrimination can constitute "executive or administrative action" within the meaning of Article 126 of the Constitution. Although we can begin a discussion of this matter by referring to the case of *Wijesinghe v. The Attorney-General (supra)*, it may be necessary to remind ourselves that in *Wijesinghe's Case (supra)* this court was dealing with the exception rather than the general rule relating to state liability for violation of fundamental rights. The present case relates to a different situation. This is a case, as stated earlier, not of some error, negligence or mistake on the part of some public officer operating a given Code of rules or practices. Here we have purposeful though misguided action by a group of public officers who, acting for and on behalf of the state, have formulated and put in operation a set of rules. These decisions have the characteristics and nature of policy decisions at one level while at another level they may be considered as ordinary administrative action. While the steps taken by the 2nd respondent have the characteristics of a policy decision, some of the other errors, which would ordinarily be regarded as violations of mere rights and not a violation of a constitutional right or a fundamental right, may in the special circumstances of this case have to be assimilated to the aforesaid policy decision as they constitute an integral part of the alternate procedure devised in this matter. The respondents, while acting in their capacity as public officers but without due authority, had under a mistaken view of their powers sought to divert the orderly course of administration to unauthorised and unwarranted channels, thereby placing the petitioner at a disadvantage compared with other officers similarly placed. In short

the petitioner has been denied the protection of the law which he was entitled to. This would constitute discrimination by executive or administrative action within the meaning of Article 12.

In my view, this application can be disposed of on this legal ground alone. I am accordingly not called upon to make any pronouncement on the factual question of malice argued before us and I wish to make it clear that I make no pronouncement thereon. The petitioner therefore succeeds in this application and I would quash the order of compulsory retirement and order the State to reinstate the petitioner in the substantive post he held before action was taken to retire him.

It is however quite clear that the relations between the petitioner and some of the respondents are quite strained and the petitioner would prefer an order of compensation rather than continue in service. The Deputy Solicitor-General, who presented the case for the Government competently and fairly indicated to us when a settlement was discussed in the course of the hearing that the Government would be prepared to take back the petitioner and, if necessary, permit him to retire from service in the normal way, adding any years of service necessary for this purpose.

The petitioner is undoubtedly an able officer whose competence and skills in many fields were conceded by the respondents. The respondents have however alleged that the petitioner's conduct is abrasive and belligerent and is a disruptive influence wherever he works and that this is a serious failing going to his competence and efficency in the case of his further promotion. Clearly the Government would prefer not to have him in these circumstances and, since the petitioner has himself averred that the feelings between him and his seniors have been strained to breaking point, I trust that the offer made by the State, which is expected to be a model employer, is still open and it would be possible for the parties to adjust their differences in a fair and reasonable manner. It would be unfortunate if an officer of undoubted ability who had served the State for 27 years is compelled to go out in this fashion, leaving the public service under a cloud.

I would suggest for the serious consideration of the State some adjustment of this matter on lines indicated above which, it would be observed, does not go beyond the terms that were offered by the State in the course of the hearing. Apart from the above suggestions,

my specific order is for the reinstatement of the petitioner in his substantive post with effect from the alleged date of compulsory retirement.

The application is therefore allowed with costs, which are payable by the State.

WIMALARATNE, J.

The Constitution of the Democratic Socialist Republic of Sri Lanka, in its Preamble, assures to all people freedom, equality, justice and fundamental human rights as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of Sri Lanka. To give meaning to this Preamble the Constitution enumerates in Chapter III the Fundamental Rights it guarantees. Further, in Chapter VI which deals with the "Directive Principles of State Policy & Fundamental Duties" it proclaims in Article 27 (2) that the State is pledged to establish in Sri Lanka a democratic socialist society the objectives of which include the full realisation of the Fundamental Rights and Freedoms of all persons. Article 4 (d) enjoins all organs of government to respect, secure and advance, and not to abridge, restrict or deny the fundamental rights declared and recognised in the Constitution. In my approach to the interpretation of the equality provisions contained in Article 12 (1) I shall bear in mind not only the recitals in the Preamble, not only the injunction contained in Article 4 (*d*), but also the spirit enshrined in them and the duty of this Court to advance and not to restrict the fundamental rights so meaningfully enshrined.

The petitioner Elmore Perera is an Honours Graduate of the University of Colombo. He joined the public service as an Assistant Superintendent of Surveys on 1.2.57. By 1975 he had risen to the rank of Deputy Surveyor-General without any halt in his progress. He was seconded to the Academy of Administrative Studies in 1978 and made Head of the Operations Management Division of that Organisation in 1979. In the same year there was formed the Sri Lanka Institute of Development Administration (SLIDA). The petitioner was appointed co-ordinate consultant, Projects & Operations Management Division of that Institution. SLIDA was incorporated by Act No. 9 of 1982 and among the general objects of SLIDA is the development of a competent cadre of supervisory and support staff throughout the public service to ensure efficient and effective

administration at all levels – Section 3 (*d*). SLIDA has a Governing Council whose Chairman is the Secretary to the Ministry of Public Administration and who is the 2nd respondent to this application. The other members of the Council consist of the Secretaries to several important Ministries as well as a Director of the Institute, Mr. V. T. Navaratne by name. The Governing Council appointed the Petitioner to be the Additional Director, Training and Evaluation. By November 1982 the petitioner had also completed the I.C.M.A. examination and was admitted as an Associate Member of the Institute of Cost and Management Accountants.

His career was however interrupted when he was informed that his services were no longer required at SLIDA, by the 2nd respondent's letter K dated 5.7.83. Yet, whilst reverting to his substantive post of Deputy Surveyor-General he did lecture at SLIDA as a visiting lecturer until that too was discontinued in November 1983. Admittedly that was as a result of instructions received by the 2nd respondent from the 1st respondent, who is the Minister of Public Administration and to whom the subject of SLIDA was assigned. An attempt to ascertain whether there was any reason other than the Minister's directive for this reversion revealed that the Director Mr. Navaratne had placed on record on 21.7.83 the fact that the petitioner "had made a significant contribution to SLIDA's development, particularly in the area of project management and operations research". What is more, the 2nd respondent expressed his regret that circumstances made it necessary to terminate the petitioner's association with SLIDA "to which petitioner had made a valuable contribution over several years". I take it that senior Public Officers mean what they say, and say what they mean.

I therefore find it difficult to understand how Mr. Navaratne in his affidavit filed in this case takes up the position that the petitioner had at times been abrasive, tactless in his relation with trainees, and that his attitude was counterproductive to the objectives of SLIDA. If that had been so he should never have given the petitioner the certificate referred to ; but having given it he must expect us to act on it.

After he reverted to his substantive post the petitioner had to undergo further humiliation. By Public Administration Circular No. 136 dated 17.4.79 the Government had set up a "Public Officers Reserve"

with the intention of placing in that Reserve the following categories of officers :–

A (i) those redundant to the needs of the individual departments ; and

B (i) those who on account of such reasons as inefficiency and incompetence, were not effective members of the department ;

(ii) those who on account of engagement in anti-government activity were not effective members of the department ;

All reservists were to be placed on compulsory leave prior to disciplinary action being taken against them.

The 3rd respondent who is the Secretary to the Ministry of Lands, under which Ministry comes the Department of the Surveyor-General, who is the 4th respondent by his letter Q dated 24.8.84 requested the 2nd respondent to transfer the petitioner to the Reserve, and also required the petitioner to show cause why he should not be retired for general inefficiency and incompetence. The reply was to be sent to reach the 2nd respondent within 30 days of receipt.

The petitioner was thus placed in the Reserve, sans work, awaiting his trial for inefficency and incompetence. He says he sent a reply to reach the 3rd respondent on 26.9.84 but the 3rd respondent by his letter 2R2 dated 27.9.84 reported to the 2nd respondent that he had received no reply to Q up to that date. Thereupon the 2nd respondent by his letter P1 dated 2.10.84 retired him under section 24 :3 of Chapter XLVIII of the Establishments Code on the ground of general inefficiency *because* the petitioner had not replied to Q. It would suffice to state here that section 24 :3 applies to the case of the Head of Department retiring an officer and not to the case of a Secretary to a Ministry retiring an officer.

It has been contended by learned Counsel for the Petitioner that Circular No. 136 has no application to the retirement for general inefficiency of an officer of a grade to which the petitioner belongs. The circular, by paragraph 8, imposes a duty on the Head of Department to take action under sections 24 :1 and 24 :2 of Chapter XLVIII of the Code. When we look at those sections in the Establishments Code, which is the document X7 it seems quite clear

that they relate to the retirement of officers for general inefficiency in respect of whom disciplinary control is exercised by the Head of a Department and not by a Secretary to a Ministry. Staff grade officers such as the petitioner fall within subsection 2 :2 :1 and in respect of those officers the Public Service Commission (P.S.C.) has delegated its powers of dismissal and disciplinary control to Secretaries of Ministries. It was never intended that staff officers who fall within category 2 :2 :1 were to be dealt with by the circular. The circular was limited not only in its scope as regards the categories of officers who could be dealth with under it, but also in its duration, as could be gathered from the fact that Heads of Departments were obliged to send in the "Reservist Report" to reach the Secretary, Public Administration before 30.6.79. This aspect of the matter as well as the failure of the 2nd, 3rd and 4th respondents to comply with the Circular, even on the assumption that it did apply, has been dealt with fully in the judgments of my brothers Wanasundara, J., and Colin Thomé, J. whose judgments I have had the benefit of reading. There has thus been a misapplication of Circular No. 136.

The power of dismissal and disciplinary control of public officers (other than of those public officers who hold office by virtue of an appointment from the President) is vested by Article 55 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka in the Cabinet of Ministers. The Cabinet directly exercises these powers over Additional Secretaries to Ministries, Heads of Departments, Government Agents and Senior Assistant Secretaries. The Cabinet has delegated its powers over other categories of public officers to the Public Service Commission by Article 55 (3), and by article 55 (4) the Cabinet has provided for "the procedure for the exercise and delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers". That procedure is to be found in the Establishments Code. By subsection 2 :2 :1 of the Code the P.S.C. has delegated to Secretaries to Ministries its powers of dismissal and disciplinary control of certain categories of officers in the Staff grade (with certain exceptions which do not concern us in this case). Admittedly Deputy Surveyors-General fall within the category so delegated to the Secretary to the Ministry, which is the Ministry of Lands and Land Development, and whose Secretary is the 3rd respondent.

The Petitioner's case is that the disciplinary powers placed in the hands of the Cabinet of Ministers to retire compulsorily a public officer of the staff grades was never exercised by the Cabinet in the case of the Petitioner. Disciplinary powers which were conferred on the executive for purposes germane to the administration of the public service were used by the four respondents for a wholly alien purpose, namely, to punish the Petitioner (a public officer) on account of personal grievances by securing his premature retirement from the public service. Thus the Petitioner was denied both equality before the law, as well as the equal protection of the law.

The retirement on grounds of general inefficiency of staff grade officers such as the Petitioner is regulated by the following sections of the Code :–

"23. Retirement for General Inefficiency by the Cabinet of Ministers or by the Secretary to a Ministry."

23 : 1 Where the Secretary to a Ministry is of opinion that an officer referred to in section 2 : 1 or sub-section 2 : 2 : 1 and not belonging to a Combined Service should be compulsorily retired from Public Service on grounds of general inefficiency, which cannot be appropriately dealt with by specific charges, or which do not appropriately fall within the terms of section 22 he will obtain reports on the officer from the Departments in which he has previously served on his work and conduct.

23 : 3 Thereafter, the procedures outlined in sections 22 : 3 to 22 : 6 will apply.

22 : 3 The Secretary will then inform the officer in writing of the grounds on which it is proposed to retire him for general inefficiency and request him to show cause in writing within a stipulated period as to why he should not be retired or otherwise dealt with for inefficiency.

22 : 4 On receiving his explanation the Secretary will forward the case, with his own report thereon to the Cabinet of Ministers through the Minister concerned. The Minister will also make his own observations on the matter.

22 : 5 If the Cabinet of Ministers considers that the offence is one that should be dealt with as falling under Schedule A it will call upon the officer to explain why he should not be compulsorily retired.

22 : 7 If the offence falls under Schedule A the order may either be one of compulsory retirement or one imposing a punishment.

Schedule A

(1) Incompetence, negligence or errors of judgment resulting in serious failures in the planning or execution of important programmes, projects or policies.

(2) Offences of the type that are serious enough to warrant dismissal or a major punishment.

(3) Repeated offences of a type which considered singly are not serious enough to warrant dismissal or a major punishment, but where repetition justifies dismissal or a major punishment.

It is quite clear, in fact it has been conceded, that the 3rd respondent, the Secretary to the Ministry of Lands had not complied with this procedure. Whilst there has been a misapplication of the Circular by the 2nd respondent there has been a non-application of the correct procedure in respect of the retirement of the petitioner for general inefficiency by the Secretary to his Ministry, the 3rd respondent. The Cabinet of Ministers was never made aware of any offence committed by the petitioner for the Cabinet to take steps under sections 22 : 5 and 22 : 7 of the Code. The termination of the petitioner's services was clearly unlawful.

The Petitioner states that the order of compulsory retirement by the 2nd respondent was not only unlawful, but also made against him solely by reason of the personal animosity and vindictiveness that the 1st respondent (the Minister) had towards him, and that the 2nd, 3rd & 4th respondents were, in the circumstances, acting at the dictation of the 1st respondent and in order to conform to his wishes, and have thus by these acts denied the petitioner the equal protection of the law. In support of the hostility of the Minister towards him the petitioner relies on the following incidents :–

(*a*) The Instructions given by the Minister to the 2nd respondent on 24.5.83 that the petitioner should be summoned and instructed to stop interfering with the playing section of the Sri Lanka Tennis

Association (S.L.T.A.). It is admitted that the 2nd respondent conveyed these instructions to V. T. Navaratne, who in turn conveyed them to the petitioner. There appears to have been quite a deal of friction between the petitioner who was the President of the S.L.T.A. and one Duwearachi, who was the President of the playing section of that body. The 1st respondent was the Vice-Patron of the S.L.T.A. It is alleged by the petitioner that Duwearachi as an ardent supporter of the Minister had claimed for the Minister certain privileges such as waiver of the limitation on playing time to half an hour, which was opposed by the Petitioner.

The Petitioner's services at SLIDA were terminated as from 6.7.83. This was done on the instructions of the Minister, as admitted by the Minister in his affidavit, for the reason that SLIDA had a responsibility for training present and future administrators, and permitting a lecturer of the disposition of the Petitioner to train them would be inimical to the interests of SLIDA. Unfortunately, however, the 2nd respondent who was the Chairman of SLIDA and whose responsibility it was to assess the value of the lectures appears to have had a different view. It cannot be forgotten that by his letter P2 of 13.3.84 2nd respondent had referred to the valuable services rendered by the Petitioner to SLIDA over several years. Even if, as the 2nd respondent says, it was a polite way of terminating an association, it was too serious a matter to have been put down in writing considering the fact that his own Minister, a few months earlier, had an unfavourable opinion of the Petitioner's disposition and hence disqualified him to teach future administrators. It seems to me that apart from the independent attitude the Petitioner took in the affairs of the SLTA of which he was President, there was no valid reason for the 2nd respondent to have terminated his services at SLIDA. The only reason was to satisfy the Minister's direction.

(*b*) John Rodrigo is an assistant Superintendent of Police and also Assistant Secretary of the SLTA. He says in his affidavit that on 20.7.83 when he was waiting for a game of tennis near court No. 22 the 1st respondent addressed him thus–"I say, you better tell that fellow Elmore Perera that I will take him off the Survey Department and put him in my pool." The "pool" referred to is the "Public Officers Reserve" which came under the Minister of Public

Administration. There was an emergency committee meeting of the SLTA held on 12.8.83 and John Rodrigo reported this conversation to the Committee. The 1st respondent denies having made this statement and attributed that John Rodrigo has maliciously made this affidavit in order to malign him. In view of the Minister's denial, and the period of about 14 months that elapsed between the alleged statement of the Minister and the date of actual transfer to the "pool," I would hold that that allegation has not been proved by the Petitioner.

(*c*) On 25.5.84 the Minister of Sports issued a directive to the SLTA limiting the playing area by reserving 14 courts out of 23 courts for the purpose of carrying out coaching and training programmes at a national level. This directive of the Minister was challenged in the Court of Appeal by Duwearachi and his faction. A temporary success in the way of a "stay order" was turned into defeat when the court refused to extend the stay order beyond 3.8.84. The petitioner Elmore Perera was the 2nd respondent to that application.

(*d*) The petitioner pleads that the failure of the Minister to get elected as Vice-Patron followed by the failure of the Minister's faction in the Court case "wounded his pride". Hence he decided to take revenge on the petitioner by getting the co-operation of three public officers (2nd, 3rd and 4th respondents) who he alleges were prepared to abuse the authority and powers vested in them under the disciplinary rules to terminate the petitioner's career as a public officer. The petitioner submits that Q and P1 were issued at the Minister's instigation.

The next question is whether the 2nd respondent, in terminating the petitioner's services as Deputy Surveyor-General acted independently, or whether he acted at the request of the Minister. As regards the removal of the petitioner from SLIDA, even if 2nd respondent acted on the directions of the Minister he cannot be blameworthy because there may be some justification by reason of section 30 (1) of Act No. 9 of 1982, which obliges the Institute to give effect to such special or general direction given in writing by the Minister. But as regards the transfer of the petitioner to the Reserve that was not upon any material placed before him by the Head of Department (4th respondent) in the form of a full confidential report, as required by paragraph 6 of the

Circular, but at the mere request of the 3rd respondent, without even an oral communication of the reasons for alleging general inefficiency in support of the request. There was even less justification for terminating the petitioner's services by letter P 1. Nowhere has the 2nd respondent come to any finding of general inefficiency. Manifestly he did not have the confidential report of the petitioner, required by the Circular to be sent to him, before he took a decision, nor does the 2nd respondent say that even an oral communication of the petitioner's inefficiency was ever made to him at any time by either the 3rd or the 4th respondents who are the officers who would have known best. The letter P 1 gives as the reason for holding that the petitioner is guilty of inefficiency the fact that he had not replied the 3rd respondent's show cause letter within 30 days. But it has been established beyond doubt that the petitioner did hand over his reply within 30 days to the 3rd respondent. Learned Deputy S.G. quite correctly stated that he was not taking the defence that the reply was not sent in time. We are therefore left with the simple situation that the petitioner has been retired for inefficiency without proof of any inefficiency. To retire a public officer on the ground of inefficiency when in fact such inefficiency has not been proved is to add insult to injury.

When the 3rd respondent by his letter of 27.9.83 informed the 2nd respondent that the petitioner had not as yet sent his explanation, what was the inordinate hurry for the 2nd respondent to take immediate action to retire the petitioner when paragraph 8 of the Circular itself gave the Head of Department a two-month period of time to send all papers together with his observations. The 2nd respondent could well have shown his bona fides by calling for the confidential report required to be sent by the Circular even at that stage. Had he not been in haste, the 2nd respondent would have had the benefit of reading the petitioner's explanation contained in P 18 and P 19 which had reached the hands of the Surveyor-General within the stipulated month. The petitioner submits that the haste with which the 2nd respondent acted shows his desire to please his Minister at every turn, even if that meant the removal of a Senior Public Officer for general inefficiency without any evidence of such.

What, then is the remedy available to a public officer whose services have been terminated without compliance with the Constitutional procedure stipulated for his removal, and who proved that such

termination has been motivated by ill will towards him ? Article 55 (5) provides that subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a Public Officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer. So the Writs are out, Declaration is out and an action for damages for wrongful dismissal is out. He is completely debarred by this section from seeking relief in the Court of Appeal or the District Court. His only forum is the Supreme Court, if he comes by way of Article 126 (1).

The argument of the Deputy S.G. that the petitioner if he is aggrieved by the retirement order has a right to appeal to the P.S.C. does not merit serious consideration because it is not an answer to a charge of infringement of fundamental rights when the exclusive jurisdiction of the Supreme Court is invoked under Article 126. If a violation of the fundamental right to equality and equal protection is found to be present upon a complaint made by a public officer, the Supreme Court cannot deny the petitioner relief on the ground that he has another remedy, namely, an appeal to the P.S.C. The exercise of the Supreme Court jurisdiction is not conditional upon there being no other remedy available to the person aggrieved. If the petitioner's complaint of a violation of fundamental rights is true, then Article 17 of the Constitution guarantees to him the constitutional remedy provided by Article 126. Since Article 17 appears within Chapter III, entitled "Fundamental Rights", the remedy itself has the status of a fundamental right and is an entrenched right and its exercise cannot be taken away or whittled down by the plea that he could appeal to the P.S.C. The P.S.C. cannot determine the question whether his fundamental right to equality has been violated. The jurisdiction is exclusively vested in the Supreme Court. The P.S.C. may decide whether an order of compulsory retirement has been properly made by the lawful authority but it cannot rule on the question of a violation of fundamental rights. In this case the lawful authority to make an order of compulsory retirement was the Cabinet of Ministers which did not in fact exercise the power. It seems to me that the right of appeal given under Article 58 (2) does not apply to a case where the authority empowered to make the order is the Cabinet of Ministers. The power

which the second respondent purported to exercise was never lawfully delegated to him by the P.S.C. Therefore no question of an appeal to the P.S.C. arose in this case.

It is significant that the petitioner is here not complaining of an inadvertent failure to comply with the law–not an isolated mistaken view or a bona fide error made by the respondents. His case is that it was a wilful and a deliberate course of conduct carried out with a malicious intention and in concert and collusion by the four respondents in order to punish the petitioner for a purely personal and private grievance of the 1st respondent which has nothing to do with their official duties.

In the case of *Wijesinghe v. Attorney-General (supra)* this Court held that every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place due solely to some corruption, negligence or error of judgment a person cannot be allowed to come under Article 126 and allege that there has been violation of constitutional guarantees. That was a case where the petitioner, who was a sub post mistress from 1975 complained that her services had been terminated from 31.1.79 by the Post-Master-General in consequence of a Cabinet decision following the report of a Committee known as the "Political Victimisation Committee" set up to inquire into political victimisations by the previous government. The petitioner stated that her termination was effected without any charges being brought against her and without giving her a hearing. The relief claimed was under Articles 12 (1) and (2). The Court in coming to its finding had been guided by the decision of the Supreme Court of India in *State of Jammu & Kashmir v. Ghulam Rasool (supra)* where the Court held that even where the State had failed to follow the procedure prescribed by the Kashmir Civil Service Rules before the order demoting the employee was made, all that the State had done was to have, if the Rules had the status of Law, acted in breach of the law, but that did not amount to a denial of the equal protection of the law. In his judgment in *Wijesinghe's Case (supra)* Wanasundera, J. made the following significant observation :–

> "The mistake of the (Political Victimisation) Committee however serious, cannot in my view have the effect of undermining the Cabinet decision, which by virtue of the Constitutional provision, is entitled to an independent existence".

What I understand by the above passage is that by virtue of Article 55 (1) the Cabinet of Ministers had the power to terminate the services of public officers , because they held office "at pleasure". "At pleasure" in the context meant at the pleasure of the Cabinet of Ministers who by Article 43 (1) is charged with the direction and control of the Government of the Republic and which is collectively responsible to Parliament. The Head of the Cabinet of Ministers is the President himself. "At pleasure" can never mean at the pleasure of a Secretary to a Minister or at the pleasure of a single Minister. Had the decision to retire the petitioner been taken by the Cabinet of Ministers, then such decision would be unassailable. So that, unlike in *Wijesinghe's Case (supra)* there is no decision, (other than an unlawful termination by a Secretary who had no jurisdiction) "entitled to an independent existence". *Wijesinghe's Case (supra)* is therefore easily distinguishable.

In *Dr. Wijetunga v. Alawatuwala (supra)* the petitioner who was a Doctor in Government service admitted that he openly but passively associated himself with his father on political platforms of the S.L.F.P. during the Presidential Elections of 1982. Charges were framed against him in respect of his political activity. The petitioner did not complain that the disciplinary inquiry was vitiated by any irregularity or breach of principles of natural justice. In fact at the end of the inquiry he signed the record of the proceedings to signify his satisfaction with the manner in which the inquiry was held. His only complaint was that the Inquiring officer was under pressure to hold against him.

Rodrigo, J. held firstly that the only way out for the petitioner to seek relief from the order of his dismissal is to have recourse to the saving clause in Article 55 (5), and secondly that he cannot bring himself under Article 12 (1) except in contrast, and there was no other person to provide the contrast. In my separate judgment I agreed with the order proposed by Rodrigo, J. because *the facts* did not disclose that there had been a violation of any of the fundamental rights guaranteed by Articles 12 (1), 12 (2) or 14 (1) (*g*). Incidentally, the first of the above findings of Rodrigo, J. that the only way out for the petitioner to seek relief was under Articles 55 (5) provides an answer to those who are of the view that the petitioner's remedy was by way of appeal to the P.S.C. under Article 58 (2).

Chapter III of the Constitution dealing with "Fundamental Rights" provides in Article 12(1) that "All persons are equal before the law and are entitled to the equal protection of the law." Our Article 12(1) is in the same terms as Article 14 of the Constitution of India. *Shukla* in his *Commentary on the Constitution of India* (7th Ed.) states at page 29 that this Article guarantees to every person the right not to be denied equality before the law or the equal protection of the law. The first expression :– "equality before the law" which is taken from the English Common law, is a declaration of equality of all persons within the territory, implying thereby the absence of any special privilege in favour of any individual. The second expression, "the equal protection of the laws" which is rather a corollary of the first expression, and is based on the last clause of the first section of the 14th Amendment to the American Constitution, directs that equal protection shall be secured to all persons in the enjoyment of their rights and privileges without favoritism or discrimination. Equality before the law is a negative concept ; equal protection of the law is a positive one.

Seervai in his critical commentary on the *Constitutional Law of India* (Vol 1 3rd Ed.) states at p. 275 that equal protection of the laws must mean the protection of equal laws for all persons *similarly situated*. To separate persons similarly situated, from those who are not, we must *discriminate*, that is, "act on the basis of a difference between" persons . . . . who are and persons who are not similarly situated.

It has been the main contention of learned D.S.G. that even assuming that all the facts as deposed to by the Petitioner are established, yet there is no violation of Article 12(1) of the Constitution. For Article 12(1) to operate there has to be proof of discrimination by the executive, and there can be no discrimination unless there be more than one person. In the instant case, it is his submission that besides establishing that his services have been unlawfully terminated, there is no proof that he has been discriminated as against another of his same class either in the method of retirement or in the procedure adopted.

The contention of learned Counsel for the petitioner is that unlawful discrimination is the denial of equality or the equal protection of the law. An arbitrary deviation from the normal rules in an isolated instance adverse to the interests of the person in respect of whom the deviation is made amounts to unlawful discrimination. Unlawful

discrimination also exists when the executive applies a law or rule different to the law or rule which the Constitution has laid down for the protection of the public. Here the Constitution has laid down in the Establishments Code, the procedure for retirement on grounds of general inefficiency. Instead of following that procedure, which was easily open to the executive if it was acting constitutionally, the executive has in the case of the petitioner only followed a "short cut" procedure, a procedure which was not meant for application to the category of officers to which the petitioner belonged.

The question then is, has there been discrimination between the petitioner and others similarly situated ? The Cabinet of Ministers, by virtue of powers vested under Article 55(1) has drawn up in Vol. II of the Establishments Code the procedure for the disciplinary control of all public officers (other than certain categories which need not concern us). The equal protection that the petitioner enjoyed is that he, along with others similarly situated as himself (eg. the 18 other Deputy Surveyors-General) would all be controlled in the matter of discipline by the provisions of the Establishments Code relating to their category, and not by some other rule or circular not applicable to them. If the Executive chooses not to follow the stipulated procedure, that is the Establishments Code relating to officers in category 2:2:1, in dealing with the petitioner, then the petitioner has lost the equal protection guaranteed to him. His may be the first case of deviation from the established procedure.

In order to establish discrimination it is not necessary for the petitioner to show that correct procedure was applied in the case of others and that he has been singled out for the adoption of a different procedure. Nor is it necessary for him to show that no others were the victims of the wrong procedure now applied for the first time, perhaps, in his case. Take the case of X, Y & Z officers of the same grade lined up for retirement on, say the ground of general inefficiency. The wrong set of rules is purposefully applied in the case of X and he is retired, whilst the cases of Y and Z have yet to be tried. It is not necessary for X to wait till Y and Z have been tried, perhaps after the executive becomes wise and tries them following the correct procedure. The moment the correct Constitutional procedure has not been adopted in the case of X, the equal protection afforded to him by the correct procedure has been violated.

Quite clearly if there was evidence led that in earlier years a number of public officers in the staff grade (referred to in section 2:2:1 of the Establishments Code) were compulsorily retired for general inefficiency by the proper authority viz. Cabinet of Ministers, after following the procedure prescribed in section 23, there would be irrefutable evidence that the Petitioner has been denied the equal protection which the Constitution guarantees to him. Is the position any different if the Establishments Code itself had just come into existence and there had in fact been no compulsory retirement for general inefficiency of public officers in the staff grade ? Can it be said that while in the first situation there is violation of equal protection, in the latter situation there is no violation of equal protection because there is no proved previous instance of the due observance of the rules ? That would be a most extraordinary result where a violation of equality is considered to be established only if there are proved instances of due compliance with the law. Does it then mean that the first deliberate refusal to follow the law does not result in a denial of equal protection and a person can only succeed in establishing a violation of equal protection if he can adduce evidence of previous instances where the law has been followed ?

Nor need he show that others in his category have also been, like him, "treated" under the circular and retired. That also is not a burden cast on him. I inquired during the argument from learned D.S.G. whether any other officers in category 2 : 2 : 1 of the Code had been retired under the circular on the ground of general inefficiency, but there has been no response. As learned Counsel for the petitioner aptly put it :

> "To deviate from the rules or to refuse to apply them to the petitioner is of itself a negation of the petitioner's right to equal protection, for by such refusal there is clearly a reduction in the measure of protection afforded to him. *It is no longer equal in measure. It is no longer equally enjoyed* because it is now granted to some and denied to another who by membership of that class is entitled to it along with others".

Learned D.S.G. referred us to the decision in *Melbourne Corporation v. The Commonwealth (supra)* where Latham C.J. said this : "I have some difficulty in understanding how 'discrimination' in a precise sense can be shown in a law applying only to one person or class of persons in respect of a particular subject matter.

Discrimination appears to me to involve differences in the treatment of two or more persons or subjects" at p. 61. In that case the proposition on which the plaintiff corporation relied was that the Commonwealth Parliament cannot, even under a legislative power expressly conferred upon it, make a "discriminatory" as distinct from a general law, which is aimed at or directed against an essential governmental power or function of a State. Section 48 of the Banking Act, 1945 made provision that except with the consent in writing of the Treasurer, a Bank shall not conduct any banking business for a State or any authority of a State, including a local governing authority. The passage referred to above was made in the context of holding (at p. 69) that laws "discriminate" against States if they single out States for taxation, or some other form of control. So that "discrimination" or "non discrimination" in the enactment of laws cannot afford a parallel when we are in the field of violation of fundamental rights by executive action.

The essence of discrimination is a deviation from the established standard or norm. So that every wilful and deliberate refusal to accord to a person his legal rights per se entails discrimination against him. Such a person is being discriminated in that the norm or standard applicable (not necessarily hitherto applied) to all persons in that class is not being applied to him who belongs to that class of persons who are entitled. Such a person is being discriminated vis-a-vis all persons falling into that class, and that class in the instant case is the class of staff grade public officers (those falling under 2 : 2 : 1). So with all respect to those of my brother Judges who insist on contrasts and comparisons with actual previous instances, as a pre-condition for the proof of discrimination, to do so *in every case* is to adopt a simplistic view of discrimination, which is not what the Constitution expects us to do.

Discrimination may be bona fide or mala fide. "If the person who alleges discrimination succeeds in establishing that the step was taken *intentionally* for the purpose of injuring him, or in other words that it was a hostile act directed against him, the executive act complained of must be annulled, even if the statute itself be not discriminatory. In short, if the Act is fair and good, the authority who has to administer it will be generally protected. To this rule, however, there is an exception, which comes into play when where is evidence of mala fides in the application of the Act". *Constitutional Law of India by Bashu* (2nd Ed.) p. 28.

"Hostile discrimination" by executive action may give rise to situations in which Article 14 of the Indian Constitution can be invoked. In *Dhanaraj Mills Ltd. v. B. K. Kocher* (26) the Court took the view that when a subject challenges a specific act of an individual officer as being contrary to Article 14, the Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Article 14 or under Article 226. Seervai submits that the judgment is clearly wrong when it holds that no relief is available under Article 226 against "dishonest, arbitrary or capricious acts" of the officer. If the dishonest action intentionally and purposefully discriminated against the petitioner the decisions in *Ghulam Rasool (supra)* and in *Narain Das v. Improvement Trust, Amritsar* (27) may have been different. In both cases the petitioners failed to establish hostile discrimination.

The true scope and ambit of Article 14 of the Constitution of India has been the subject of numerous decisions. In the early stages of the evolution of the Constitutional Law of India Article 14 came to be identified with the "doctrine of classification" because of the view taken by the Supreme Court that Article 14 prohibits discrimination, and there would be no discrimination where the classification making the differentiation fulfills two conditions, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things from others left out of the group ; and (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action.

However, a "new doctrine" (as Seervai calls it) was for the first time laid bare in 1974 in *Royappa v. State of Tamil Nadu (supra)* to the effect that Article 14 embodies "a guarantee against arbitrariness". The Court speaking through Bhagwati, J. with Chandrachud and Krishna Iyer, JJ. agreeing said :

> "The basic principle which, therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of Bose, J., 'a way of life', and it must not be subject to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional

and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in state action and ensure fairness and equality of treatment."

This doctrine was reaffirmed and elaborated by the Supreme Court, also speaking through Bhagwati, J. (Untwalia and Fazal Ali, JJ. agreeing) in *Maneka Gandhi v. Union of India (supra)* in these terms :

"Now the question immediately arises as to what is the requirement of Article 14 : What is the content and reach of the great equalising principle enunciated in this Article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. . . . . Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

This was again reiterated by the Court (Bhagwati, J., Tulzapurkar, J. and Pathak, J.) in *Ramana Dayaram Shetty v. International Airport Authority of India (supra)*. Finally the scope of Article 14 was elucidated by the Court in *Ajay Hasia v. Khalid Mujab Sehravardi (supra)* (Chandrachad, C.J., Bhagwati, J., Krishna Iyer, J., Fazal Ali, J. & Koshal, J.). Bhagwati, J. speaking for the court said :

"It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine

of classification which is evolved by the Courts is not a paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constitutes denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness prevades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

There could be no doubt that what Bhagwati, J. has enunciated in the above cases is the Law of India today, despite Seervai's criticism of this new doctrine at p. 273.

Then again, there is the case of *The Manager, Government Branch Press v. Belliappa, (supra)* where it was held by the Court (Sarkaria, Tulzapurkar & A. P. Sen J J.) that if the services of a temporary government servant are terminated arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which could put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that the appointing authority was acting in accordance with the terms of employment. Sarkaria, J., speaking for the Court said "Bereft of rationality and fairness, discretion degenerates into arbitrariness which is the very antithesis of the rule of law on which our democratic polity is founded," at p. 483.

It is this "new dimension" in the principle of equality in both its aspects which has been underscored by Mr. Justices Bhagwati & Sarkaria in the cases cited. While in the sphere of legislation when the question of a violation of the principle of equality is involved the doctrine of classification assumes great importance, in the sphere of executive action the dominant role is played by the doctrine of bona fides and its negation namely, the misuse and abuse of power. Where there is an abuse of power there is ipso facto a denial of equality before the law and the equal protection of the law. The judgments of Mr. Justice Bhagwati have elucidated those principles with crystal

clarity. By his lucid exposition of these principles the constitutional guarantee of equality has received a new impetus and has acquired a new vigour to the great advantage of the people, and the realisation of the sovereignty of the people. The doctrine of equal protection has thus become a powerful shield against the abuse of power by the Executive.

I have had the benefit of reading the Judgment prepared by the Chief Justice, wherein he states :

"It is fundamental to fair procedure that the 2nd respondent should have heard the petitioner before he took such prejudicial action against the latter. He has violated this basic principle of fair procedure. He did not wait for and take into consideration the explanation (P 18 & P 19) of the petitioner in answer to the allegations against him. The hurry to take action against him cannot be appreciated. . . . . Furthermore none of the 2-4 respondents have chosen to fault the petitioner's explanation, probably for the reason that no fault can be found therein. He did not check from the 4th respondent the Surveyor-General whether the petitioner had shown cause within the 30 days from the date of receipt of letter Q dated 24.8.84. He never went through the personal file relating to the petitioner. He does not appear to have even bothered to find out whether there was any material to justify his taking a decision which was so fateful to the petitioner. According to his affidavit he does not even appear to have asked the 3rd respondent to substantiate his allegation against the petitioner. . . . . Certainly the conduct of the 2nd respondent is not calculated to enhance the reputation of the State for fairness." Then again according to the C.J., "There is abundant substance in petitioner's complaint that the 2nd respondent acted arbitrarily and capriciously. The 2nd respondent had depended too much on the 3rd respondent's arbitrary report, a report which is not based on any adverse entry after 1974 in the petitioner's confidential file. . . . . the grave allegations made by the 3rd and 4th respondents are not supported by any entry therein. From the 2nd respondent's affidavit it is clear that the earlier order of transfer of the petitioner to the Public Officers' Reserve was not upon any material placed before him by the Head of the Department verifying the reasons why he should be placed on compulsory leave for general inefficiency and general incompetence. The 3rd and 4th

respondents never confronted the petitioner with such charges and called for explanation from him before they chose to make serious complaints against him."

"In my view the 2nd respondent's decision to retire the petitioner compulsorily on the alleged ground of inefficiency is unreasonable and unjustifiable and lacked bona fides. True, a grave injustice has been inflicted on the petitioner". (The emphasis is mine).

I am in entire agreement with the Chief Justice on the above findings of fact, with which Ranasinghe, J., Atukorale, J., Tambiah, J. and L. H. De Alwis, J. also agree.

But *in spite of such a finding* the majority of the Members of this Court held that no violation of equal protection has taken place as "there is no evidence of discriminatory treatment" because it has not been shown that there are in comparison others who have received favourable treatment. It then means with great respect that *equal protection has become a wholly illusory concept and one devoid of any real value or usefulness.* It means that *despite* the fact that the petitioner has been treated in a manner prejudicial to his interests in being arbitrarily retired as compared with his colleagues in the public service also similarly situated but who continue to remain in service, that there is nevertheless no denial of equal protection. This is a conclusion which in my respectful view will surely lead to a denial of elementary justice ; For how can it be said that the man who is arbitrarily dismissed from service as well as his colleagues who remain in service, without being so subjected to arbitrary treatment, all enjoy equal protection despite the vastly different consequences that have ensued in their respective cases ? To accept that there is arbitrariness in the case of the man dismissed and accept that no such prejudicial consequences have taken place in the case of those who remain in office is to concede the fact of differential treatment and hostile discrimination. That is the very essence of a denial of equal protection.

My conclusions, therefore, are that –

(1) the petitioner's services have been terminated on the alleged grounds of inefficiency and incompetence, without an iota of evidence of inefficiency and incompetence ;

(2) the petitioner's services have been terminated by the misapplication of a Circular which was not meant to apply to the category of officers to which he belonged ;

(3) the procedure laid down in the Establishments Code, which is the Constitutional procedure has not been followed in retiring him ;

(4) there has thus been "hostile discrimination" in that –

(*a*) he has not been retired according to procedures prescribed by the Constitution, and

(*b*) the termination of his services has been mala fide, that is, for reasons other than inefficiency and incompetence ;

(5) the petitioner's fundamental right to the equal protection of the law guaranteed under Article 12 (1) of the Constitution has been violated by executive action.

I would accordingly grant a declaration that (i) the fundamental right of the petitioner under Article 12 (1) has been violated (ii) that the compulsory retirement of the petitioner from the public service is unconstitutional, unlawful, null and void.

As regards damages or compensation I take into account the fact that a senior public officer with 27 years' experience in the Surveyor-General's Department has been purposefully branded as inefficient and incompetent without any proof. On the contrary his record of service appears to be unblemished except for a few occasions when his independence had proved irksome to his superiors. There has thus been the addition of insult to injury. I would therefore direct that he be paid his salary from the date of retirement up to age 55 as well as damages in a sum of Rs. 300,000. He will also be entitled to the costs of this applicaton.

COLIN-THOMÉ, J.

The main questions in this case are whether :

(*a*) the compulsory retirement of the petitioner from the Public Service was unconstitutional, unlawful, illegal and null and void ;

(*b*) the fundamental rights of the petitioner under Articles 12 (1) and 14 (1) (*g*) were violated and infringed upon ; and

(*c*) the compulsory retirement of the petitioner was an act of hostile discrimination against him.

The 3rd Respondent sent a letter to the petitioner notifying him that he was being transferred to the Public Officers' Reserve with effect from 1984.08.24. This letter dated 1984.08.24 was received by the petitioner on 1984.08.27. This fact was not contested by the learned Deputy Solicitor-General. This letter marked Q reads as follows :

"My. No. 01/28/2-25 (09)

Ministry of Lands & Land Development,
500, T. B. Jaya Mawatha,
Colombo 10.
1984.08.24.

Mr. Elmore Marsh Perera, Deputy Surveyor-General,
Through Surveyor-General.

Transfer to Public Officers' Reserve

The Secretary, Ministry of Public Administration, has instructed me to transfer you to the Public Officers' Reserve with effect from 1984.08.24 for reasons of inefficiency and incompetence in terms of the provisions of Public Administration circular No. 136 dated 1979.04.17 and to place you on compulsory leave as from that date.

I inform you that you are accordingly transferred to the Public Officers' Reserve with effect from 1984.08.24 and placed on compulsory leave as from that date. Report to the Secretary, Public Administration, immediately you receive this letter.

Further, if there are any reasons why you should not be compulsorily retired for general inefficiency or otherwise punished submit them in writing to the Secretary, Public Administration, through me within 30 days of receipt of this letter.

K. W. M. P. Mapitigama
Senior Assistant Secretary
(Administration)

Sgd/– Nanda Abeywickrema,
Secretary,
Ministry of L. & L. D.

Copies : (i) S.P.A – No. 543 E 595/56 DG
(ii) Surveyor-General– S.P.A.'s letter of 84.08.23 addressed to me with copy to you refers. For the early submission of the particulars referred to in paragraphs 4 and 5 thereof."

According to this letter it was the Secretary, Ministry of Public Administration (the 2nd Respondent) who directed the transfer of the petitioner to the Reserve "for reasons of inefficiency and incompetence in terms of the provisions of Public Administration Circular No. 136 dated 1979.04.17."

The 2nd Respondent has averred in paragraph 6 (*g*) of his affidavit that Circular 136 is yet in operation and the requirement in paragraph 10 of the Circular was inserted by him for administrative reasons. Paragraph 10 of the Circular reads :

"The Reservist Reports should be sent to reach me (Secretary, Public Administration) by 30th June, 1979."

No material was placed before Court to establish conclusively that Circular 136 has been kept alive after the 30th June, 1979, at all times relevant to this case.

Assuming that Circular 136 applied to the petitioner the question arises for consideration whether its provisions have been observed by the respondents. Paragraphs 6 and 8 of the Circular 136 read as follows :-

"6. In respect of category 'B' Reservists, the transferring Department should forward to this Ministry a full confidential report on the reasons for the request for transfer.

8. Where under category 'B' (i) an officer's transfer is requested on account of such reasons as inefficiency and incompetence, the Head of Department should take action under sections 24:1 and 24:2 of Chapter XLVIII of the Establishments Code. Thereafter however, instead of himself taking action in terms of 24:3, he should forward all papers with his observations to reach me within two months of the Reservist Report."

Sections 24:1, 24:2 and 24:3 of Chapter XLVIII of the Establishments Code reads :

"24:1 Where the Head of a Department is of opinion that an officer referred to in section 2:3 should be retired for general inefficiency which cannot appropriately be dealt with by specific charges he will obtain reports on the officer from the Department in which he has previously served, on his work and conduct.

24:2 He will then inform the officer in writing of the grounds on which it is proposed to retire him and order him to show cause why he should not be retired or otherwise dealt with for general inefficiency.

24:3 If the explanation is found to be unsatisfactory the Head of the Department will either make an order of retirement for general inefficiency or impose other appropriate punishment as he deems fit."

It is clear when paragraphs 6 and 8 are read with sections 24:1 and 24:2 of Chapter XLVIII of the Establishments Code that it is the Head of Department and not the Secretary, Public Administration, who has the authority to call for an explanation from the petitioner as to why he should not be compulsorily retired. It is the Head of Department who should initiate the procedure for transferring a Public Officer into the Public Officers' Reserve and not the Secretary, Public Administration.

Again, assuming that Circular 136 applied to the petitioner the letter Q did not as required by the Circular which brought section 24:2 into operation *specify the grounds* on which the petitioner was to be retired for general inefficiency, in asking him to show cause. This was a contravention of the *audi alteram partem* rule embodied in section 24:2. At no time was the petitioner informed in writing that in the view of the administration he was temperamentally unsuited to continue in the public service and that he had a disruptive influence on the service, and to show cause against these charges.

From the 2nd respondent's affidavit it is clear that the order of transfer to the Public Officers' Reserve was not upon any material placed before him by the Head of Department in the form of "a full confidential report on the reasons for the request for transfer" as required by paragraph 6 of Circular 136. The 2nd respondent does not aver in his affidavit that the 3rd respondent even orally communicated the reasons for alleging general inefficiency in support of the request to place the petitioner on compulsory leave.

In paragraph 6 (*a*) of his affidavit the 2nd respondent has stated that he received from the Secretary, Ministry of Lands and Land Development (3rd respondent) a Report indicating that the petitioner was a public officer who by reason of his inefficiency and incompetence was not an effective member of the Survey-General's Department and requesting a transfer to the Public Officers' Reserve under Circular 136.

The Report referred to in the 2nd respondent's affidavit was the Reservist Report on the lines of Annex 1 of Circular 136 signed by the 3rd respondent. It was marked 2R1. The reasons for transfer to the

Reserve consisted of two words "inefficiency and incompetence". This Report was dated 23.8.84. The letter Q transferring the petitioner to the Reserve was dated 24.8.84. So that there was no *prima facie* case made out for making the order of compulsory leave contained in the document Q. The 2nd respondent does not even say that he brought his mind to bear on the question or that he examined the petitioner's personal file. The 2nd respondent acted with alacrity on the bald statement in the Reservist Report 2R1 without raising a query. The petitioner has stated in his second affidavit (paragraph 6) that the 2nd respondent told him that the Minister had wanted immediate action taken on the 3rd respondent's request.

The last paragraph of document Q requested the petitioner to state his reasons, if any, why he should not be compulsorily retired for inefficiency or otherwise punished and to submit them to the Secretary, Public Administration, through the Secretary, Ministry of Lands and Land Development within 30 days of receipt of Q. Q was received by the petitioner on the 27th August 1984. The undue haste with which this matter was dealt is made clear by paragraph 8 of Circular 136 which required the Head of Department to forward all papers with his observations to reach the Secretary, Public Administration within *two months* of the Reservist Report.

On the 2nd October 1984 the 2nd respondent sent the petitioner the following letter (marked P1) :

"My No. 543 E 595/56 DG

Ministry of Public Administration,
Independence Square,
Colombo 7.
1984 – October 2nd.

Mr. Elmore Marsh Perera,
144, Sri Vipulasena Mawatha,
Colombo 10.

Retirement

It has been notified that no reply has been received from you up to now to letter of Secretary, Lands & Land Development dated 24.8.84, informing you, in accordance with my instructions, to notify within 30 days, reasons, if any, why compulsory retirement for general inefficiency or punishment in some other manner should not be imposed.

02. Accordingly, you are retired with immediate effect for general inefficiency under sub-para 24.3 of Chapter XLVIII of the Establishments Code.

H. N. Junaid,
Director of Establishments.

Sgd/– D. B. I. P. S. Siriwardhana,
Secretary, Ministry of Public Administration.

Copies :

I. S/L & LD – Reference 01/28/2-25(09) of 84.09.27. Take action to retire the officer with immediate effect in accordance with the above instructions and notify my Chief Accountant the date of retirement with copy to me.

II. Chief Accountant – for necessary action.

III. Surveyor-General – for information.

IV. Deputy Secretary to the Treasury – for information.

Although P1 which informed the petitioner that he was being compulsorily retired on the ground of general inefficiency and incompetence, implies that the 2nd respondent had come to such a finding, nowhere in his affidavits does he state that he came to a considered view on the matter and if he did on what material he had acted. Manifestly he did not have the full confidential report required to be sent by Circular 136. He does not even say that he called for the petitioner's personal file and examined it, nor does he say that an oral communication concerning the petitioner's inefficiency or incompetence was ever made to him at any time by either the 3rd respondent or the 4th respondent who were the officers directly concerned. The inference is therefore that the 2nd respondent came to a finding without any evidence.

The 2nd respondent received letter 2R2 dated 27.9.84 from the 3rd respondent informing him that no explanation had been received from the petitioner. On 26.9.84 the petitioner's explanation P18 and P19 was received by the 4th Respondent. P 18 and P 19 were addressed to the Secretary, Lands and Land Development through the Surveyor-General. The 2nd respondent does not say in his affidavit whether he had seen P18 and P19 at any time or whether he inquired from the 3rd respondent or the 4th respondent after 27.9.84 and before he sent P1 on 2.10.84 whether the petitioner's explanation had been received. The petitioner at this time was reporting every day

at the Ministry of Public Administration. The 2nd respondent could have questioned the petitioner whether he had forwarded his explanation but he chose not do so.

The petitioner reverted to the Surveyor General's Department from the Sri Lanka Institute of Development Administration (S.L.I.D.A.) in July 1983 and worked there until his transfer to the Reserve in August 1984. The Surveyor General's Department came under the Ministry of Lands and Land Development. If as the 3rd respondent now states in his affidavit that the 4th respondent (Surveyor General) had made serious complaints to him about the petitioner on several occasions it is remarkable that none of these complaints are in writing. Neither the 3rd respondent nor the 4th respondent has explained why these complaints are not in writing considering that they were of such a serious nature :–

(i) "causing considerable dissension within the administration,

(ii) that the "petitioner was causing serious problems."

(iii) that he placed "obstacles in the way of the smooth functioning of the department,"

(iv) that the "petitioner was a belligerent and abrasive official,

(v) that he was "a disruptive influence,"

(vi) that he "was involved in bitter conflicts with some of his good senior officers,"

(vii) that his conduct was "contributory largely to stress and tension, within the department."

If such complaints were made to the 3rd respondent by the 4th respondent it is remarkable why the 3rd respondent as Secretary to the Ministry did not call upon the petitioner for his explanation on serious matters of discipline. The 3rd respondent has not explained his inaction.

If the petitioner had been guilty of such serious acts of indiscipline in the Survey Department especially during the period July 1983 – August 1984 the Surveyor General (4th respondent) was obliged (*a*) to have the officers concerned to make written complaints against the petitioner on such matters, and (*b*) to ask the petitioner to submit

explanations. The fact that the 4th respondent has no written records of (*a*) or (*b*) casts doubt on whether such incidents did take place. It is also significant that the 3rd respondent and the 4th respondent have not been able to get an affidavit from even one officer of the Surveyor Generals Department to substantiate the allegations against the petitioner in their affidavits.

The absence of a "full confidential report" required by the Circular setting out the reasons for requesting the transfer of the petitioner to the Public Officers' Reserve makes it very unlikely that the 4th respondent initiated action against the petitioner.

The failure of the 4th respondent to explain what he did with the petitioner's explanation P18 and P19 which were handed to him on the 26th September 1984 indicates that the explanation was with held by him or that it was sent by him to the 3rd respondent who did not forward it to the 2nd respondent. A serious omission in the affidavits of the 3rd and 4th respondents is their failure to explain what was done to the explanation submitted by the petitioner.

It is necessary now to examine the material placed before Court to substantiate the charges of inefficiency and incompetence made by the respondents against the petitioner. To begin with only photo copies of selected documents from the petitioner's personal file marked 3R1 to 3R67 were filed and not the whole personal file. The Court, however, examined the whole personal file of the petitioner and was able to get a composite picture of the petitioner's work and conduct since 1957.

The petitioner graduated from the University of Ceylon in 1956 obtaining a B.Sc. (Special Mathematics) Degree. He joined the Public Service as an Assistant Superintendent of Surveys in the Survey Department on the 1st February 1957. In 1958/1959 he was sent to the University of Cambridge, England, for training in Geodetic and Topographical Surveying.

The photo copies 3R1 to 3R67 from his personal file fall into three categories :–

(i) 3R1 to 3R45 (1960-1966)

(ii) 3R46 to 3R50 (1974-1975)

(iii) 3R51 to 3R67 (1984).

The vast bulk of these documents 3R1 to 3R45 fall within the period 1960 to 1966. There were several complaints against the petitioner in this period, for instance, that he queried the orders of his immediate superior officer in an abrasive manner, that he was intractable and did not carry out orders. He was warned by the Surveyor General that if he did not co-operate with his Superintendent and continued to bicker with him over trivial matters it will be necessary to transfer him out of the Division. The petitioner denied that he was impolite to his Superintendent. He stated that he had merely pointed out to the Superintendent his mistakes and this was unpleasant to the Superintendent. The Surveyor General asked him to refrain from criticising his Supervising Officer. In the meanwhile, however, the petitioner continued to receive his increments.

The petitioner was promoted Superintendent of Surveys with effect from the 1st October 1967. In 1969 a Board of Assessment appointed by the Public Service Commission and presided over by the then Surveyor General C. T. Gunawardene placed the petitioner second in order of seniority out of a batch of five officers who were appointed together in 1957.

The petitioner was appointed Co-Manager of the UNDP Project that established the Institute of Surveying and Mapping at Diyatalawa from 1968 to 1971. During this period the petitioner spent six months visiting Survey Training Institutes and Universities in the U.S.A., Canada, Switzerland and India. He served as Assistant Surveyor General from April 1972.

R. A. Goonewardene who was Acting Surveyor General from October 1971 to September 1973 has stated in his affidavit that in 1967 when he was Assistant Surveyor General the petitioner served under him as Superintendent in charge of Puttalam Division. The petitioner "displayed considerable organisational ability and initiative with which he was very impressed. The division functioned very satisfactorily under his leadership." During his tenure of office as Acting Surveyor General the petitioner was in charge of Western Division and later was Assistant Surveyor General. The petitioner made "valuable contributions at the monthly Staff Conferences by careful study of the agenda." "The petitioner has always been articulate and direct in his speech and unafraid to be even the only person to hold his views. Immediately after exchanges at conferences an exemplary spirit of camaraderie was happily always present."

It is significant that between 1966 and 1974 there have been no adverse entries in his file. The second category of four documents 3R46 to 3R50 refer to the period August 1974 to March 1975. 3R46 dated 5.8.74 is a complaint by W. P. de Silva, Asst. S.S., to the Surveyor General of "humiliation, harassment and lack of co-operation by the petitioner". W. P. de Silva stated in paragraph 4 "The final result is a retard in progress. An attitude which leans heavily on verbal thuggery and colonial and imperialist verbosity can never be conducive to a smooth and effective co-operation between officers."

The explanation of the petitioner, if any, is not included among these papers. The Acting Surveyor General in a letter to the petitioner dated 16.8.74 (3R48) has requested him to avoid "correspondence of a desultory nature" and to "be more tactful with your subordinates."

3R49 and 3R50 deal with a disciplinary inquiry into the conduct of a Government Surveyor P. W. Pathirana which was entrusted to the petitioner. The documents were stolen from the petitioner's table frustrating the inquiry. The petitioner accepted responsibility for this.

Between 1975 and July 1984 there were no adverse entries in the petitioner's personal file. In 1975 he was promoted Deputy Surveyor General. He joined the Academy of Administrative Studies on secondment with effect from the 1st March 1978 as a Training and Research Associate. In January 1979 he sat for the Graduate Management Admission Test at Princeton University, U.S.A., and obtained an overall score of 94% which included a score of 99% in the quantitative area. In 1979 he was appointed Head of the Operations Management Division.

On the formation of the Sri Lanka Institute of Development Administration (S.L.I.D.A.) in November 1979 he was appointed Co-ordinating Consultant, Projects and Operations Management Division.

From September 1980 to April 1981 he qualified for the Diploma in Public Management Development with Specialisation in Project Analysis at the Institute of Public Service, International University of Connecticut, U.S.A.

In April and May 1981 he followed a Course in Project Management for Infrastructure Projects at the Economic Development Institute of the World Bank, Washington, U.S.A.

From May to August 1981 he qualified for the Certificate in Training and Education for National Development at the Institute of Public Service International of the University of Connecticut.

From 3rd May 1982 when S.L.I.D.A. became a Corporation, the Governing Council created the post of Additional Director, Training and Evaluation and appointed him to the post.

In November 1982 he completed his I.C.M.A. examination and was admitted as an Associate Member of the Institute of Cost and Management Accountants, London.

The Hon. R. Premadasa, Prime Minister, nominated him to participate as a Professional Associate in a Management Training Seminar for Public Works Projects at the East-West Center, Hawai, from the 27th February to the 12th March 1983.

The third category of documents 3R51 to 3R67 has been put together selectively and is incomplete. As a result these documents present a distorted version of the petitioner's work and conduct in 1984. It is significant that the first three documents 3R51, 3R52 and 3R53 are dated 6.8.84 only 16 days prior to the letter Q dated 24.8.84, transferring the petitioner to the Public Officers' Reserve.

In 3R51, dated 6.8.84, the Surveyor General has found fault with the petitioner for stating in a minute "In spite of repeated instructions, the Administration is dragging its heels in the filling of these vacancies.

A Superintendent had complained to the petitioner by a minute dated 19.6.84 that several important vacancies in his branch had not been filled and that this was retarding work. He pointed out that although the petitioner had informed the Surveyor General by letter No. 1B/Staff of 11.4.84 to fill the vacancies and although the Surveyor General had instructed the Deputy Surveyor General (Administration) on 16.4.84 to fill the vacancies nothing had been done.

This prompted the petitioner to send a minute to the Surveyor General dated 31.7.84 as follows :

"S.G.

The output in 1B is very poor – but this has gone on at this level for several years. Pl. see S.I.B's recommendation for remedying this situation. In spite of repeated instructions from you, the Administration is dragging its heels in the filling of these vacancies. Nothing useful can be done until these vacancies are filled. Pl. push this if it is within your power to do so."

The Surveyor-General has omitted the words *"from you"* in 3R51 and has advised the petitioner to be more courteous in his correspondence. He objected to the word "push".

In 3R52, dated 6.8.84, the Surveyor-General addressed a letter to the petitioner about the transfer of R. M. W. Perera, G.C.S. Officer, in which he stated :

"You keep insisting that the officer (R. M. W. Perera) has been transferred out of the Accounts Branch to the C.C. Branch without obtaining his consent while D.S.G. (Adm.) has stated clearly that the officer agreed to take up duties as H/R in the C.C. Branch. Your statement is incorrect. I personally checked this matter with Perera who stated that he verbally agreed to the transfer to the C.C. Branch, though he did not make an application in writing."

The Surveyor-General faulted the Petitioner for casting "insolent aspersions" on the motives of the D.G.S. (Adm.).

The connected document instead of being attached to 3R52 has been inserted later in the set of 3R documents and marked 3R64. In 3R64 the petitioner has addressed a minute to the Surveyor-General dated 25.7.84 as follows :

"S.G.

Pl. see lr. from Mr. Perera submitted h/w.
D.S.G. (A)'s report to you appears to have been based on incorrect infor.
Pl. cancel the tfr."

The Surveyor-General has made a minute immediately below the above minute dated 26.7.84 as follows :

"The officer's wish is not so important as urgent view of the C.C. for a senior G.C.S. officer as Head of R. . . . . (indecipherable) Pl. allow this."

The letter from R. M. W. Perera referred to by the petitioner in his minute to the Surveyor General dated 25.7.84 (X10) reads :

"D.S.G. (R & M)
Sir,

This is to inform you that I have not made a request for a transfer. I prefer to remain in the Accounts Branch PI.

Sgd. R. M. W. Perera.

S.G.
PI. see my recommendation on annexed lr.

initialled E. P. 7/25."

3R53, also dated 6.8.84, is a letter addressed to the Surveyor General by W. K. M. de Silva, D.S.G., complaining of the long and unnecessary delays in granting allocations by D.S.G. (HM) to be distributed among the various Divisions. What the Surveyor-General's reaction was to this letter and whether he called for an explanation from the petitioner is not known as there are no endorsements touching this matter among the 3R documents.

3R54, 3R55 and 3R56 are connected documents. The petitioner had queried the travelling claims of the surveyor named M. Velayathampillai. In 3R56 dated 23.8.84 (the day before the petitioner was sent on compulsory leave) Velayathampillai complained about the undue delay by the petitioner in settling his travelling claim.

3R57 and 3R58 are about the dilatoriness of D.S.G. Range 2 and about who is to cover up duties of D.S.G. (R3). 3R59 and 3R60 are correspondence between the petitioner and D.S.G. (R2) over the delay in taking charge of store rooms. In 3R61 the petitioner forwards certificates to be placed in his personal file. 3R62 is only part of a minute by the petitioner. In 3R63 the petitioner complains to the Surveyor General about the lack of co-operation by the C.A.O. over the Duty Lists for watchers and the Surveyor General has called for a meeting of the officers concerned on 6.7.84. 3R64 should be read with 3R52.

3R65, dated 4.6.84 is a note to the Superintendent of Stores by his assistant complaining that the petitioner shouted at him and was rude to him when he presented the Superintendent's note asking for a day's leave.

3R66 is a note from the petitioner to the Superintendent of Stores dated 12.6.84 directing him to speak to the petitioner with all papers on which orders have to be made and that no papers should be sent unless the petitioner calls for them specifically.

3R67 dated 2.10.84 (the day the petitioner was compulsorily retired) is a note from the Superintendent of Stores to the Surveyor General complaining about the incidents referred to in 3R65 and 3R66. There is an endorsement by the Surveyor General on this document 3R67 dated 8.10.84 (six days *after* the petitioner was retired) which reads :

"This is a complaint by Mr. Hector Weeratunga Supdt. of Surveys (Stores). Mr. Weeratunga, in making this complaint appealed to me that if I am taking any direct action (e.g.) calling for explanation etc. that he be not placed under the supervision of Mr. E. M. Perera (D.S.G. (R.M.)). Under the circumstances I am filing this note in confdential file."

According to this endorsement by the Surveyor General (4th respondent) 3R67 has been filed in a confidential file and not in the personal file of the petitioner.

The petitioner has annexed X12 dated 1.6.84 which is a note by him to the Surveyor General regarding the application by the Superintendent of Stores for leave. X12 reads :

S.G.

S.S. Stores has not turned up for work today. He has sent a note informing me of his inability to come for personal reasons. He has not made any arrangements for his work and several persons who have arrived from outstations like Trinco and Polonnaruwa have come to me with their stores applns. *This has happened several times before.* I regret I cannot continue to cover up S.S. Stores functions when he is on leave. Hence please reconsider your decision not to assign an Asst. S.S. to assist S.S. Stores."

The Surveyor General has made an endorsement on this document which he has initialled and dated 6/4. It reads :

"D.S.G. (R.M.)

I have not made a final decision not to assign an Asst. S.S. The main problem is that we are short of exp. officers in the field etd. (indecipherable)."

The tone of this endorsement by the Surveyor General is in marked contrast to the tone of his belated endorsement on 3R67 made on 8.10.84 in connection with the belated complaint of H. Weeratunga dated 2.10.84 over an incident which took place early in June 1984.

The Respondents have filed an affidavit dated 29.11.84 from V. T. Navaratne, Director of S.L.I.D.A. He avers that after the Petitioner was appointed an Additional Director (Training) in S.L.I.D.A. in 1982 the Petitioner started to "intermeddle with the day to day running of the different Divisions which was disruptive of S.L.I.D.A. as a Training Institute." The Petitioner "was very abrasive in this dealings (with the staff) and harsh in his language. . . . . his attitude was counter-productive to the goals of S.L.I.D.A."

The affidavit by V. T. Navaratne is contradicted by his Memorandum he submitted to the Governing Council of S.L.I.D.A. dated 21st July 1985 which states :

"*Mr. E. M. Perera, Addl. Director, Training/S.L.I.D.A.*

Mr. E. M. Perera, Deputy Surveyor General came on secondment to the former Academy of Administrative Studies (now S.L.I.D.A.) as a Training and Research Associate in 1978 and was subsequently appointed as Consultant in the S.L.I.D.A. Faculty. From 3rd May, 1982 he served as Addl. Director in charge of Training and Evaluation. From 7.7.83 the Ministry of Public Administration terminated his secondment with S.L.I.D.A. and reverted him to the Surveyor-General's office.

I am covering up the work of Additional Director, Training as no suitable arrangement could be made at present. A recommendation for filling the vacancy will be made to the Governing Council in due course.

I wish to place on record that Mr. E. M. Perera made a significant contribution to SLIDA's development particularly in the areas of Project Management and Operations Research."

The 2nd Respondent is in a similar predicament as V. T. Navaratne. On 6.7.83 he discontinued the Petitioner's services with SLIDA with less than 24 hours' notice. He tranferred the Petitioner to the Public Officers' Reserve on 24.8.84 and compulsorily retired him on 2.10.84 for "inefficiency and incompetence."

In a letter to the Petitioner dated 13th March, 1984, the 2nd Respondent wrote :

"I am sorry that circumstances made it necessary to terminate your association with the Sri Lanka Institute of Development Administration to which you made a valuable contribution over several years."

It is common ground that the membership of the SLTA was divided into two embittered factions. The petitioner was in one faction and the 1st respondent was in the other.

On the 3rd March 1983 Kingsley Candappa addressed a letter to the petitioner in his capacity as President of the Sri Lanka Tennis Association, complaining that the half hour rule of play was not being observed by some members of the SLTA. This rule was necessary as there was a heavy demand for the courts. Candappa stated that on the 2nd March 1983 when he was waiting to play on court No. 2 the bell rang but the four persons playing there did not vacate the court. One of the players was the 1st respondent. Candappa stated that if Committee members did not observe the rules it will be difficult to get young members to observe the half hour rule.

As the petitioner was abroad at the time C. Duwearatchi Vice-President of the SLTA and Captain of the Playing Section replied on the 9th March to Candappa's letter stating that it was "a matter of protocol" based on an unwritten code that a Minister enjoyed special privileges above that of an ordinary member.

Petitioner did not share the views of Duwearatchi on this matter and he told him so in a letter dated 18th June, 1983.

On the 24th May, 1983, V. T. Navaratne Director of SLIDA handed a note to the petitioner conveying directions to the petitioner issued to the 2nd respondent by the 1st respondent. The note reads :

"I am directed to inform you that you should summon Mr. Elmore Perera and inform him that he should stop interfering with the Playing Section of the Sri Lanka Tennis Club, because it is not consistent with his position in SLIDA which is an institution which comes under the Minister who is an office bearer of the SLTA "

The 1st respondent has admitted in his affidavit that he got the 2nd respondent to convey this message to the petitioner "as he was involving himself in the affairs of the Sri Lanka Tennis Association and of its Playing Section, and in a manner unbecoming of a public servant and capable of bringing the public service into disrepute."

SLIDA functioned under the 1st Respondent and was subject to his control.

Within half-an-hour of receiving the note from V. T. Navaratne the petitioner sought an interview with the 1st respondent in order to explain his conduct and ascertain the precise nature of any complaint by the 1st respondent. The 1st respondent refused to see him.

On the 24th June, 1983, the 1st respondent ceased to be a Vice-Patron of the SLTA and was not re-elected to the post.

At about 8.45 a.m.on the 6th July 1983 V. T. Navaratne, Director of SLIDA handed over a letter to the petitioner from the 2nd respondent, stating that the petitioner's services were not required by SLIDA as from that day. He was reverted to his post as Deputy Survey-General at about 9.30 a.m. the same day. No reasons were given for this precipitate action. Neither V. T. Navaratne nor the Surveyor-General had asked for this transfer.

Later, the 2nd respondent wrote a letter to the petitioner dated 13th March, 1984 stating : "I am sorry that circumstances made it necessary to terminate your association with the Sri Lanka Institute of Development Administration to which you made a valuable contribution over several years."

On the 8th August 1983 the rival factions of the SLTA held separate meetings. The meeting attended by the petitioner to elect office bearers for the Playing Section was disrupted with force. At the rival meeting attended by the 1st respondent he made a veiled reference to the petitioner in the following words :

> "Can we allow one man and a coterie of people said to run the tennis of this country to get away with all these excuses ?"

Although the petitioner's services with SLIDA were abruptly discontinued on the 6th July 1983 he continued to deliver lectures in SLIDA training courses with great acceptance and according to V.T. Navaratne's Memorandum to the Governing Council of SLIDA dated 21st July 1983 the petitioner "made a significant contribution to SLIDA's development particularly in the areas of Project Management and Operations Research."

According to W. N. H. Ranasinghe, a Consultant in SLIDA, the petitioner was one of the best lecturers in SLIDA. On the 8th November 1983 the 2nd respondent summoned V. T. Navaratne, H. B. Sandors, S. A. P. Rupasinghe and others to his office and "made it clear that the petitioner should not thereafter be invited to lecture in SLIDA as that would be contrary to the wishes of the Hon. Minister of Public Administration.

The 1st respondent has admitted in his affidavit that he gave instructions to discontinue the petitioner as he was of the view "that SLIDA had responsibility for training present and future administrative personnel and permitting a lecturer of the disposition of the petitioner to train them would be inimical to the interests served by SLIDA."

On the 6th June 1984 an application was filed in the Court of Appeal in case No. 700/84 by C.E. Duwearatchi and S. B. Wijeratne, Petitioners, who were captain and Secretary respectively of the Playing Section of the SLTA. The Respondents were (1) the Minister of Sports. (2) Elmo Perera, President of the SLTA and (3) A. J. T. Madugalle, Hony. Secretary of the SLTA.

The application by the petitioners under Article 140 of the Constitution was for a mandate in the nature of a Writ of Certiorari to quash the direction issued by the 1st respondent, the Minister of Sports to the SLTA under Section 39 (1) of the Sports Law, to make 14 courts available for training and coaching programmes as lawn tennis in Sri Lanka is seriously impeded by the lack of facilities. An *ex parte* stay order was obtained and notice was issued to the respondents. Subsequently, after argument the Court of Appeal vacated the stay order by judgment delivered on the 3rd August, 1984.

On the 24th August 1984 the petitioner was transferred to Public Officers Reserve. On the 2nd October 1984 he was compulsorily retired.

The main objection to this application by the learned Deputy Solicitor-General is that there has been no breach of a fundamental right of the petitioner under Articles 12 (1) and 14 (1) (*g*) of the Constitution, even assuming that all the facts alleged by the petitioner are correct.

These two Articles state :

12 (1) "All persons are equal before the law and are entitled to the equal protection of the law."

14 (1) (*g*) "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 14th Amendment of the Constitution of the United States of America provides that "the State shall not deny to any person within its jurisdiction . . . . . the equal protection of the laws."

Article 14 of the Constitution of India provides that "the State shall not deny to any person equality before the law or the equal protection of the laws in the territory of India."

The first expression "equality before the law" is taken from the English common law and implies the absence of any special privilege in favour of any individual. A Court administering justice is not concerned with the status or position of the parties appearing before it, "the law is no respecter of persons."

The object of the second expression "equal protection of the law" is to make the whole system of the law rest upon the fundamental principle of equality of application of the law." The guarantee was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the other : per Taft, C. J. in *Truax v. Corrigan (supra).*

It has been held by the Courts in the United States that Article 14 does not preclude legislative classification provided it is reasonable. The segregation of negroes by requiring them to attend separate schools or ride in separate buses is only a glimpse of the difficulties that have beset this complex doctrine in the socio-economic setting of the United States.

The general doctrine as stated in *Henderson v. Mayer* (28) is as follows : –

> "Though the law be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hands so as practically to make unjust and illegal discriminations, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *The State of Jammu and Kashmir v. Ghulam Rasool. (supra)* the respondent was a Civil Engineer who held his appointment under the appellant. On September 8, 1954, while the respondent was holding the post of Development Commissioner he was suspended by the appellant. Later on February 12, 1955 the appellant made a further order demoting the Petitioner to the post of Divisional Engineer.

The respondent moved the High Court of Jammu and Kashmir for a writ directing the appellant not to give effect to the order of February 12, 1955, and to recognise him as the Chief Engineer, the substantive post held by him when he was suspended, with effect from the date of suspension and with all the emoluments of that office. The High Court issued the writ as prayed. The State appealed from this judgment of the High Court.

The respondent was connected with a Hydro Electric Scheme from 1949 till he was transferred from the work in 1953. The appellant was dissatisfied with the progress of the work and the manner it was carried out. On September 8, 1954 various officers associated with the scheme including the respondent were suspended. Thereafter on October 20, 1954, the Appellant appointed a Commission to investigate into the reasons for the progressive rise in the estimates, the defective planning and delay in the execution of the work and other irregularities and to fix responsibility upon the persons concerned and make appropriate recommendations.

The Commission made certain enquiries and eventually submitted a report to the appellant. The appellant then made the order demoting the respondent purporting to act on the basis of the report.

The respondent in his application for a writ questioned the validity of the orders suspending and demoting him on the grounds that the Commission did not conduct the enquiry according to the rules of natural justice. He was not even informed of the charges against him nor given a proper hearing and if he had been given a proper opportunity, he would have proved that he had not been at fault at all.

The respondent also submitted that he could be reduced in rank only in accordance with the procedure laid down in the Kashmir Civil Service Rules passed by the State Council Order No. 81 – C of 1939 and this procedure had not been followed. The High Court took the view that these Rules had the status of law.

The High Court was moved to exercise its powers under Art. 32 (2A) to enforce a fundamental right.

Counsel for the respondent submitted that the respondent was entitled to have the procedure prescribed by the Kashmir Civil Service Rules followed before the order demoting him could be made and as that procedure was not followed his client had been denied the equal protection of the laws under Art. 14.

The Court held that even if the Rules are a law and the respondent has been given the benefit of them, all that can be said to have happened is that the appellant has acted in breach of the law. But that does not amount to a violation of the right to the equal protection of the laws. Otherwise every breach of law by a Government would amount to a denial of the equal protection of the laws. It was not the respondent's case that other servants of the appellant had been given the benefit of those Rules and such benefit had been designedly denied only to him. The appeal must be allowed on the simple ground that the respondent's petition does not show a violation of any fundamental right.

It is noteworthy that in *Rasool's Case* (*supra*) the respondent did not submit that there was hostile discrimination against him by the appellants or to use the expression in *Snowdon v. Hughes (supra)* "an element of intentional or purposeful discrimination." The reasons for the judgment in *Rasool's Case (supra)* were followed in *Wijesinghe v. Attorney General (supra)* The petitioner who was a Sub-Postmistress from April, 1975, complained that her services were terminated with effect from 31.1.79 by the Post Master General in consequence of a Cabinet decision following a report from the Political Victimization Committee. The petitioner stated that the termination was effected without any charges being brought against her and without giving her a hearing. She claimed that her fundamental rights under Article 12 had been violated.

Evidence was led before the Victimization Committee that the Petitioner had herself been improperly appointed due to the pressure of the local Member of Parliament and that she was selected over the claims of Indra Ranjini who was better qualified and had previously acted as Sub-Postmistress. The petitioner complained that she had not been given an opportunity of refuting these allegations.

According to the contract of employment her services could be terminated giving one month's notice. The cabinet acting on the report of the Victimization Committee decided to terminate her contract of service after due notice.

The Court dismissed the application holding that there was no violation of a fundamental right. Per Wanasundera, J. "On the material placed before me, I am unable to say that the government action could be described as an instance of purposeful or hostile discrimination."

In *Narain Das v. Improvement Trust, Amritsar (supra)* the Supreme Court of India held that hostile discrimination against the appellants by the executive in refusing exemption under s. 53 of the Punjab Town Improvement Act, 1922, had not been established. Consequently there was no denial of equality.

A clear distinction must be drawn between the law and the administration of the law. If the law itself permits discrimination the Court may intervene. In *Dhanaraj Mills Ltd. v. B. K. Kocher (supra)* it was held that the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Art. 14. The officer in acting contrary to Art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law . . . In such a case the subject comes to Court not for protection under Art. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art. 14 or under Art. 226.

Seervai has submitted (*See* Constitutional Law of India, 2nd Edn., Vol. 1, 207) "that this judgment is clearly wrong when it holds that no relief under Art. 226 is available against 'the dishonest, arbitrary or capricious' action of the officer. If the dishonest action intentionally and purposefully discriminated against the petitioner, the decisions which we have considered earlier are agreed that the petitioner's right to equality under Art. 14 would be violated, and relief under Art. 226 would be available."

"If a deliberate intention on the part of the executive to violate the law is actionable under Art. 14, it is difficult to see why a deliberate violation of the law in an individual case by an executive officer is not

actionable under Art. 14." I am in agreement with these submissions by Seervai which are supported by the Judgment of the U.S. Supreme Court delivered by Brandeis, J. in *Iowa – Des Moines National Bank v. Bennet* (29).

> "The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals . ... But acts done by virtue of a public position under a State Government and in the name and for the State . . . are not to be treated as if they were acts of private individuals, although in doing them the official acted contrary to an express command of the State law. When a State official, acting under color of State authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the State officer not only exceeded his authority but disregarded special commands of the State law."

The doctrine of classification was adopted by the Supreme Court in India prior to 1974, but since then it has been jettisoned as being too restrictive in its interpretation of Art. 14. In *U. P. Electric Co. v. Uttar Pradesh* (30) Shah, J. referring to the doctrine of classification observed :

> "Art. 14 . . . . ensures equality among equals. Its aim is to protect persons similarly placed, against discriminatory treatment . . . A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice."

In *Ajay Hasia v. Khalid Mujib Sehravardi (supra)* (before a Bench of five judges) Bhagwati, J. stated at p. 740 ; "It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group ; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned

legislative or executive action. It was for the first time in *Royappa v. State of Tamil Nadu (Supra)* (1974) 2 S.C.R. 348, (1974) 4 S.C.C. 3, 38, that this Court laid bare a new dimension of Article 14 and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bagwati ,J) said : (S.C.C. p. 38) the basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of Bose J., 'a way of life,' and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment".

This interpretation of Article 14 followed the interpretation of Article 14 by a Full Bench of seven judges of the Supreme Court in *Maneka Gandhi v. Union of India (supra)* and a Bench of five Judges in *Ramana Dayaram Shetty v. International Airport Authority of India (supra).*

I am in respectful agreement with the interpretation of Article 14, in *Ajay Hasia v. Khalid Mujib Sehravardi (supra).* Shorn of its unaccustomed rhetoric the dictum that equality is antithetic to arbitrariness is axiomatic. The doctrine of classification is not an exhaustive free rendering of Article 14 (Article 12 of the Constitution of Sri Lanka). Classification is a convenient formula in certain appropriate cases for determining whether legislative or executive action is arbitrary and therefore constitutes denial of equality. It does not exhaust all the dimensions of Article 12. The object of Article 12 is to protect "All persons" from legislative or executive action which amounts to hostile discrimination and is *mala fide.*

A denial of equality or equal protection *inpso facto* involves illegal discrimination. It may involve the adoption of any criteria or differentia that results in the recognition of a class, cadre or group to which the law would ordinarily apply. Alternatively, it may involve an arbitrary deviation from the legal rules in an isolated instance in favour of or adverse to the interests of a person in respect of whom the deviation is made. It may be that the deviation from the accepted rules does not reveal the recognition of an identifiable class, cadre or group within the class. It is nevertheless unlawful discrimination.

In order to establish discrimination or a denial of equal protection it is not necessary to establish the due observance of the law in the case of others who form part of that class in previous instances. The Rule of Law which postulates equal subjection to the law, requires the observance of the law in all cases. The maxim *omnia praesumuntur rite esse acta* under section 114 of the Evidence Ordinance applies, and the Court will presume that official acts have been regularly performed.

In practice previous instances of differential treatment become necessary only in areas of administrative action where the discretionary element looms large and there are no strict rules prescribing the adoption of a particular course of action. But where the denial of equal protection is complained of by reason of the failure to observe a plain legal duty on the part of the Executive, it is not necessary to show the due observance of the law in other instances. This is presumed.

The objection has also been taken that the petitioner cannot invoke the special jurisdiction of the Supreme Court under Article 126 as he is free to enforce his legal rights through the normal legal remedies open to him, including the prerogative writs. This principle does not apply as the petitioner has come to Court with an allegation that his fundamental rights under Articles 12 (1) and 14 (1)(*g*) have been infringed and has sought relief under Article 126. There is a curtailment of judicial review imposed by Article 55 (5) and the petitioner is limited to the Article 126 jurisdiction which limits the choice of forum. Furthermore, if the petitioner chose to appeal to the Public Service Commission or the Cabinet of Ministers under Articles 58 and 59 before applying to the Supreme Court under Article 126 for

relief or redress in respect of the infringement of his fundamental rights, within one month of the alleged infringement, this opportunity may have been lost forever.

The Rules made under Article 55 (4) of the Constitution governing the procedure for the exercise of the powers of disciplinary control and dismissal of public servants are designed to include provisions of certain basic rights of a proper investigation and a fair hearing and the rules of natural justice which are implied in the exercise of these powers, before disciplinary action is taken or an order of dismissal is made against a public officer. Together with the rules which control the exercise of these powers the provisions of the Constitution guarantee to public officers a measure of security and a standard of fairness in regard to the terminon of their employment, despite the fact that they hold office at pleasure.

For the reasons stated in this judgment I hold that the fundamental rights of the petitioner under Article 12 (1) of the Constitution have been violated. Learned Counsel for the petitioner has not pressed the ground that the petitioner's fundamental right of freedom to engage in any lawful occupation under Article 14 (1) (*g*) has been infringed. I therefore make no declaration regarding the infringement of his rights under Article 14 (1) (*g*).

I hold that the compulsory retirement of the petitioner from the Public Service has been motivated not on the basis of inefficiency and incompetence but for extraneous and irrelevant reasons. His compulsory retirement, in which the 1st, 2nd, 3rd and 4th respondents played a significant role, was an act of hostile discrimination against the petitioner and mala fide. The procedures laid down in the Constitution and the Establishments Code for compulsorily retiring a Public Servant have been blatantly flouted. I grant the declaration prayed for that the petitioner's fundamental rights under Article 12 (1) have been violated and that the compulsory retirement is unconstitutional, unlawful, illegal and null and void.

The petitioner has withdrawn his prayer for reinstatement in the Public Service. However, I direct that the petitioner be paid his salary and other benefits to which he is entitled from the date of his retirement until his 55th year.

As the allegations of inefficiency and incompetence are a burlesque of the truth, I direct that damages in a sum of three lakhs of rupees be paid to the petitioner for violation of his fundamental rights. The petitioner must also be paid his costs.

ABDUL CADER, J.

Articles 58 (1) and 59 of the Constitution provide for appeal to the Public Service Commission and the Cabinet by any public servant aggrieved by an order or decision against him. Petitioner did not appeal to these bodies, but instead petitioned this Court that his fundamental right has been violated.

Petitioner was compelled to adopt this procedure without adopting the appeal procedure first, because of the one month rule in Article 126 (2) and because of Article 55 (5) which purports to exclude legal process in any other court. But is this article so exclusive as to shut out for instance a writ in the Court of Appeal ? I would like to leave behind (on the verge of my retirement) my opinion that it may not be so, as the words "order or decision" generally connote a valid and proper order or decision. If my view be correct, petitioner, contending as he was that 2nd respondent had no legal authority or jurisdiction to take disciplinary action against the petitioner, could well have petitioned the Court of Appeal questioning the validity of the impugned order or decision (Lord Reid in *Anisminic Case*) and/or contending that even if the 2nd respondent had jurisdiction, petitioner had not been dealt with fairly.

Apart from the many circumstances set out in the several judgments of my brothers, there are two glaring defects in the procedure adopted by 2nd respondent that no appellate body could have ignored.

1. Rule 6 of R1, which the 2nd respondent followed, requires a full confidential report on the reasons for the request for transfer" to be sent to the 2nd respondent. Obviously this is a requirement so that 2nd respondent could bring an independent mind to decide the very vital question whether petitioner was inefficient and incompetent. This report was not sent, full or otherwise and 2nd respondent took action on a mere request.

2. Petitioner sent his reply P 18 to Q within the time limit given to him. Admittedly P 18 was not considered by 2nd respondent before he decided to terminate petitioner's employment. This action offends natural justice.

If my view of Article 55 (5) is correct, petitioner need not have gone through the very expensive procedure of coming to this Court in the first instance, but rather he could have followed the appeal procedure which the Constitution permits him, and thereafter gone to the Court of Appeal, as the time limit in a writ application will be computed from the order in the last legal step available to a petitioner by other process. Secondly, where, as in this case, a petitioner is unable to prove discrimination, he could well succeed in a writ application.

As regards the question referred to the Full Bench I am of the view that equal protection of the law will involve equality between two or more persons and when a single instance is presented to court, the court is obliged to set its own standards instead of weighing the case by standards adopted by the executive, which should be the proper test. I therefore agree with Sharvananda, C.J., that this petition should fail for want of proof of discrimination and that this petition be dismissed.

Application dismissed.