WIJENAIKE
v.
AIR LANKA LIMITED AND OTHERS

SUPREME COURT.
H. A. G. DE SILVA, J., KULATUNGA, J. AND RAMANATHAN, J.,
S.C. APPLICATION No. 223/88,
OCTOBER 13 AND 31, NOVEMBER 15 AND 16, 1989.

Fundamental rights - Termination of employment for vacation of post - Unequal treatment and discrimination - Article 12(1) of the Constitution - Time Bar - Breach of contract and statutory and constitutional rights - Jurisdiction.

The petitioner joined Air Lanka as a Cadet Pilot on 10.06.84. He left the country on 22.12.87 with a view to employment with Gulf Air having applied on 19.12.87 for 03 years no pay leave. Leave however was refused. On 04.02.88 the petitioner returned and on 22.02.88 applied to be rostered for duty. This was not allowed. Air Lanka by letter dated 06.05.88 informed petitioner that he had vacated post. The petitioner's position was that he had only prospected for foreign employment and he had made a separate application for annual leave (55 days) and left with the assurance of the Chief Pilot that it would be allowed and returned before the expiry of the annual leave. He also submitted that other officers who sought foreign employment had received favoured treatment. On his appeal to the authorities, the Chairman, Air Lanka on 23.08.99 wrote that his grievance would be looked into. On 08.11.88 the Chairman informed the petitioner he could not be re-employed. The questions for determination were,

(1) was the application time barred;
(2) was this only a question of breach of contract not involving statutory and constitutional rights;
(3) has there been unequal treatment in violation of petitioner's rights under Article 12(1).

Held :

(1) (*a*) there is no automatic termination of services even for breach of the condition of service Cl. 12.2 which is as follows :-

> "A first officer who continues to be guilty of unauthorised absence beyond 48 hours may be dismissed from service at the discretion of the company";

Or for breach of Cl. 15 which prohibits a first officer against employment in any outside employment or aircraft whatsoever without prior written permission of the company.

(*b*) The principles of Roman Dutch Law entitling the employer to repudiate the contract on the ground of absence of the servant in appropriate circumstances necessarily implies a right in the employee to give his explanation before a final decision is taken to repudiate or revoke the contract. This principle is acknowledged in the Establishments Code in respect of public officers.

(*c*) The relevant date is 08.11.88 when the Chairman refused re-employment and hence the application to the S.C. dated 06.12.88 is not time barred.

(2) In India and Sri Lanka public officers enjoy a status and the rights and liabilities of their employment arise from constitutional or statutory provisions. Their relationship with the State goes beyond contract. They are, therefore, competent to invoke the jurisdiction of this Court for the enforcement of their right to equality before the law and equal protection of the law under Article 12(1) of the Constitution. However, in the case of a public corporation which is an agency of the government, a breach of contract between an employee and the agency would not per se attract the provisions of Article 12(1). Such an employee can complain of a violation of that Article only if the rights and obligations under the contract of employment are imposed by statutory provisions. This is a question that must be decided in each case having regard to the conditions of employment and the intention of the relevant statute. If the remedy sought arises purely from the contract based on the consent of parties Articles 12(1) and 126 have no application in which event the

dispute must be resolved by an ordinary suit provided by private law, even if the dispute involves an allegation of discrimination.

Even though it may be a government agency, Air Lanka is a company duly incorporated under the Companies Ordinance. There is no provision in that Ordinance nor any other statute which govems the petitioner's contract of employment with Air Lanka. The petitioner's grievance has to be resolved by a private law remedy such as the Application he has already made to the Labour Tribunal.

This Court has no jurisdiction to hear and determine the petitioner's application.

Cases referred to:

(1) *Roberts and Another v.Ratnayake and Others [1986] 2 Sri L R 36.*
(2) *Gamaethige v. Siriwardena [1988] 1 Sri L R 384.*
(3) *The Lanka Estate Workers' Union v. The Superintendent, Hewagama Estate 13 LTR/1212 decided on 15.01.69 - Appeal dismissed by Supreme Court on 02.02.70 (SCM) in S.C. 7 - 9/69.*
(4) *Jayawardena v. Attorney-General FRD (1) 175.*
(5) *Gunawardena and Others v. E. L. Senanayake and Others FRD (1) 178.*
(6) *Rajaratne v. Air Lanka Limited [1987] 2 Sri LR 128*
(7) *Palihawadana v. Attorney-General and Others FRD (1) page 1.*
(8) *Elmore Perera v. Major Montague Jayawickrema and Others [1985] 1 Sri L R 285.*
(9) *Perera v. University Grants Commission FRD (1) 103.*
(10) *Eheliyagoda v. Janatha Estates Development Board and Others FRD (1) 243.*
(11) *Jayasinghani v. Union of India AIR 1967 SC 1427.*
(12) *State of Mysore v. S. R. Jayaram AIR 1968 SC 34.*
(13) *Bal Krishnan Vaid v. The State of Himachal Pradesh and Others AIR 1975 Himachal Pradesh 30.*
(14) *Prabhakar Ram Krishna Jodh v. A. L. Pande (1965) 2 SCR 713.*
(15) *C. K. Achutan v. State of Kerala* AIR 1959 S.C..490.
(16) *Radhakrishna Agrawal and Others v. State of Bihar and Others AIR 1977 S.C. 1496.*
(17) *R. V. Berkshire Health Authority, ex parte Walsh 1984 3 All E R 425 C.A.*
(18) *Ratnakar Visvanath Joshi and Others v. Life Insurance Corporation of India and Others 1975 Lab. I.C.*
(19) *Abeywickrema v. Pathirana and Others [1986] 1 Sri LR 120.*
(20) *Nanayakkara v. The Institute of Chartered Accountants of Sri Lanka and Others [1981] 2 Sri LR 52.*
(21) *Akbar Ahad v. State of Orissa AIR 1971 Orissa 207.*

APPLICATON for relief for the infringement of the fundamental right of equality.

R. K. W. Gunasekera with *Colin Senarath Nandadeva* for petitioner.

L. C. Seneviratne, P.C. with *M. A. Bastiansz* for 1st to 3rd respondents and 5th and 6th added respondents.

Cur. adv. vult.

March 14,1990
KULATUNGA, J.

The petitioner joined the 1st respondent company (hereinafter referred to as 'Air Lanka') on 10.06.80 as a Cadet Pilot. He was appointed as a First Officer with effect from 22.06.84. He left the country on 22.12.87 with a view to employment with Gulf Air having made an application on 19.12.87 (P1) for 3 years no pay leave for that purpose. The petitioner claims that pending approval of no pay leave he had been allowed annual leave for 55 days which was available to him. However, the respondents deny this.

The petitioner's application for no pay leave was not approved and the Air Lanka administration was considering whether his services should be terminated for joining Gulf Air without obtaining approval therefor. At this stage, the petitioner returned from abroad on 04.02.88 before the expiry of his annual leave and applied to be rostered for duty. This was not allowed. Thereafter despite the petitioner's request dated 22.02.88 to be rostered for duty (P4) and forwarded to the Manager Personnel Air Lanka by the President of the Pilots Guild on 07.03.88 with his recommendation (1R8) Air Lanka by its letter dated 06.05.88 (P6) informed the petitioner that he had vacated his employment with Air Lanka on 23.12.87 by becoming an employee of Gulf Air without permission and being absent without obtaining prior leave. He was also accused of gross selfishness, disloyalty and ingratitude.

By his letter dated 15.08.88 (P7) the petitioner made representations to the Chairman and the Board of Directors of Air Lanka against the notice of vacation of employment. Briefly his position is that he had only prospected for foreign employment with notice to Air Lanka utilising for his purpose his annual leave. He had made a separate application for annual leave and left with the assurance of the Chief Pilot that it would be allowed; that he returned before the expiry of annual leave. He also submitted that other officers who sought foreign employment had received favourable treatment even though their conduct had been culpable in some aspects. He denied that he had vacated his employment with Air Lanka in that his annual leave had been allowed as is evident, inter alia, from entries in the duty roster (P2), Captain Ratnayake's observations (P18) and staff and telephone list (P25). He also denied the other accusations made against him. He requested that he be reinstated in service.

The Chairman, Air Lanka by his letter dated 23.08.88 (P8) acknowledged the petitioner's representations and informed him that his grievances will be looked into and a reply will be sent as early as possible. Thereafter by letter dated 08.11.88 (P6A) the Chairman informed the petitioner that they were unable to re-employ him for the reasons set out in the letter dated 06.05.88 (P6).

The petitioner sought to challenge the termination of his services firstly by an application dated 01.11.88 under S. 31B of the Industrial Disputes Act addressed to the Labour Tribunal pursuant to which the Tribunal has called upon Air Lanka to transmit its answer to the petitioner's application (1R3). In his application to the Tribunal the petitioner seeks reinstatement with back wages on the ground of unlawful and unjust termination of his contract of employment. Secondly, he invoked the jurisdiction of this Court by filing this application on 06.12.88 alleging that by reason of the action taken against him Air Lanka and its officers - the 2nd and 3rd respondents have subjected him to unequal treatment and unjust discrimination. He prays for a declaration that the respondents have violated his fundamental rights guaranteed by Article 12(1) of the Constitution, and for compensation in a sum of Two Million Rupees.

The 4th respondent - Attorney ,General did not participate in these proceedings. We have heard submissions of the learned Counsel for the petitioner and the other respondents. Air Lanka through its Chairman, the 2nd respondent and the Chief Operating Officer, the 3rd respondent resisted the application of the petitioner on the following grounds:-

(1) that this application is time barred under Article 126 of the Constitution in that it has not been filed within one month from the alleged infringement or the imminent infringement of the petitioner's fundamental rights;

(2) that the remedy sought by the petitioner arises from an alleged breach of contract not involving constitutional or statutory rights and as such the petitioner is not entitled to invoke the jurisdiction of this Court under Article 126 on the ground of a denial of the equal protection of the law within the meaning of Article 12 (1) of the Constitution.

(3) that if the petitioner's application is not time barred and the remedy sought by him is within the ambit of Article 12 (1), on the facts of

this case he has not been subjected to any unequal treatment in violation of his rights under Article 12 (1).

While the first of these grounds is a familiar one, the second ground has hitherto not been considered in depth except perhaps in *Roberts and Another v. Ratnayake and Others (1).* The question whether every act or omission of the government or a corporate body which is an agency of the government is liable to challenge for a denial of the right to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution even if the remedy sought is not founded upon a statutory right but arises from a purely contractual or private right is of the utmost importance. Whilst there are many fundamental rights the violation of which can be established in an application under Article 126 without proof of any statutoty base apart from the constitutional provision which guarantees the right, an allegation of the violation of rights under Article 12(1) requires proof of the denial of equality before the law or the equal protection of the law by executive or administrative action. The Court has, therefore, to interpret the meaning of the word 'law' in Article 12(1). The Article guarantees that both at the stage of making a law as well as at the stage of its application, the right to equality is observed. All persons who are similarly circumstanced are entitled to this right and are protected against unjust discrimination.

A decision on the limit of the jurisdiction of this Court in applications based on Article 12 (1) is very necessary to ensure that the exclusive jurisdiction vested in it by Article 126 is not exceeded. If we were to exceed our constitutional jurisdiction, we would not only be trespassing on the jurisdiction of other courts and tribunals administering justice but also induce aggrieved parties to abandon their lawful and effective remedies elsewhere and to look to this Court for resolution of disputes which, in view of the summary procedure prescribed by Article 126 and the relevant rules, this Court may be ill-equipped to decide having regard to the complicated nature of the dispute and the relevant evidence which can only be assessed in proceedings which provide for confrontation and cross examination of witnesses.

Is the Petitioner's Application Time Barred?

Mr. Gunasekera, learned Counsel for the petitioner submitted that the relevant date for computing time is 08.11.88 which is the date of the letter

of the Chairman, Air Lanka (P6A) informing the petitioner in reply to his representations that the company was unable to re-employ him. He contended that the notice of vacation of employment dated 06.05.88 (P6) was not final and does not constitute the infringement of the petitioner's fundamental rights; that as is evidenced by the Air Lanka letter dated 23.08.88 (P8) a decision on the subject was pending even according to Air Lanka; and that the decision which constitutes the infringement of fundamental rights is the one contained in the letter dated 08.11.88 (P6A). In his further affidavit dated 29.05.89 the petitioner states that it is shortly after 08.11.88 that he became aware for the first time of the action by Air Lanka that was violative of his rights under Article 12(1) of the Constitution. Mr. Gunasekera submitted that the decision in *Gamaethige v. Siriwardena (2)* has no application to the facts and circumstances of this case.

Mr. L. C. Seneviratne, PC, learned Counsel for the respondents submitted that on 04.02.88 when the petitioner returned and requested to be rostered for duty the respondents took up the position that the petitioner was not in the service of the company and could not be rostered for duty. On 04.02.88 the petitioner had got the Crew Scheduling Officer Mr. Olagama to make a log entry to the effect that he had reported for duty (3R20). On 09.02.88 he had sent a telegram to the Personnel Manager, Mr. Wickremasinghe stating that he was reporting for duty that day (1R12). However, he was not rostered. Subsequently, the President of the Pilots Guild interviewed the Personnel Manager and arranged for the petitioner to make his representations dated 22.02.88 (P4) in reply to which Air Lanka informed him by their letter dated 06.05.88 that he had vacated his employment on 23.12.87 (P6).

On the foregoing facts, learned President's Counsel submits that the petitioner became aware of the infringement of his rights from 04.02.88 and certainly by 06.05.88. He did not protest against it but made his appeal on 15.8.88. This was considered and refused on 08.11.88 (P6A). Counsel contends, that the said appeal was made in consequence of an infringement which the petitioner himself says had occurred much earlier; but the petitioner filed his application only on 06.12.88 which is outside the one month prescribed by Article 126; and that he has not explained his delay.

In his further affidavit, the petitioner takes up the position that there is provision in the Establishments Code for an officer on whom an order of

vacation has been served to volunteer an explanation, within a reasonable time and for the appropriate disciplinary authority to consider the explanation and to allow or refuse permission to resume duties; Chapter V - S. 7.4; there is further provision in the Establishments Code where an officer is so refused permission for the officer's appeal to be referred to the Public Service Commission within three months of the order of such refusal. Vol. 11 Chapter XLV111 S. 27.1. Accordingly, the administrative process for the termination of his services was completed only on 08.11.88.

However, the 3rd respondent in his further affidavit has stated that the Establishments Code does not apply to employees of Air Lanka which is a company incorporated under the Companies Ordinance, and that these employees are not members of the Public Service and hence are not governed by the Establishments Code. The petitioner has not placed any material which would establish the applicability of the Establishments Code to employees of Air Lanka. As such, I shall proceed to consider the preliminary objection on the footing that the Establishments Code does not apply to them.

In my view, the answer to the issue on the time bar is to be found in the principles of law applicable to termination of employment by vacation. In English Law, absence of an employee from his place of work in circumstances which make the performance of the contract of employment impossible automatically terminates the contract on the ground of frustration - *Unger v. Preston Corporation*. In Roman Dutch Law, the contract of employment is not automatically terminated by the servant's absence. Such absence only entitles the employer to terminate the contract forthwith. However, mere absence will not warrant dismissal in every case. See Maasdorp's Institutes of South African Law, Vol. (3) 6th ed. pages 215-217 where it is also stated -

> "The decision in each case depends on its own circumstances and amongst others, upon the nature of employment and the length of the absence and upon the question whether the employer was prejudiced by the absence or not".

Roman Dutch Law which is the Common Law of Sri Lanka applies to termination of employment by vacation. S.R. de Silva 'Legal Framework of Industrial Relations in Ceylon' p. 579 cites the order of the Labour Tribunal in *The Lanka Estate Workers' Union v. The Superintendent,*

Hewagama Estate (3). In that case, a workman who had been in police custody was released about two years later. On his return he reported for work but was refused employment. The employer's position was that the workman had abandoned his employment or that the contract of employment ceased to exist by the operation of the doctrine of frustration. The Tribunal held that there was no abandonment as the workman had no intention of abandoning his employment. S.R. de Silva cites the following passage from the order of the Tribunal.

> "Since the doctrine of frustration does not apply the arrest of the workman and .....subsequent imprisonment may have in law entitled the respondent to determine the contract of employment which was not been done. The Roman Dutch Law does not recognise the involuntary frustration of contract but acknowledges that supervening circumstances may make it impossible for the contract to be performed in which event either party could take steps to revoke or repudiate the contract" (S.R. de Silva pp. 579 - 580).

The above principle of Roman Dutch Law has not been excluded by the petitioner's contract of employment and the conditions of service with Air Lanka (3R1, 3R2). Thus, Cl. 12.2 of the conditions of service states-

> "A First Officer who continues to be guilty of unauthorised absence beyond 48 hours may be dismissed from service at the discretion of the company".

It follows that the termination of employment by vacation is not automatic.

> Cl. 15 prohibits a First Officer against employment in any outside employment or aircraft whatsoever without prior written permission of the company.

Breach of this condition would constitute misconduct within the meaning of Cl. 7.2. for which a First Officer "may be dismissed .....without notice". The services of a First Officer for breach of Cl. 15 can be terminated only after due inquiry although in exceptional circumstances where it is necessary in the interest of the service to do so the order of dismissal may be made without notice . It is implicit that even in such a case the officer would have a right to make representations on being informed of the dismissal and to obtain relief if he can. There is thus no automatic termination of services even for a breach of Cl. 15.

The principle of Roman Dutch Law which only entitles the employer to repudiate the contract on the ground of the absence of the servant in appropriate circumstances would necessarily imply a right in the employee to give his explanation before a final decision is taken to repudiate or revoke the contract. This is the principle which has been acknowledged in respect of public officers by the relevant sections of the Establishments Code relied upon by the petitioner. Even if that Code does not apply to Air Lanka employees, the petitioner is entitled to the benefit of the principle of Roman Dutch Law as determined above. In this view of the matter the infringement of the petitioner's rights would arise upon the final decision dated 08.11.88 refusing to re-employ him after considering his representations.

The decisions cited by the learned President's Counsel do not raise the kind of issue which arises here and have no application to the case before us. Thus in *Gamaethige v. Siriwardena (supra)* the petitioner did not come to Court within one month either from the date on which he was informed that his request for restoration of his place in the waiting list for government quarters cannot be granted or from the date on which his appeal therefrom to the Secretary/ Ministry of Public Administration was refused. In *Jayawardena v. Attorney- General (4)* the petitioner, the holder of a permit under the Crown Lands Ordinance renewable annually came to Court long after steps to cancel the permit were taken and only after receiving summons to appear in the Magistrate's Court in proceedings under the State Lands (Recovery of Possession) Act. It was held that his application was out of time in that it had not been made within one month from the date on which he became aware of the infringement or the imminent infringement of his fundamental rights. In *Gunawardena and Others v. E. L. Senanayake and Others (5)* the allegation was that the petitioners were not allowed lands for their children whilst similar claims of others had been allowed. It was held that the petitioners had failed to file their petition until long after becoming aware of such discrimination. The application was dismissed as it had not been filed within one month from the date of the alleged violation of the fundamental right claimed by them.

Accordingly, I hold that the petitioner has filed his application within time and reject the preliminary objection raised in that regard. This takes me to the second ground urged against the application.

Mr. Gunasekera concedes that there are cases in which a right with a public corporation could be purely contractual but submits that if Air Lanka is an agency of the Government (it has been so held in *Rajaratne v. Air Lanka Limited (6)* equality follows; that Air Lanka officials are entitled to equality at all points in their career; that Article 16 of the Indian Constitution (which guarantees equality of opportunity for all citizens **In matters of employment or appointments** to any office under the State) is built into our Article 12 (1) ; that in order to found a violation of the right to equality before the law or the equal protection of the law, administrative acts of discrimination need not be referable to law in the sense of statute or subordinate legislation; that laws, regulations, rules, schemes and any administrative action are all caught up by Article 12 (1); that fairness of the principle of equality must apply to all administrative action; and that what should control administrative discretion is not the existence of a statutory base but that it should be fair between equals. He seeks to distinguish the decision in Roberts case (supra) on the basis that it is a case involving the termination of a contract entered into by the Municipal Council of Kandy (an organ of the government) with an outsider and that the party affected was not an officer of the Council. In support of his submissions, learned Counsel also cited dicta from several decisions of this Court, which I shall later examine.

Mr. L.C. Seneviratne , PC, in reply cited a series of decisions and submitted as follows :-

(1) Merely because a public authority which is an organ of government (even if established by statute) performs functions within the field of public law, it does not *per se* result in its contracts of employment as falling within the ambit of public law.

(2) It is only if those contracts are underpinned by statutory provisions that they could be regarded as falling within the ambit of public law.

(3) Otherwise such contracts are purely private law transactions and rights of parties are governed by contractual terms.

(4) These principles apply to all contracts - employment or otherwise.

(5) Rights arising from private contracts should not be confused with public duties which public bodies have to perform which fall within the field of public law.

(6) Employees of public corporations or bodies or an organ of State do not *ipso facto* acquire status which government servants or

public officers acquire by reason of employment in the government service.

(7) The dispute raised by the petitioner arises from contract; it is out of the domain of public law and hence the petitioner cannot invoke the jurisdiction of this Court under Article 126 read with Article 12 (1).

Mr. Gunasekera referred us to several dicta appearing in certain fundamental rights cases involving the right to equality under Article 12. He cited *Palihawadana v. Attorney - General and Others (7) (Job Bank case)* Sharvananda, J. (as he then was) said (p.6).

"What is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of the difference, such as age, sex, education and so on and so forth as may be found amongst people in general. Indeed, while the object of the Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between citizen 'A' and citizen 'B' who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law or operating an administrative scheme, reasonable classification is possible and a certain measure of inequality is permitted. The State is permitted to make unequal laws or take unequal administrative action if it is dealing with individuals or groups whose circumstances and situations are different".

Wanasundera, J. said (p.27) :

" In my view there is implicit in this scheme the duty on the Member of Parliament to exercise the powers reposed in him in a fair and rational manner so that there will be no inequality in the administration of the scheme".

The use of the expressions "scheme" and "administrative action" in the above passages would not support the wide meaning which Mr. Gunasekera seeks to give to the word 'law' in Article 12 of the Constitution in that the Job Bank Scheme under attack in that case was not a mere scheme or administrative action having no statutory force. It is a scheme which provides for the selection of persons to be considered for appointment as public officers or as employees of other bodies including appointments

giving rise to a status or rights and obligations imposed by constitutional or statutory provisions.

In *Elmore Perera v. Major Montague Jayawickrema and Others (8),* Sharvananda, C.J .said (pp. 301-302):

> "The concept of equality permeates the whole spectrum of a public servant's employment from appointment through promotion and termination to the payment of his pension and other benefits".

At page 321 he said :

> "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".

These passages which have relation to public officers who enjoy constitutional rights as opposed to mere contractual rights do not contemplate the employees of institutions such as Air Lanka; and hence the dicta relied upon cannot be used to advance Mr. Gunasekera's submission on the interpretation of Article 12 (1).

In *Perera v. University Grants Commission (9)* Sharvananda, J. (as he then was) said (p.111) :

> "Equality of opportunity is only an instance of the general rule of equality laid down in Article 12".

This case determined an application for the enforcement of the right of students to be considered for admission to the University by selection made in the exercise of the powers of the University conferred by the Universities Act, No. 14 of 1978. The remedy sought arose out of statute. As such it does not advance the construction which Mr. Gunasekera seeks to place on Article 12 (1) of the Constitution.

In *Eheliyagoda v. Janatha Estates Development Board and Others (10).* (consolidated with two other similar petitions) the petitioners challenged an offer by the JEDB to appoint them as Asst. Field Officers in the JEDB by way of absorbing them into the Board's service from their previous employment in the Dehiovita Electorate Land Reform Co-

operative Society Ltd. where they held positions falling within the Executive Grade. The position taken by the respondents was that the offer was made pursuant to a scheme of reorganization in terms of which the petitioners have been offered alternative employment. Wanasundera, J. said (p.249): -

> "..... We are not satisfied that the determinations relating to these petitioners are based on just and reasonable criteria. The discretion that has been exercised in these cases is one that is unfettered, unregulated and without guidelines. There is also nothing in the material to show that the cases of petitioners were considered on their merits and how their cases compared with those of the others who obtained appointment and vice versa".

This judgment makes no express reference to Article 12 of the Constitution; but it is very clear both from the subject considered and the authorities cited that the remedy sought was on account of an alleged denial of the right to equality before the law and the equal protection of the law under Article 12. The decision does not examine the question whether the remedy sought is founded on law within the meaning of Article 12(1) or whether it falls purely into the field of private law. At the same time the two decisions cited, *Jayasinghani v. Union of India (11) and State of Mysore v. S.R. Jayaram (12)* are in respect of alleged violations of Article 14 and 16 (1) of the Indian Constitution in respect of appointments in the government service. In the context, this decision also is of no assistance in determining the specific issue raised before us as to the applicability of Article 12 (1).

I shall now examine the decisions cited by Mr. L. C. Seneviratne, PC. The learned President's Counsel first cited authority for the proposition that even within the public service there can be contracts which have no statutory base. He cited *Bal Krishnan Vaid v. The State of Himachal Preadesh and Others (13).*,a decision of the Himachal Pradesh High Court. This was a writ petition under Article 226 of the Indian Constitution to quash an order made by the Himachal Pradesh Government terminating a quarrying contract held by the petitioner in terms of which the petitioner supplied sand, stone and bajri required for a project. The grounds of invalidity urged against the order included an allegation that the petitioners had been discriminated against in as much as no such

action had been taken in respect of two other contractors supplying material to the project. This allegation was based on Article 14 (our Article 12) of the Constitution.

The issue before the Court was whether the petitioner had established a right or obligation founded in statute or that the State had acted in the context of law entitling the petitioner to the writ sought or it was a mere breach of contract in respect of which the petitioner was not entitled to a writ or to invoke Article 14.

The petitioner's claim to relief was based inter alia on the submission that Cl. 30 of the contract which empowered its termination in the public interest was statutory in that the contract was signed in form 'K' as required by Rule 33 of the rules made under the Mines and Minerals (Research and Development) Act 1957. Pathak, C.J. giving reasons for dismissing the writ petition said (pp. 32, 33) :

> "If the term or condition which creates the right or obligation is contained in the statute then the violation of the term or condition is a violation of statute..... But if the term or condition has legal force only when it is incorporated in a contract between the parties, then violation of that term or condition amounts to a mere breach of contract and that is so even if that term or condition is required by the statute to be incorporated in a contract. The question always is;
>
> Does the term or condition upon which the grievance is founded, have legal force because it is a provision of the statute or only because it is a clause of the contract ?"

By way of illustration Pathak, C.J. cited *Prabhakar Ram Krishna Jodh v. A.L. Pande (14)* in which the Supreme Court held that an order of termination of services of the appellant, a teacher of a college affiliated to the University of Saugar was violative of his statutory rights under Cl. 8 of the Ordinance relating to the security of the tenure of teachers made under the University of Saugar Act and which was part and parcel of the Teachers' Service Conditions. The Supreme Court held that Cl. 8 of the Ordinance gave the appellant a right to apply under Article 226 for relief and the consideration that he had entered into a contract was immaterial.

Pathak, C.J. analysed the termination clause in the case before him thus (p.33) :

> "The provision for such termination is to be found in the agreement. It is not a provision of the Act or Rules ..... To be more specific, the rules do not mention that the contract can be terminated by the government in the public interest. Authority for the termination of the contract on that ground is to be found in the contract alone. It is a right founded in contract, it is not a power issuing from the statute".

Considering the allegation of discrimination based on Article 226 Pathak, C.J. said (p.34) :

"Had the discrimination been applied in the course of granting a contract .....the discriminatory action of the Government would be referable to its statutory authority because the statute empowers the government to enter into such contracts. But once the contract has been concluded between the government and an individual any action taken by the government in the application of a term or condition of contract must be attributable to the capacity of the government as a contracting party. When the government passes from the stage of granting the contract to the stage of exercising rights under it, it passes from the domain of statutory rights into the realm of contract. And as was observed by the Supreme Court in *C.K. Achutan v. State of Kerala* AIR 1959 SC 490 "(15) a contract which is held from the government stands on no different footing from a private party". In my view Article 14 of the Constitution cannot be invoked by the petitioner".

The next case cited is *Radhakrishna Agrawal and Others v. State of Bihar and Others (16)* which considered certain appeals concerning writ petitions under Article 226 challenging the revision of royalty payable by the petitioners-appellants under a lease and the subsequent cancellations of the lease. The petitioners claimed constitutional rights based on Articles 298 and 14 of the Constitution. Under Article 298 executive power of the Union and each State shall extend inter alia to the making of contracts for any purpose. Counsel for the petitioners urged that the State acting in its executive capacity, even in the contractual field, cannot escape the obligations imposed by Part 111 of the Constitution including Article 14 which guarantees equal protection of the laws. Beg, C.J. expressed his opinion on the Counsel's submission thus (p. 1501)-

"Learned Counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in the exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties". If we were to accept this very wide proposition every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all".

The Court reiterated the position that at the threshold stage or at the stage of granting the contract, acts of the State would be governed by constitutional provisions but subsequent acts in the field of contract are not so governed unless the power or obligation is statutory. Beg, C.J. said (p.1500) -

"At this (threshold) stage, no doubt the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties *inter se*. No question arises of violation of Article 14 or of any other constitutional provision when the state or its agents purporting to act within this field perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract".

In *Roberts and Another v. Ratnayake and Others (1)* this Court heard an application arising from the termination of a lease of 3 stalls and 2 sites of bare lands held by the 2nd petitioner from the Muncipal Council, Kandy. The petitioners complained that the termination was violative of Article 12 (1). Ranasinghe, J. (as he then was) having considered the decisions in *Bal Krishnan Vaid (13)* and *Agrawal (16)* cases (supra) and the relevant provisions of our Constitution said (p.44) :

"On a consideration of the principles contained in the judgments referred to above, and the provisions of both Articles 12 (1) and 170 of

the Constitution, the principles that govern the question, which calls for determination, are, in my opinion, that the 'law', equality before which and equal protection of which is guaranteed by Article 12 (1) of the Constitution, constitutes only those statutory provisions contained in Acts of Parliament, and in any enactment passed by a legislature of this Island at any time before the Constitution was promulgated in September , 1978, including all orders in Council promulgated before the Constitution came into operation, and also those by-laws which, as set out earlier, are also as valid and effectual as if enacted in the main statute; that where the State enters into a contract with a citizen in pursuance of statutory power, the State or such agency is, at the "threshold stage" or at the stage at which such contract is being entered into, bound by the operation of the provisions of Article 12 (1) of the Constitution; that once such agreement is validly entered into all parties to such agreement - the State, the state agency, and the citizen - are all ordinarily bound only by the terms and conditions set out in such agreement; that, if, however, there exists a statutory provision which, whether included expressly or impliedly, as a term or condition of such agreement or not, confers some special power even in the field of contract, then such provision affects the rights and obligations of the parties under such agreement; that if the term or condition, which creates rights or obligations of the parties under the agreement, has legal force only because it is incorporated in such agreement, then any violation even by the State amounts only to a breach of contract, even where such term or condition has been incorporated because a statutory provision requires it to be so incorporated; that where the rights and obligations of parties to such agreement have to be determined according to the law of contract, then even the State has to be treated in the same way as any other ordinary party to a legally binding contract; that where the rights and obligations of the parties to such contract fall to be determined by the ordinary law of contract, then the provisions of Article 12 (1) of the Constitution have no application, and cannot be invoked".

Learned President's Counsel also cited certain cases dealing with employment. I do not consider it necessary to examine all the cases cited. Of them the case of *R.v.Berkshire Health Authority, ex parte Walsh (17)* (Court of Appeal) - although it is only concerned with the question whether an order terminating the employment of the petitioner is subject to judicial review by the issue of a writ of certiorari - is very instructive on some

aspects which are relevant even in the field of fundamental rights guaranteed by the Constitution. These are rights which are as much in the sphere of public law as are statutory rights enforceable through writs.

The petitioner Mr. Walsh was employed by the East Berkshire Area Health Authority as a Senior Nursing Officer at Wexham Park Hospital. His services were terminated whereupon he applied to an Industrial Tribunal alleging that he had been unfairly dismissed and seeking compensation. He also applied for judicial review to quash the order of dismissal. The question for decision was whether the remedy sought by Mr. Walsh arose solely out of his contract of employment with the health authority as opposed to any public duty imposed on the authority, the legal position being that it is only in the latter case that a writ of certiorari could be sought.

In terms of the regulations made under the National Health Service Act conditions of service of nursing officers had to be negotiated by the Whitley Counsel and approved by the Secretary of State. Such conditions were included in Mr. Walsh's contract of employment. Hodgson, J. who decided the case in the Divisional Court approached the question thus (p.429) -

> "The public may have no interest in the relationship between the servant and master in an "ordinary case, but where the servant holds office in a great public service the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that nurses who serve the public should be treated lawfully and fairly by the public authority employing them..... It follows that, if in the exercise of my discretion I conclude that the remedy of certiorari is appropriate, it can properly go against the respondent authority".

Sir John Donaldson, M.R. disagreeing with this approach said - (p. 430) -

> "Employment by a public authority does not *per se* inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment..... It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant

for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions that is quite different, but the interest of the public *per se* is not sufficient".

May, L.J. said - (p. 434) :

"Further, I think that at the present time, in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal. In my opinion the Courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure provided for by R.S.C. Ord. 53". He thought that Hodgson, J. had stated the test "in far too wide terms" (p.435). He also said - (p.436)" I doubt however, whether one should properly say, in the present context, that as a senior nursing officer Mr. Walsh held a public position .....Having regard to the detailed terms of Mr. Walsh's contract with the authority, I do not think that considerations which determine whether he was validly dismissed do go beyond that contract".

Purchas, L.J. said - (p. 442) :

"However, in my judgment the relationship between Mr. Walsh and the health authority was one which fell within the category of 'pure master and servant' although the powers of the authority to negotiate terms with its employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which Mr. Walsh complained related solely to the private contractual relationship between the health authority and him and did not involve any wrongful discharge by the health authority of rights or duties imposed on it *qua* health authority".

In *Ratnakar Visvanath Joshi and Others v. Life Insurance Corporation of India and Others (18) Delhi High Court,* the question was whether a scheme of benefits for payment of special pay to employees of the Corporation was available to the petitioners only as a term of their contract of service with the Corporation or whether it was available to them by law. The petitioners sought to quash the withdrawal of the scheme by the Chairman of the Corporation by means of a writ under

Article 226 on the ground that the scheme was law or an order having the force of law.

The Corporation was established by the Life Insurance Corporation Act 1956. Its power included the power to make regulations. However, Deshpande, J. observed (p. 472) "the Corporation need not wait for the framing of rules and regulations before it can start working under the Act". In view of this and certain regulations made by the Corporation, in particular regulation 59 relied upon by the petitioners, Deshpande, J. proceeded to state thus - (p. 472) :

> "It is essential for the petitioners, therefore, to show that there is a statutory obligation imposed on the Corporation either by the Act or by the rules or by the regulations to give the petitioner the benefit of the scheme.....".

On the merits the Court thought that the withdrawal of the scheme by the Chairman was invalid in that he did not have the authority of the Corporation to do so. However, the Court held that this was a question concerning the validity of the internal administration of the Corporation which could not be inquired into under Article 226; that the special pay under the scheme is a matter of grace which could not be claimed by the employees as a matter of right; and that the withdrawal of the scheme cannot be said to have been contrary to Articles 14 and 15 of the Constitution in that it did not discriminate against the petitioners because it did not favour other employees of the Corporation to the detriment of the petitioners.

On the law, the Court held that the scheme is not covered by Regulation 59; that it consisted of mere administrative instructions competent under Regulation 27 *(b)* or 23 but did not constitute law or a direction having the force of law given in the exercise of the legislative power of the Constitution; that if it is remuneration payable to the employee for work done by them, then the employee can enforce payment of the remuneration as a part of the contract of service in a suit and that such conditions of service are not enforceable by a writ petition under Article 226.

In view of its conclusion that the petitioners had no statutory rights enforceable under Article 226, the Court found it unnecessary to decide

whether the Corporation is a 'State' within the meaning of Article 12. Even if it is assumed to be a 'State' the Court held that its employees do not obtain the constitutional status of government employees. The following passage from the judgment sets out the position more clearly. (pp. 470 - 471).

"Under Article 310 of the Constitution an employee under government holds his office during the pleasure of the President or the Governor. Under the proviso to Article 309 the President or the Governor may frame rules governing the conditions of service of the Government servants. A Government servant has, therefore, in theory no security of tenure and no equality of position as a contracting party. On the other hand constitutional obligations are cast on the government by Article 311 of the Constitution. This is why a contract of service under the Government is regarded as a status under the Constitution. A corollary of the above position is that even if no rules are framed under Article 309 the Government may determine the conditions of service of its employees by executive action. The executive power of the union may be exercised by the President under Articles 53 and 73 and by the Governor under Articles 154 and 162. The constitutional conditions of service could be changed by the mere exercise of such executive power".

The Court ruled on the rights of the employee of the Corporation thus - (p. 472) :

" There are no provisions in the Act of 1956 or in the rules and regulations framed thereunder which transform the relationship between the Corporation and its employees into status as distinguished from contract. The result is that the relationship between the petitioners and the Corporation is governed either by the service contract with the Corporation for the unilateral benefit which the Corporation may give as a matter of grace or the regulations governing certain conditions of service framed under section 49. It is only those conditions of service which are governed by the regulations that have become a matter of statutory rights and obligations between the petitioners and the Corporation. The rest of the conditions of service are not a statutory right or obligation enforceable by a writ petition under Article 226".

In *Abeywickrema v. Pathirana and Others (19)* the validity of the election of the respondent as a Member of Parliament was challenged on

the ground that at the time of his election he held public office as the Principal of a school and as such he was disqualified for election in terms of Article 91 (1) *(d)* (V11) of the Constitution. The respondent's position was that he had resigned from his post on 21.04.83, a day before the nomination date. The petitioner argued that the respondent's resignation was not validly made in that he had failed to comply with the prescribed procedure for resignation in that the letter of resignation was not addressed to nor accepted by the appointing authority as required by s.4 Chapter V of the Establishments Code which had been approved by the Cabinet of Ministers under Article 55(4) of the Constitution. It was held that s. 4 of the Code has statutory force and is binding; that a public officer acquires a status; that his relations are governed by status and not by contract; and that in view of non-compliance with the mandatory provisions of s.4, the respondant had not ceased to be a public officer on the date of his election and was therefore a person disqualified for election as a Member. Sharvananda, C.J. said - (p.143) -

> " If rules made under Article 309 of the Indian Constitution attract statutory force, in my view by a parity of argument the rules made under Article 55 (4) also should be held to have statutory force".

In *Nanayakkara v. The Institute of Chartered Accountants of Sri Lanka and Others (20)* in which an employee of the Institute sought to challenge disciplinary proceedings against him by certiorari, the Court of Appeal considered the nature of the relationship between the Institute and its employees. The Institute was established under Act No. 23 of 1959, s. 12 of which empowered the Institute to make regulations including in respect of disciplinary control over officers. Such regulations were contained in the Manual of Procedure, paragraph 2 of which stipulates that they may be amended; repealed or substituted by new regulations made by the Institute when necessary. Thambiah, J. said - (p. 61 - 62) -

> ".....The petitioner's employment has a statutory flavour, which differentiates his employment from the ordinary relationship of master and servant. The Manual of Procedure (R1) gives rights to the employees and imposes obligations on the employer, which go beyond the ordinary contract of service..... If an employee is dismissed for unspecified reasons or if there is a breach of these essential principles of natural justice, then the order of dismissal may become liable to be controlled by certiorari".

In *Akbar Ahad v. State of Orissa (21)* where the government terminated the lease of the petitioner under C1.12 of the lease deed whilst in respect of similar leasehold, resort had been made to the provisions of the Land Acquisition Act, it was held that from the fact that on some occasions, the State as lessor had waived its rights reserved under Cl. 12 of the lease deed, it cannot be said that the petitioners had been discriminated against simply because the benefit of such a waiver had not been extended to them. Enforcement of a contractual obligation against one and waiver of a similar obligation under an independent contract in the case of another does not amount to denial of equal protection envisaged in Article 14 of the Constitution.

The forgoing authorities establish that in India and Sri Lanka public officers enjoy a status and the rights and liabilities of their employment arise from constitutional or statutory provisions. Their relationship with the State goes beyond contract. They are, therefore, competent to invoke the jurisdiction of this Court for the enforcement of their right to equality before the law and equal protection of the law under Article 12 (1) of the Constitution. However, in the case of a public corporation which is an agency of the government a breach of contract between an employee and the agency would not *per se* attract the provisions of Article 12 (1). Such an employee can complain of a violation of that Article only if the rights and obligations under the contract of employment are imposed by statutory provisions. This is a question which must be decided in each case having regard to the conditions of employment and the intention of the relevant statute. If the remedy sought arises purely from the contract based on the consent of parties Articles 12 (1) and 126 have no application, in which event the dispute must be resolved by an ordinary suit provided by private law, even if the dispute involves an allegation of discrimination.

Even though it may be a government agency, Air Lanka is a company duly incorporated under the Companies Ordinance. Our attention has not been drawn to any provision of that Ordinance or of any other statutory provision which govern the petitioner's contract of employment with Air Lanka; nor have I been able to discover any such provision. I am, therefore, of the view that the petitioner's grievance has to be resolved by a private law remedy such as the application he has already made to the Labour Tribunal. An inquiry by the Labour Tribunal is also beneficial to both parties who are entitled to the rights of an ordinary suit, of calling witnesses and of confrontation and cross-examination of testimony at

such inquiry on all the points in dispute. I am also of the view that this would promote the due and orderly administration of justice by Courts and Tribunals established by law. Any other view would encourage the prolification of applications before the Supreme Court which are not within its jurisdiction merely because the aggrieved parties or Counsel advising them may feel that the remedy under Article 126 is convenient or expeditious.

Aggrieved parties may themselves not be able to distinguish the cases of arbitrary treatment or discrimination falling within the ambit of Article 12 (1). It is therefore, the duty of Counsel to examine each case and to advise clients accordingly and to dissuade them from coming to this Court in the hope of obtaining relief here even in cases of doubt. This would also help in some measure in solving the problem of laws delays. I do not agree with the submission of the learned Counsel for the petitioner that where a person complains of treatment violative of Article 12 (1) of the Constitution by a body which is a government agency such as Air Lanka what should control administrative discretion for the purpose of the exercise of our jurisdiction under Article 126 is not the existence of a statutory base but whether the treatment in issue has been fair between equals even if the application is based on an alleged breach of contractual rights; and that the word 'law' in Article 12 (1) should be construed accordingly to include any scheme or administrative action. In my view such a construction is far too wide and is not supported by the relevant provisions of the Constitution or authority.

In view of my findings above, this Court has no jurisdiction to hear and determine the petitioner's application. As such, I do not propose to consider the question whether the termination of the petitioner's employment with Air Lanka is discriminatory in particular for the reason that any opinion expressed by us on that matter can only prejudice either party, in the hearing and determination of the dispute by the Labour Tribunal. Accordingly, I dismiss the petitioner's application with costs which I fix at Rs. 1575/=.

H.A.G. DE SILVA, J. - I agree.

RAMANATHAN, J. - I agree.

Application dismissed.