ARIYAPALA GUNARATNE

v.

THE PEOPLE'S BANK

SUPREME COURT.
SHARVANANDA, C.J., WANASUNDERA, J., COLIN-THOMÉ, J., RANASINGHE, J. AND TAMBIAH, J.
S.C. APPEAL No. 58/84.
C.A. No. 280/77 (F).
D.C. COLOMBO No. A/87/Z.
NOVEMBER 18, 19, 20 AND 21, 1985.

Fundamental rights – Freedom of association under Article 18(1) (f) of Constitution of 1972 – Violation by employers outside the State – Can requirement to resign membership of Trade Union to qualify for promotion from Grade IV to Grade III of service in People's Bank be included in contract of employment? Article 126 of 1978 Constitution.

The plaintiff was required to resign from membership of the Trade Union to which he belonged to qualify for promotion from Grade IV to Grade III in the People's Bank. He refused and filed a declaratory suit in the District Court.

Held –

The right of all employees (except a few prescibed categories) to voluntarily form unions is part of the law of this land. It exists both in the Constitution and in statute form. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. But of course where the State considers a restriction of this right is necessary for good cause, it is enabled to do so by s.18(2) of the 1972 Constitution. Such restriction can be imposed only by law and only for grounds set out in s.18(2) and no other.

This right of association is of great value and has varied scope. It embraces associations which are political, social, economic and includes even such entities as clubs and societies. But trade unions enjoy pride of place. They play a significant role as an integral part of the democratic structure of government, and are a part of the contemporary political and social landscapes. When Article 18(1)(f) of the Constitution speaks of the freedom of association, it means primarily the freedom of forming trade unions. Restraints or limitations on it would be permitted only in the most exceptional circumstances and that would only be done by law in the interests of national security or in the interests of law and order etc.

The analysis of the law should be on the basis that the impugned acts or provisions constitute an invasion of fundamental rights and not on the basis that they fall within the exclusive domain of the private law of employment.

The impugned clause in the proposed letter of employment is inconsistent with the guarantee of freedom of association contained in section 18(1)(*f*) of the Constitution of 1972 and constitutes a matter of public law and not merely private rights.

Although the guarantee contained in section 18(2) is only against State action and not violations by individuals the concept of State has been extended today to include almost any institution performing public functions. The People's Bank represented the plaintiff here as part of the management. Within this function the People's Bank would constitute the State or the Government within the meaning of s. 18 of the 1972 Constitution for the purpose of enabling the maintaining of a declaratory action for violation of fundamental rights under that Constitition.

The argument that the imposition of the impugned condition was valid under the Constitution of 1972 because existing law was kept alive by the Constitution notwithstanding inconsistency with the provisions relating to fundamental rights is untenable. This argument is based on the wrong assumption that the law prior to the coming into operation of the 1972 Constitution permitted an employer to include a condition of this nature in a letter of appointment. The right of employees to join unions of their choice was there even before the Trade Unions Ordinance.

Cases referred to:

(1) *Mc Auliffe v. New Bedford (1982) 155 Mass 216.*
(2) *National Water Relations Board v. Laughlin Steel Corporation (1937) 301 U.S. 1133.*
(3) *Thomas v. Collins (1944) 323 U.S. 516.*
(4) *Adler v. Board of Education(1952) 342 U.S. 589.*
(5) *Keyishian v. Board of Regents (1967) 385 U.S. 589.*
(6) *United Public Workers' Ltd. v. Mitchell (1946) 330 U.S. 75.*
(7) *U.S. Civil Service Commission v. National Association of Letter Carriers (1973) 413 U.S. 548.*
(8) *Broodrick v. Iklahoma (1973) 413 U.S. 600, 601.*
(9) *Ramakrishnaiah v. The President, District Court, Nellore A.I.R. 1952 Madras 253.*
(10) *Balakotaiah v. Union of India A.I.R. 1958 S.C. 812.*
(11) *Ghosh v. Joseph A.I.R. 1963 S.C. 812.*
(12) *State of Madras v. V. G. Row A.I.R. 1952 S.C. 196.*
(13) *Shamdasani v. Central Bank of India A.I.R. 1952 S.C. 59.*
(14) *Electricity Board, Rajasthan v. Mohan Lal A.I.R. 1967 S.C. 1857.*
(15) *Sukhdos Singh v. Bhagat Ram (1975) 1 S.C.C. 421.*
(16) *Shetty v. International Airport Authority (1979) 1 S.C.C. 489.*
(17) *Son Prakesh Rekhi v. Union of India (1981) 1 S.C.C. 449.*
(18) *Ajay Hasin v. K. M. Sehravardi (1981) 2 S.C.C. 66.*
(19) *Wijeratne v. The People's Bank [1984] 1 S.L.R. 1.*

APPEAL from judgment of the Court of Appeal.

Dr. Colvin R. de Silva with *Prins Ranasooriya, Mervyn Cassie Chetty, Miss Saumya de Silva* and *A. Samarajeewa* for the plaintiff-respondent-appellant.

Dr. J. A. L. Cooray with *M. B. Peramune, K. Rampukpotha* and *Rohan Sahabandu* for defendant-appellant-respondent.

Cur. adv. vult.

April 4, 1986.

WANASUNDERA, J.

The facts in this case are not in dispute. The Emergency Regulations were in operation in this country from the beginning of 1971 due to the insurrection and insurgency that threatened our country at that time. Under those Emergency Regulations, service in the People's Bank (in which the appellant was employed as a Grade III officer in the Bank Service) had been declared an "essential service" and this had the effect of prohibiting strikes. Notwithstanding those regulations, on 1st September 1972 the Ceylon Bank Employees' Union, a registered trade union of which the appellant was a member, called out its membership on strike.

On the next day, 2nd September 1972, the respondent Bank notified the strikers that they would be regarded as having vacated their posts unless they returned to work by the 6th September, which was the deadline fixed by the Bank. The strikers paid no heed to this notice. Sometime later, on the 17th December, the Bank Employees' Union called off the strike and directed its members to resume work from the 18th December 1972.

When the appellant reported for work on the 18th, he was informed by the Bank authorities that he could only come in as a new entrant, for which he should make an application. The appellant had been in employment with the Bank since 1961 and had been promoted to Grade III in 1964. On the appellant making such an application, he was issued a letter of appointment (P3) to Grade VI in the Bank Service. The letter of appointment contained, *inter alia*, the following conditions:–

"(3) *Probation*:

You will be on probation for a period of three months from the date of your taking up appointment in terms of this letter....

(12) *Prospects of Promotion*:

On confirmation in your appointment you will be eligible for promotion to higher grades in the Bank's service under the terms and conditions laid down by the Bank for such purposes from time to time and subject to the restriction on trade union membership as stated in para. 21 of this letter."

Paragraph 21 is worded as follows:

"(21) *Trade Union Membership*:

The Bank does not give permission to its officers in Grade III and above to be members of any trade union the membership of which is open to employees in Grade V and/or equivalent of lower grades. If you are or become a member of such a trade union, in order to qualify for promotion to Grade III or any higher grade, you are and will be required to resign your membership from such union and also undertake not to rejoin or become a member of such Union while being in the Bank's service in such higher Grade. However the Bank will have no objection to your joining at that stage a trade union, the membership of which is open only to Bank Officers in Grade IV and/or equivalent or higher grades."

The appellant was confirmed in his appointment with effect from 18th May 1973. Thereafter, by letter P4 dated 10th April 1973, the Bank informed the appellant that it had decided to promote him to Grade III but subject, *inter alia*, to the following conditions:–

"2. As stated in your letter of appointment, the Bank will not permit the employees in Grade III and above to be a member of any Trade Union the membership of which is open to employees of Grade V and below.

If you are a member of such a Trade Union you should resign that membership before you get the proposed promotion and you should give an undertaking that you will not hold membership in any such Trade Union in the future as long as you hold a post in Grade III or above.

If you accept this promotion on these conditions, please return the attached letter to me duly signed."

The appellant after considerable delay, perhaps after much soul-searching and after a reminder was sent to him, replied by D9 of 3rd August 1973 that he was not prepared to resign his membership in the union of which he was a member. He was thereby staking his future on his convictions. All the material events relating to this matter took place during the existence of the 1972 Republican Constitution and it is those provisions that govern this case.

The appellant then came into court challenging the objectionable conditions restricting trade union membership referred to earlier, stating that they were a contravention of his fundamental rights set out in section 18(1)(*f*) read with section 14 of the Constitution of 1972 and were a negation and denial of the said fundamental rights guaranteed to the appellant. In his plaint he prayed for a declaration that clause 21 in P3 and clause 2 in P4 were null and void and that the appellant's promotion to Grade III is not subject to such conditions. The appellant claims the constitutional right of freedom of association. This means the right of voluntary association, and not to have that freedom subjected to the dictation, behest or control of anyone else, particularly that of the employer. The proposed condition in the letter of employment is clearly a negation of that right because it prevents the appellant joining or forming a union of his choice and his freedom of association is subjected to a measure of control by the employer.

In the lower court the learned District Judge held with the appellant and granted judgment in his favour. In appeal the Court of Appeal has reversed this judgment and dismissed the appellant's action without costs.

The parties to this action had been at issue on three matters. First, whether the impugned clauses violate the appellant's fundamental right granted under section 18(1)(*f*) of the Constitution? Second, whether the fundamental right guaranteed by the Constitution was only against violations by State action and not in respect of violations by individuals such as the respondent? And third, whether in any event the existing law which prevailed immediately prior to the coming into operation of the Constitution and which was continued by it permits the inclusion of a clause of this nature in a contract of employment?

The Court of Appeal disposed of the appeal on the first ground alone as it was of the view that it went to the foundation of the appellant's action. The Court held against the appellant on this issue. Dr. Colvin R. de Silva for the appellant in his careful analysis of the judgment submitted that this judgment is based on a number of misconceptions of the law on fundamental principles relating to this branch of the law which were fatal to the judgment.

The Court of Appeal has taken the view, that properly understood the impugned acts complained of do not attract the fundamental rights relied on but on the contrary they fall within the domain of contractual relations and are a matter of private law. The learned judge's reasoning is crystallised in the following passage from the judgment:

> "In my view it is necessary to draw a distinction between the exercise of the fundamental right of association on the one hand and the right to employment on the other. While the former falls within the purview of the constitutional guarantees, there is no fundamental right to employment or to a promotion in terms of a contract of employment. On an examination of the impugned clauses, it seems to me that the true and real complaint of the plaintiff is that there is a denial or a restriction of his right to a promotion as a Grade III officer of the Bank. But the point is the plaintiff has no constitutional right to a promotion. Where a person finds himself in a situation where he has to restrict his freedom of association if he desires to obtain employment of a particular kind, he cannot both assert his constitutional right of association and at the same time seek employment on his own terms. He has to make his choice."

This passage which was the crux of the judgment came in for serious adverse comment from counsel for the appellant. Dr. Colvin R. de Silva stated that this was a completely erroneous formulation of the basic issue involved and the result of a complete misreading of the case law.

The learned judge has sought to support his reasoning by reference to decisions from the U.S. and India. Dr. Cooray for the respondent relied on them to a great deal in supporting the judgment. Relying on these decisions, Dr. Cooray submitted that the fundamental right of association invoked in this case is not absolute. He submitted that a person who seeks employment cannot insist on working on his own terms upon the supposed claim of a fundamental right. On the contrary he has to abide by any reasonable terms laid down by the employer in the interests of order and discipline and for the promotion of efficiency and integrity in the discharge of his duties.

The learned judge has cited a judgment of Holmes, J. in *Mc Auliffe v. New Bedford* (1). This was a case where a policeman challenged a service rule prohibiting the soliciting of monies for any political purpose. Holmes, J. said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."

While this general statement of this distinguished judge may be perfectly correct in so far as it states that there are many jobs which by their inherent nature require the holder to act in a particular way that may result in a limitation on his rights, including his fundamental rights. For example, a Cabinet Minister has to abide by the conventions and practices relating to the Cabinet and the Cabinet system of government and this may affect his fundamental rights, like those of free speech. But this is not to say that every employer is free to impose conditions in the contract of employment inconsistent with the guarantees of fundamental rights contained in the Constitution merely because he chooses to do so.

Dr. Colvin R. de Silva also remarked that the judgment of Holmes, J. – a State Court judgment – is nearly a century old and there had been many developments in this field since then. In fact, in the material submitted to us, we were shown a comment made on the above quoted passage from Justice Holmes' judgment in an article in the Harvard Law Review, (1968) 81 Harvard Law Review 1439. The learned writer comments:

> "That under appropriate circumstances one's interest in his government job, his publicity financed home, his food stamp meals, or his state university educational opportunities may indeed be consitutional rights in the positive-law sense ought no longer be denied. Any per se constitutional distinction which would exclude governmental regulation of status in the public sector from constitutional review would, to steal a phrase from Mr. Justice Holmes, reflect neither logic nor experience in the law."

Further, the American courts stated that the right of employees to form themselves into unions is a well recognised right in all civilized countries. In the *National Labour Relations Board v. Laughlin Steel Corporation* (2), it was observed that–

"employees have as clear a right to organise and select their representatives for lawful purposes as a corporate employer has to organise its business and select its own officers and agents."–See also *Thomas v. Collins* (3).

Adler v. Board of Education (4) to some extent reflects Holmes' position in the *Mc Auliffe's case (supra)* but the facts there indicate certain exceptional circumstances. In *Adler's case (supra)* the court upheld a provision of the New York Civil Service Law disqualifying from the civil service and the public school system any person who "advocates, advises or teaches" the overthrow of the government by force or violence or who organises or joins any group advocating such doctrine in any organisation prescribed under the Feinberg Law of 1949. This law empowered the State Board of Regents to list "subversive" organizations and membership therein was prima facie evidence of disqualification.

Minton, J. speaking for the court said–

"It is clear that (public school teachers) have the right to assemble, speak, think and believe as they will but it is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper State authorities. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. A teacher works in a sensitive area in a schoolroom. That their superiors have the right and duty to screen them as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

But in 1967, in *Kayishian v. Board of Regents* (5), the U.S. Supreme Court disapproved of the width of the ruling in *Alder's case (supra)*. Justice Brennan delivering the opinion of the court said, referring to the Feinberg Law and *Alder's case (supra)*:

"... Subsection (2) was before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise.

That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. That theory was expressly rejected in a series of decisions following *Adler*. In *Sherbert v. Verner*, we said: 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'

We proceed then to the question of the validity of the provisions of subsection (*c*) of section 105 and subsection (2) of section 3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since *Adler*. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."

Justice Clark in the opening sentence of his dissenting judgment brings out the change in direction and the radical nature of this ruling. He began as follows:

"It is clear that the Feinberg Law, in which this Court found 'no constitutional infirmity' in 1952, has been given its death blow today."

Dr. Cooray also relied on *United Public Workers' Ltd. v. Mitchell* (6), *U.S. Civil Service Commission v. National Association of Letter Carriers* (7) and *Broodrick v. Oklahoma* (8). This line of cases are based on *United Public Workers' Ltd. v. Mitchell (supra)*.

They dealt with the interpretation of what is called the Hatch Political Activity Act 1940. This Act prohibited officers and employees in the Executive Branch of the Federal Government from taking any active part in political management or in political campaigns under penalty of immediate removal. Justice Reed speaking for the Court in the *Mitchell case (supra)* said:

"The prohibitions now under discussion are directed at political contributions of energy by Government employees. These contributions too have a long background of disapproval. Congress and the President are responsible for an efficient public service. If in

their judgment efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection..... We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulations of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of the Congress damage the integrity and the competence of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

In *U.S. Civil Service Commission v. National Association of Letter Carriers (supra)* the Supreme Court followed the above case and added that the Hatch Act prohibitions were neither unconstitutionally vague nor fatally over-broad. In *Broodrick v. Oklahoma (supra)* the Supreme Court was called upon to determine the validity of an Oklahoma Statute which contained provisions similar to those in the Hatch Act. The court followed the earlier decisions.

These American authorities are in accordance with the principles enunciated earlier. These cases, unlike the present case, deal with particular classes of employees in sensitive positions in the Government where the very nature of their work requires limitations on their fundamental rights. Fundamental rights and freedoms we all know are not absolutes. When they operate in a given context, they are affected by the context and may take colouration from it. When fundamental rights undergo such restriction, it is not so much by the imposition of a limitation on them, but this happens when those rights adjust themselves to that particular setting and environment. Such

situations and context can differ from one category of job to another. It would also be noted from the American cases and the Indian cases that follow that the curtailment of the freedom of association arose in situations where the action involved was either criminal, such as the advocacy of revolution, rebellion or violence, or the incitement thereof so as to bring it within the tests that the courts have formulated as constituting a danger to the State and Society. It generally involved both sensitivity of job and a threat to the State and Society.

Now let me turn to the Indian cases relied on by counsel. In *Ramakrishniah v. The President, District Court, Nellore* (9) the validity of a Government order requiring Municipal teachers not to join unions other than teachers' unions officially approved was challenged. The Madras High Court declared the order void as it constituted an abridgement of the right of freedom of association guaranteed by Art. 19(1) (*a*) of the Constitution. The court observed:

> It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of administrative or executive authority which can grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of administrative censorship. The guaranteed freedom cannot be abridged or abrogated by the exercise of official discretion."

Dr. Cooray however relied very strongly on the case of *Balakotaiah v. Union of India* (10). In this case appellants were employees in the Railway Department. The Railway Services (Safeguard of National Security) Rules 1949 enabled the Government to terminate their services at its pleasure. The Government terminated the services of the appellants under rule 3 of the said Rules on the ground that they had engaged themselves in subversive activities. Rule 3 was worded as follows:-

> "A member of the Railway Services who in the opinion of the competent authority is engaged in or is reasonably suspected to be engaged in subversive activities or is associated with others in subversive activities in such a manner as to raise doubts about his reliability may be compulsorily retired from service or have his services terminated."

The validity of this rule was not challenged as such, but the appellants submitted that the orders of termination were made because the appellants were members of the Communist Party and trade unionists, and this was a contravention of their fundamental right of association.

The Supreme Court rejected this submission. It said:

> "The notice, it is true, refers to the appellant being a member of the Communist Party or a trade unionist. But it is not the necessary attribute either of a Communist or a trade unionist that he should indulge in subversive activities, and when action was taken against the appellant under the rules, it was not because he was a Communist or a trade unionist but because he was engaged in subversive activities. We hold that the Security Rules are not illegal as being repugnant to Art. 14."

The Court next proceeded to deal with the argument that the appellant's freedom to form associations under Article 19(1) has been infringed. The Court said:

> "It is next contended that the impugned orders are in contravention of Art. 19 (1) (c) and are therefore void. The argument is that action has been taken against the appellants under the rules because they are Communists and trade unionists, and the orders terminating their services under R. 3 amount in substance to a denial to them of the freedom to form associations which is guaranteed under Art. 19 (1) (c). We have already observed that this is not the true scope of the charges. But apart from that we do not see how any right of the appellants under Art. 19 (1) (c) has been infringed."

Thereafter the Court proceeded to add that the orders do not prevent them from continuing to be communists or trade unionists. Their rights in that behalf remain after the impugned orders precisely what they were before. The Court added:

> "The real complaint of the appellants is that their services have been terminated, but that involves, apart from Article 311, no infringement of any of their constitutional rights. The appellants have no doubt a fundamental right to form associations under Article 19(1)(c), but they have no fundamental right to be continued in employment by the State, and when their services are terminated by the State, they cannot complain of infringement of any of their constitutional rights, when no question of violation of Article 311 arises."

The Court of Appeal misguided itself when it took the latter part of this citation out of its context and thought that it contained the *ratio decidendi*. This judgment, as I read it, does not carry the respondent's case any further. The constitutional freedom of right of association does not stand in the way of, for example, disciplinary action being taken against an employee. The allegations against the appellants were that they were parties to subversive activities. The reason the appellants chose to give themselves for the dismissals was one of their own making and not the true one. But, on the other hand, if a person is a member of a lawful trade union which is engaged in lawful activity, a dismissal or disciplinary action solely on this ground would certainly violate the constitutional guarantee. It was however sought to interpret this case to mean that an employee can be dismissed for exercising his fundamental right of joining or being in a union and that it would be a sufficient answer to an action challenging the dismissal to say that the order does not in fact interfere with the employee's right of association as this right still remains with him. Applying this argument to the facts of the present case, it is suggested that it would be legitimate to have a condition in the contract of employment against the employee joining a union and such a condition would not as such interfere with his right of association because he will continue to have that right and if he insists on it he must seek employment elsewhere. This appears to me to be a misunderstanding of the language and a complete misreading of the case. Such an interpretation which strangely enough had appealed to the Court of Appeal would, if given effect to, result in nothing less than this guaranteed right being wiped out altogether from the Constitution.

In 1963 the Indian Supreme Court in *Ghosh v. Joseph* (11) gave a clearer exposition of the law, which leaves the matter beyond any doubt. Rule 4.B of the Central Civil Services (Conduct) Rules (1955) laid down that no Government servant shall join or continue to be a member of any service association of government servants (*a*) which has not, within a period of six months from its formation obtained the recognition of the Government under the rules prescribed in that behalf or (*b*) recognition in respect of which has been refused or

withdrawn by the Government under the said rules. These provisions had to be read with the Recognition of Service Associations Rules 1959. Gajendragadkar, J. said:

"It is not disputed that the fundamental rights guaranteed by Art. 19 can be claimed by Government servants..... Thus, the validity of the impugned rule has to be judged on the basis that the respondent and his co-employees are entitled to form associations or unions. It is clear that R. 4-B imposes a restriction on this right. It virtually compels a Government servant to withdraw his membership of the Service Association of Government servants as soon as recognition accorded to the said association is withdrawn or if, after the association is formed, no recognition is accorded to it within six months. In other words, the right to form an association is conditioned by the existence of the recognition of the said association by the Government. If the association obtains the recognition and continues to enjoy it, Government servants can welcome members of the said association; if the association does not secure recognition from the Government, or recognition granted to it is withdrawn, Goverment servants must cease to be the members of the said association. That is the plain effect of the impugned rule. Can this restriction be said to be in the interests of public order and can it be said to be a reasonable restriction? In our opinion, the only answer to these questions would be in the negative. It is difficult to see any direct or proximate or reasonable connection between the recognition by the Government of the association and the discipline amongst, and the efficiency of, the members of the said association. Similarly, it is difficult to see any connection between recognition and public order."—(*Vide also* 1963 A.I.R. Rajasthan 136.)

This case shows that this fundamental rights is subject to restraint in terms of clause 4 of Article 19. Restrictions can be imposed in the interest of public order or morality, but such interest must be proximate and direct.

It would be observed in both the American cases and in the Indian case, the analysis of the law is on the basis that the impugned acts or provisions constitute an invasion of fundamental rights and not as the Court of Appeal in the present case has held that they fall within the exclusive domain of the private law of employment.

The decision in *State of Madras v. V. G. Row* (12) dealt with a situation which was similar to that in the American cases. The State Government was empowered by legislation to declare any association as unlawful if it constitued a danger to public peace or interfered with the maintenance of public order. The impugned law required the Government to state in the notification the grounds for action and gave a right to the association to make representations against the order. The law also provided for an Advisory Board to hold an inquiry and report to the Government. The Supreme Court struck down this legislation as being unfair mainly on the ground that the law made no provision for judicial review. These decisions show how zealously is the freedom of association protected by the courts.

The right of all employees (except a few prescribed categories) to voluntarily form unions is part of the law of this land. It exists both in the Constitution and in statute form. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. But of course where the State considers a restriction of this right is necessary for good cause, it is enabled to do so by section 18(2) of the 1972 Constitution. Such a restriction can be imposed only by law and only for grounds set out in section 18(2) and no other.

This right of association is of great value and has varied scope. It embraces associations which are political, social, economic and includes even such entities as clubs and societies. But trade unions enjoy pride of place. They play a significant role as an integral part of the democratic structure of government, and are a part of the contemporary political and social landscapes. When Article 18(1)(*f*) of our Constitution speaks of the freedom of association, it means primarily the freedom of forming trade unions. Restraints or limitations on it would be permitted only in the most exceptional circumstances and that could only be done by law in the interests of national security or in the interests of law and order etc. There may be some employers even today who are against unionisation of labour. They may in all sincerity think that their factories or work places would be run much better and more effectively without union interference. If the law were to permit it, they would be ever ready, in the name of order and discipline to prohibit unionisation of the workers by imposing such a condition in the letter of appointment. If the courts were to adopt the view of the Court of Appeal, we would be erasing Article 18(1)(*f*) of

the Constitution and writing off trade unions and the trade union movement in this country which had, after a long and protracted struggle fraught with great hardship and suffering, succeeded in gaining this right and seeing it enshrined in the Constitution.

I am therefore of the view that the impugned clause in the proposed letter of employment is inconsistent with the guarantee of the freedom of association contained in section 18(1)(*f*) of the Constitution and constitutes a matter of public law and not merely private rights.

The second objection on behalf of the respondent was that violations of individual right such as are alleged by the appellant in the instant case are not within the purview of section 18(1) of the 1972 Constitution. While the objection had been formulated in the above language, what it means as Dr. Cooray explained in his submissions is that the guarantee contained in section 18(2) is only against State action and violations by individuals do not come within its purview. He relied on the provisions of Article 19 of the Indian Constitution.

Both Article 19 of the Indian Constitution and the corresponding provisions of the present Constitution, particularly Article 126 (which has no equivalent in the 1972 Constitution) has come in for interpretation numerous times. These may be of some assistance in interpreting section 18 of the 1972 Republican Constitution.

Article 126 of the present Constitution enables a person aggrieved by executive or administrative action to come directly to the Court by way of petition. Although there had been some doubt both among counsel and even judges as to whether this was the sole and exclusive mode of approaching the courts for a violation of the fundamental rights, it is now generally understood that this is only a special and summary mode of relief in a particular kind of situation, namely violation of fundamental rights by executive or administrative action. Article 126 is therefore not exhaustive of the manner that courts could be approached for the violation of fundamental rights. Article 126 is confined to executive and administrative action. The ambit of the fundamental rights has a much wider range.

It would be seen from Article 12(3) of the present Constitution that it contemplates possible violations of fundamental rights even by private individuals. So it is clear that fundamental rights are not infringed only by executive or administrative action but go beyond the provisions of Article 126.

If we are to go by analogy with the Indian provisions on which Dr. Cooray relied, we find that his statement that Article 19 is directed against the State is correct. To compensate for any such limitations, the courts have been progressively extending the concept of State and today it has come to include almost any institution performing public functions.

Indian courts have held that Article 19 "provides protection for the freedoms and rights mentioned therein against arbitrary invasion by the State" – *Shamdasani v. Central Bank of India* (13). Article 12 in Chapter III containing Fundamental Rights defines the expression "the State" as follows:

> ".....includes the Government, the Parliament of India and the Governments and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

The words "other authorities" have given rise to a great deal of case law. Beginning with a somewhat restricted interpretation, the courts have now discarded the *eiusdem generis* rule in this context and given the expression a much wider and extensive connotation. In *Electricity Board, Rajasthan v. Mohan Lal* (14), the Supreme Court held that the Rajasthan Electricity Board would fall within the definition of "the State". The majority took the view that it was not necessary that the statutory authority should be engaged in performing government or sovereign functions and that "other authorities" covered bodies created for the purpose of promoting the economic interests of the people.

In *Sukhdos Singh v. Bhagat Ram* (15), Mathew, J. was of the view that the public corporation is a new type of institution which has grown up from the new social and economic functions of Government. He pointed out that institutions engaged in matters of high public interest or performing public functions should be regarded by virtue of the nature of the functions performed, as Government agencies and that activities which are too fundamental to society are by definition too important not to be considered Government functions. These views were approved in *Shetty v. International Airport Authority* (16). In *Son Prakesh Rekhi v. Union of India* (17) it was held that the Bhavat Petroleum Corporation registered as a company under the Companies Ordinance came within the definition of the word "State". In *Ajay Hasin*

v. K. M. Sehravardi (18) it was held that the Regional Engineering College, Srinagar, administered and managed by a society registered under the Jammu and Kashmir Registration of Societies Act was "the State" within the meaning of the definition.

It will be seen from the above decisions that the concept of State action has been interpreted to mean something much wider than the expression "executive and administrative action" found in Article 126.

Turning to local cases, in *Wijeratne v. The People's Bank* (19), the court dealt with petitions under Article 126 of the present Constitution. Officers of the Security Service of the People's Bank complained that due to a reorganisation of the Service they had been discriminated against. It was held that the People's Bank is a statutory corporation. Numerous provisions in the Act indicated the close association of the Bank with the Government and Government control of the Bank. For example, the Minister is empowered to appoint the entire directorate of the Board of Directors. The Minister can remove the Directors. Their remuneration is determined by the Government. The Minister nominates the first Chairman of the Board. Of the 120,000 Rs. 50 shares, the Board has to allot 60,000 fully paid up shares to the Secretary to the Treasury. Section 15 sets out the considerable amounts that have to be granted or paid to the Bank by the Government. The Bank cannot commence business until it is so authorised by the Minister and his Permanent Secretary is vested with a number of powers to enable him to act until the commencement of business by the Bank. Section 21 provides for Government guarantees of loans and overdrafts. The Bank is also vested with certain powers under the Agricultural and Industrial Credit Corporation Ordinance.

In *Wijeratne's case (supra)* we said–

"A public corporation can for certain purposes serve as an agent or surrogate of the State. It all depends on the nature of its functions, whether it is performing a governmental function or not, it may happen that certain of its functions may be governmental, whilst the others may not. When a public corporation is performing its non-governmental functions its actions do not have the attributes of State action or 'executive or administrative action' When the Bank performs its functions of redemption or acquisition of land, under Section 71 of the Finance Act No. 11 of 1963, it may be urged with certain cogency that such action of the Bank constitutes 'executive or administrative action'. But in this case, the

petitioners were not employed in the service of the Bank for the performance of duties connected with the exercise by the bank of its powers under the said section 71.

It is quite apparent from the material before us that the major role of the 1st respondent is in the commercial sphere and that its main role is that of a commercial bank. Such commercial activities of the Bank cannot qualify as State actions. Having regard to the duties performed by the petitioners it appears that the petitioners are employed by the Bank in connection with their commercial activities. In that perspective their employment in the Bank cannot be stamped as State employment. There is no nexus between the State and the banking activities of the 1st respondent for such action of the Bank to be treated as that of the State. The State is not involved in the commercial activities of the 1st respondent."

In the present ease we are not dealing with persons like security officers who may well be regarded as appendages to the normal administrative structure. We are now concerned with an officer whom the Bank itself has represented here as part of management. Such management would be pervasive of the entire work of the Bank and if the Bank performs any governmental functions this would come equally under such management. In my view even under the present Constitution the concept of State or Government is a wider concept than the expression "executive or administrative action".

Wijeratne's case (supra) can be distinguished from the present case. Here we are dealing with a different provision and a different Constitution. In all the circumstances of this case I am inclined to the view that the People's Bank would constitute the State or the Government within the meaning of section 18 of 1972 Constitution for the purpose of maintaining a declaratory action for a violation of the fundamental rights under that Constitution.

The third and last submission made by Dr. Cooray was that the imposition of the impugned condition was valid under that Constitution. He submitted that this was the prevailing state of the law immediately prior to the coming into operation of the Constitution and such "existing law" was not only continued and kept alive by the Constitution but section 18(3) goes on to say that it would have validity notwithstanding inconsistency with the provisions relating to fundamental rights.

This argument is based on the assumption that the law prior to the coming into operation of the Constitution permitted an employer to include a condition of this nature in a letter of appointment. As I understand it, the whole thrust of the trade union movement has been towards freedom of association and a recognition of unionisation as a matter of a right. This pressure, which could not longer be resisted, brought in the trade union legislation, which gave the workers a bargaining power equal to that of the employers. As a corollary to this right, the workers demanded non-interference by the employers in their trade union activities, particularly such unfair practices like the setting up of unions sponsored or inspired by them and by other devices and manipulation so as to obstruct, interfere with and sap the strength of the working class movement.

Both S. R. de Silva in his book *The Legal Framework of Industrial Relations in Ceylon* and Abeysekera in *Industrial Law and Adjudication* have collated material on this point mainly from other countries. Mr. Silva's book contains the following passage at page 45:

> "In Ceylon the right of persons to associate for trade union purposes existed in fact prior to its legal recognition in the Trade Unions' Ordinance. Since then, and subject to the limitations already noted, the liberty to form trade unions is subject only to the requirement of compulsory registration of trade unions. Although there have been no statutory provisions to protect employees against acts of anti-union discrimination by employers, a measure of protection has existed for some time in the form of industrial courts, arbitrators and labour tribunals which are entitled to give relief to a workman who is dismissed or otherwise discriminated against by reason of his membership of a union. Further, a provision in a contract of employment that an employee will not join a union does not bind these labour courts which are empowered to grant relief in appropriate cases notwithstanding such a provision. The factual picture, however, is somewhat different. While the better employers have recognised the right of employees to join unions of their own choosing, there are employers who, even now, view unfavourably, unions and employees who join them. In Britain the Industrial Relations Act (1971) secures to every worker the right to be a member of a trade union of his choice and makes it an unfair industrial practice for an employer to prevent or deter a worker from exercising such right or to dismiss, penalise or otherwise discriminate against a worker for exercising such right."

Abeysekera sums up the situation in the words that "an order to desist from taking part in trade union actions is in excess of the employers' rights."

This argument too fails.

In the result I would allow this appeal and restore the judgment and decree of the District Court. The appellant would be entitled to costs both here and below.

SHARVANANDA, C.J. – I agree.

COLIN-THOMÉ, J. – I agree.

RANASINGHE, J. – I agree.

TAMBIAH, J. – I agree.

Appeal allowed.