GANESHANANTHAM

v.

VIVIENNE GOONEWARDENE AND THREE OTHERS

SUPREME COURT.
SAMARAKOON, C. J., SHARVANANDA, J., WANASUNDERA, J., WIMALARATNE, J., COLIN THOME', J., RANASINGHE, J. AND RODRIGO, J.
S.C. No. 6/83 SPECIAL – S.C. APPLICATION No. 20/83.
JANUARY 16, 17, 23, 24, 25, 26, 27 AND 31, 1984.

Per incuriam rule – Revisionary and inherent powers of the Supreme Court to review its own judgment – Natural Justice – Audi alteram partem – Justice must be seen to be done – Articles 126 (2) and (4) and 134 (3) of the Constitution – Rule 65 (1) and Rule 65 (4) (ii) of the Supreme Court Rules.

The petitioner-respondent (Mrs. Vivienne Goonewardena) made an application (S.C. 20/83) to the Supreme Court alleging that the 1st respondent (Hector Perera, Officer-in-Charge of the Kollupitiya Police Station) had illegally arrested her and subjected her to cruel, inhuman and degrading treatment in violation of her fundamental rights set out in Article 11 and Article 13 (1) of the Constitution. She made parties to her application the Inspector-General of Police (2nd respondent) and the Attorney-General (3rd respondent). The 1st respondent denied the allegations against him. The 2nd respondent filed his affidavit along with two affidavits one of which was an affidavit by the present petitioner (V. Ganeshanantham) who averred that it was he who had arrested the petitioner-respondent but that his arrest was legal. The petitioner claimed he arrested the petitioner-respondent on the pavement of the Galle Road when she was going in a procession. Neither the petitioner-respondent nor any one else in

the procession was able to produce a permit to go in the procession. As the procession was being conducted "without the authority of a lawful permit" it became the petitioner's duty to prevent the procession.

A Bench of three Judges of the Supreme Court heard the case and held–

(1) That the petitioner-respondent had not established that she had been subjected to cruel, inhuman and degrading treatment by the first respondent.

(2) That the petitioner-respondent had been arrested by the petitioner and not by the 1st respondent.

(3) That the said arrest was unlawful and therefore the State was liable in damages fixed at Rs. 2,500

No order for damages or costs was made against the petitioner.

The petitioner sought relief from the Supreme Court complaining that another Bench of the Court had, to his detriment, acted per incuriam as set out below and claiming relief in the exercise of the revisionary and inherent powers of the Court :

(1) The Court had made a finding against the petitioner in respect of an infringement not complained of by the petitioner-respondent and in fact disowned by her. Such order was in disregard of Article 126 (2) of the Constitution read with Rule 65 (1) (*a*) of the Supreme Court Rules.

(2) The power to grant relief or give directions which the Supreme Court deems just and equitable under Article 126 (4) was restricted to the petitioner-respondent's allegation and complaint to Court under Article 126 (2).

(3) In any event the Court acted in disregard of–

(i) Article 126 (2) read with Rule 65 (1) and Rule 65 (4) (ii) of the Supreme Court Rules

(ii) The rule of natural justice – audi alteram partem.

(iii) The rule of natural justice that justice must be seen to be done.

On the question of the non-observance of the rules of natural justice the petitioner's complaint is that the Court had found him guilty of unlawfully arresting the petitioner-respondent and thereby violating her fundamental rights. These findings were made against him without his being first informed that his conduct was being inquired into ; no opportunity was given to him of defending himself ; and he was not a party to the proceedings nor added as a party.

Held–

(1) The Supreme Court has no jurisdiction to act in revision of cases decided by itself. None of the provisions of the Constitution expressly conferring jurisdiction confer such a jurisdiction on it. Nor has the Legislature conferred such a jurisdiction by law. The Supreme Court is a court of last resort in appeal and there is finality in its judgment whether it is right or wrong. That is the policy of the law and the purpose of Chapter XV of the Constitution.

(2) As a superior Court of record the Supreme Court has inherent powers to correct its errors which are demonstrably and manifestly wrong and where it is necessary in the interests of justice. Decisions made per incuriam can be corrected. These powers are adjuncts to existing jurisdiction to remedy injustice – they cannot be made the source of new jurisdictions to revise a judgment rendered by that court.

(3) The jurisdiction granted to the Supreme Court by Article 126 of the Constitution concerns fundamental rights and language rights declared by Chapters III and IV of the Constitution. In exercising this jurisdiction the Court, has to make a dual determination, viz :-

(i) that there is an infringement or threatened infringement of a fundamental right and

(ii) that such infringement or threat is by executive or administrative action.

Held further : Ranasinghe J. and Rodrigo J. dissenting –

(4) It may not always be possible for a petitioner to allege in his petition that the act complained of was that of a particular officer of State. Even where the infringement of fundamental rights is found to have been committed by a State Officer other than the one named in the petition the Court would still have power to act in terms of Article 126. The jurisdiction of the Court does not depend on the fact that a particular officer is mentioned by name nor is it confined to the person named. The unlawful act gives the Court jurisdiction to entertain the petition and to make a declaration accordingly. The fact that it was committed by an officer of State empowers the Court to grant a remedy. The provisions of Article 126 (2) (unlike Article 126 (3)) does not limit the inquiry to the person named in the petition. There has been no disregard of the provisions of Article 126 (2) read with Rule 65 (2) and (4) (ii).

Per **Samarakoon, C.J.**–

"It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, it (this Court) yet dismisses the petition because it is established that the act was not that of the officer named in the petition but that of another State Officer, such as a subordinate of his. This Court has been given power to grant relief as it may deem just and equitable – a power stated in the widest possible terms. It will neither be just nor equitable to deny relief in such a case."

(5) Rule 65 merely states that the petitioner shall name the person who he alleges has committed the unlawful act. This by no means exhausts the avenues available to a petitioner. It does not provide for a situation where the petitioner is unable to name the officer of State who commits the act. Furthermore Rule 65 concerns procedure and like most rules cannot detract from the powers of Article 126.

Per **Wanasundera, J.**–

"Article 126 of the Constitution shows that in an application under that Article the accusation is made against the State and the State through its principal Law Officer, the Attorney-General, is required to defend the action. It is a legal requirement that the Attorney-General should be heard."

"The Rules cannot derogate from the substantive constitutional provisions and alter the nature and composition of a proceeding under Article 126 . . . . . A proceeding under Article 126 is against the State and the State has to bear the liability for unlawful executive or administrative action."

(6) Although the petitioner-respondent denied she had been arrested by the petitioner, the arrest by the petitioner is one episode and the Court has treated it as one transaction in which there was only one arrest – the arrest by the petitioner. The implication is that the arrest was mistakenly attributed to the first respondent. That finding cannot now be questioned in these proceedings. Moreover it was based on facts disclosed by the petitioner in his affidavit.

(7) The petitioner's statement that had he been given an opportunity he would have explained what he meant by permit suggests that when he used that word it did not have its ordinary English meaning. He has only himself to blame for this. The Court was entitled to take it to mean what it ordinarily means in the English language.

(8) The parties to the case were heard by affidavit. Likewise the petitioner was heard by affidavit and his affidavit was accepted by Court. The petitioner knew at the time he swore the affidavit that it was being filed to establish that the only arrest was by him and that it was the legality of his arrest that would be in issue at the inquiry. The Additional Solicitor-General appearing for the 2nd and 3rd respondents addressed Court on the legality of the arrest. In their written submissions the Inspector-General of Police (2nd respondent) and the Attorney-General (3rd respondent) endorsed the petitioner's action "as being in accordance with procedures established by law".

Per Wanasundera, J.–

"The petitioner had gone out of his way to justify the arrest and sought cover for his actions in certain legal provisions. This is a matter of law falling within the province of the judge".

(9) The petitioner was given such hearing as the Court considered necessary as provided in Article 134 (3).

(10) The rule of natural justice audi alteram partem has been observed. In any event the provisions of Article 134 (3) have been satisfied.

(11) The petitioner knew all along that it was the arrest by him and its validity that was in issue in the case. Hence it cannot be said that justice has not been seen to be done because the petitioner was not told that his conduct was being impugned in the case.

(12) No order for damages or costs was made against the petitioner and he has suffered no prejudice as a result of his not being given an opportunity to enter into the fray and take part in the argument.

(13) There is no justification for exercising any of the inherent powers of the Court in this case.

Per Wanasundera, J.–

(14) In the case that was filed by Mrs. Vivienne Goonewardena under Article 126 of the Constitution for a violation of fundamental rights the present petitioner came before the court in the capacity of a witness. In the course of arriving at its finding a court has necessarily to believe and disbelieve the evidence given by the witnesses for the respective sides.

It is not a requirement of the law of this country that a witness who has given evidence should be informed prior to the judgment of the proposed reasons for disbelieving him and be afforded an opportunity of making representations.

(15) When a punishment, penalty or liability has to be imposed on a person, whether he be a party or witness, the law would generally require that the person concerned be apprised of the charge, allegation or complaint against him, and he be afforded an opportunity of giving an explanation. The word "guilty" does not necessarily mean only criminality, it can also mean culpability, namely, blameworthiness. The use of the word "guilty" in the passage "Sub-Inspector Ganeshanantham was guilty of arresting the petitioner in contravention of the constitutional prohibition" by no means imposes or is intended to impose any punishment, penalty or liability on the petitioner. It constituted a necessary step in the process of the judge's reasoning and without it he could not have come to a proper determination of the case.

Per Wanasundera, J.–

When a Judge passes strictures on a witness in the course of deciding a case "It is only an episode in a single trial and constitutes part and parcel of one proceeding, conducted according to the known standards of fairness and where the principle of natural justice cannot be divided, apportioned and compartmentalised. If the rule is to be applied in situations like the present case it would result in trials within trials and the prospect of interminable litigation. Surely that would be carrying the principle of audi alteram partem to absurd lengths."

Cases referred to

(1) *Re Exchange Street, Manchester, [1956] 3 All E.R. 490, 493.*
(2) *Waterhouse & Co. v. Gilbert, 15 Q.B.D. 569.*
(3) *Lyon v. Morris, 19 Q.B.D. 139.*
(4) *Mapalathan v. Elayavan, (1939) 41 NLR 115.*
(5) *Loku Banda v. Assen, (1897) 2 NLR 311.*
(6) *Elo Singho v. Joseph, (1948) 49 NLR 312.*
(7) *Mohamed v. Annamalai Chettiar, (1932) 12 C.L. Rec. 228.*
(8) *Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents, (1953) 54 NLR 481.*
(9) *In Revision, (1921) 23 NLR 475.*
(10) *Alasupillai v. Yavetpillai, (1949) 39 CLW 107.*
(11) *Ranmenikhamy v. Tissera (1962) 65 NLR 214.*
(12) *King v. Baron Silva, (1925) 4 Times of Ceylon Law Reports 3.*
(13) *The Seistan, [1960] 1 All ER 32.*
(14) *Sheldon v. Bromfield Justices, [1964] 2 WLR 1066; [1964] 2 Q.B. 573.*

(15) *Appuhamy v. Regina, [1963] 1 All E.R. 762.*
(16) *Rex v. The Thames Magistrate's Court, [1974] 2 All E.R. 1219.*
(17) *General Council of Medical Education and Registration of the United Kingdom v. Spackman – Spackman's case, [1943] 2 All E.R. 337, (1943) A.C. 627.*
(18) *Mahon v. Air New Zealand Ltd. and Others reported in Newspaper (Privy Council) Law Report of October 21, 1983.*
(19) *R. V. Deputy Industrial Injuries Commissioner : ex parte Moore, [1965] 1 Q.B. 456, 488, 490.*
(20) *Cinnamond v. British Airports Authority, [1980] 2 All E.R. 368, 377.*
(21) *R. v. Woking Justices, ex parte Gossage, [1973] 2 W.L.R. 529.*
(22) *R. v. Hopkins, ex parte Harward, [1973] 1 W.L.R. 967.*
(23) *Maharaj v. The Attorney-General of Trinidad and Tobago (No. 2), [1979] A.C. 385, 399.*
(24) *Re A. Solicitor, [1944] 2 All E.R. 432, 434.*
(25) *Guardians of Westham Union v. Churchwardens of Bethnal Green, [1896] A.C. 477.*
(26) *Sirinivasa Thero v. Sudassi Thero, (1960) 63 NLR 31, 33.*
(27) *Selvadurai v. Rajah, (1940) 41 NLR 423.*
(28) *Narayan Chetty v. Jusey Silva, (1903) 8 NLR 162.*
(29) *Eswaralingam v. Sivagnanasunderam, (1962) 64 NLR 396, 398.*
(30) *Andris Appu v. Kolande Asari (1916) 19 NLR 225, 229.*
(31) *Olagappa Chettiar v. Reith, (1941) 43 NLR 91.*
(32) *Victor de Silva v. Jinadasa de Silva, (1964) 68 NLR 45.*
(33) *Commissioner of Inland Revenue v. Ranaweera (1969) 72 NLR 294 296.*
(34) *Edirisinghe v. District Judge of Matara, (1949) 51 NLR 549.*
(35) *Sinnathamby v. Yokammah (1958) 61 NLR 183, 185.*
(36) *De Costa and Sons v. S. Gunaratne (1967) 71 NLR 214.*
(37) *Huddersfield Police Authority v. Watson [1947] All E.R. 193.*
(38) *Morrelle Ltd. v. Wakeling, [1955] 1 All E.R. 708.*
(39) *Billimoria v. Minister of Lands, [1978-79] 1 S.L.R. 10, 12.*
(40) *Menchinahamy v. Muniweera, (1950) 52 NLR 409, 414, 415.*
(41) *Ex parte Brown, Re Tunstall, [1966] 1 N.S.W.R. 770, 775.*
(42) *Ridge v. Baldwin, [1963] 2 All E.R. 66, 80.*
(43) *Cooper v. The Board of Works for Wandsworth District, (1863) 14 C.B. (N.S.) 180.*
(44) *Franklin v. The Minister of Town and Country Planning-Stevenage Case, [1948] A.C. 87.*
(45) *Nakkuda Ali v. Jayaratne, (1950) 51 NLR 457.*
(46) *Board of Education v. Rice, [1911] A.C. 179.*
(47) *Pearlberg v. Varty, [1972] 1 WLR 534, 547.*
(48) *Durayappah v. Fernando, (1966) 69 NLR 265.*
(49) *Wiseman v. Borneman, [1971] A.C. 297, 308.*
(50) *Mallock v. Aberdeen Corporation, [1971] 1 WLR 1578, 1599.*
(51) *John v. Rees, [1970] Ch 345, 402.*
(52) *R. v. Thames Magistrate's Court, Ex parte Polemis, [1974] 2 All E.R. 1219, [1974] 1 WLR 1371.*

(53) *R. v. Hendon Justices, Ex parte Gorchein, [1973] 1 WLR 1502.*
(54) *Vadamardchy Hindu Educational Society Ltd. v. The Minister of Education, (1961) 63 NLR 322.*
(55) *Kapoor v. Jagmohan, (1980) 4 S.C.C. 379.*
(56) *R. v. Sussex Justices, ex parte McCarthy, [1924] 1 KB 256, 259.*
(57) *De Verteuiel v. Knaggs, [1918] AC 559.*
(58) *Vasudevan Pillai v. City Council of Singapore, [1968] 1 WLR 1278, 1286 (P.C.)*
(59) *Rose v. Humbles, [1972] 1 WLR 33, [1972] 1 All ER 314, 318.*
(60) *Mariyadas Raj v. The Attorney-General and another S.C. Application No. 130/82 : S.C. Minutes of 14.2.83.*
(61) *Caldera v. Santiagopillai, (1920) 22 NLR 155.*
(62) *Juan Perera v. Stephen Fernando, (1902) 2 Br. 5.*
(63) *Thambiraja v. Sinnamma, (1935) 36 NLR 442.*
(64) *Burford (Corporation of) v. Lenthall, 2 Atk. 551 ; 26 E.R. 731.*
(65) *Craig v. Kanssen, [1943] K.B. 256 ; [1943] 1 All E.R. 108.*
(66) *Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718 ; [1944] 2 All E.R. 293.*

APPLICATION in revision and for the exercise of the inherent powers and jurisdiction of the Supreme Court.

K. N. Choksy, S. A., with *D. H. M. Jayamaha, Ronald Perera, Lakshman Perera, Miss I. R. Rajepakse* and *Nihal Fernando* for the petitioner.

Dr. Colvin R. de Silva with *Batty Weerakoon, Miss M. Kanapathipillai* and *Miss Saumya de Silva* for the petitioner-respondent.

Sunil de Silva, Additional Solicitor-General, with *Priyantha Perera, Deputy Solicitor-General* and *Upawansa Yapa, Deputy Solicitor-General* for Attorney-General.

Cur. adv. vult.

March 2, 1984.

SAMARAKOON, C.J.

The application in this case is a direct consequence of the order made by a Bench of three Judges of this court in case No. 20 of 1983. In that case the petitioner-respondent filed a petition in terms of Article 126 of the Constitution (1978) alleging that she had been unlawfully arrested on the 8th of March, 1983, at the Kollupitiya Police Station by the first respondent who was at the time the Officer-in-Charge of the said station. The petitioner-respondent also alleged that she had been subjected to cruel, inhuman and degrading treatment by the first respondent. Thereby, she alleged, the first respondent had acted in contravention and in violation of her fundamental rights set out in

Article 11 and Article 13 (1) of the Constitution. She made the Inspector-General of Police and the Attorney-General parties to the petition as second and third respondents respectively. The first respondent denied all allegations made against him. The second respondent appears to have made independent investigations into these allegations. He filed affidavit supporting the denial of the first respondent and set out the true state of facts as found by him. Together with his affidavit was filed an affidavit from Vinayagam Ganeshanantham, Inspector of Police, Kollupitiya, the petitioner in this application (hereinafter referred to as petitioner) and an affidavit from Pallage Ratnaseeli Perera, Reserve Woman Constable, attached to the Kollupitiya Police Station. The second respondent swore inter alia that he was "satisfied with the truth of the contents" of the two affidavits abovementioned. The petitioner in his affidavit stated that it was he who arrested the petitioner-respondent and four others and that the arrest was made by him on 8th March with the assistance of other policemen on the Galle Road opposite the Police Station. He pleads further facts seeking to justify the arrest. I will deal with this affidavit in greater detail in the course of this judgment. The petition was inquired into by my brothers Ratwatte, J., Colin-Thome, J. and Soza J. The unanimous decision of the Court was delivered by Soza, J. The judgment discloses three salient facts. They are–

(1) That the petitioner-respondent had not established to the satisfaction of the Court that she had been subjected to cruel, inhuman and degrading treatment by the first respondent.

(2) That the petitioner-respondent had been arrested on that day in question by Inspector Ganeshanantham, petitioner, and not by the first respondent.

(3) That the said arrest was unlawful and therefore the State was liable in damages which was fixed at Rs. 2,500 by the Court.

It is relevant to note that the Court made no order as to damages or costs against the petitioner. The petitioner was in no way prejudiced by the order of this Court.

The petitioner now complains that the Court had found him guilty of unlawfully arresting the petitioner-respondent, thereby violating her fundamental rights, that the findings were made against him without first informing him that his conduct was being inquired into, that he

was given no opportunity of defending himself, that he was not a party to the proceedings nor added as a party and that the Court in making the said finding acted in contravention of natural justice and *per incuriam*. He asks for relief from this Court.

Counsel for the petitioner contends that this Court has powers of revision which enable it to grant the relief prayed for by the petitioner. Counsel for the petitioner-respondent states that this Court has no power to revise its own orders. He points to the caption of the petition which reads–

> "IN THE MATTER OF AN APPLICATION IN REVISION *AND* FOR THE EXERCISE OF THE INHERENT POWERS AND JURISDICTION OF THE SUPREME COURT".

He submits that this caption read with prayer (*a*) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative. (Vide Article 105 (2) of the Constitution). Its place was taken by the Court of Appeal (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution). It has jurisdiction in constitutional matters which are spelled out in Articles 120, 121, 122, 123 and 125 of the Constitution. A fetter has been placed on this jurisdiction by the provisions of Article 124. The exact nature and effect of its confines is not a matter that arises for discussion in this case. This Court has a jurisdiction for the protection of fundamental rights (Article 118 (*b*)). The manner of its exercise is set out in Article 126 of the Constitution. It has a final appellate jurisdiction which is referred to in detail in Article 127 of the Constitution. It has a consultative jurisdiction (Article 118 (*d*)) which is referred to in detail in Article 129 of the Constitution and it has a jurisdiction in election petitions (Article 118 (*e*)) which is referred to in detail in Article 130 of the Constitution. Lastly it has a jurisdiction in respect of any breach of the privileges of Parliament (Article 118 (*f*)) which is referred to in Article 131 of the Constitution. Other jurisdictions may be vested in it by laws passed by Parliament. (Article 118 (*g*)). None of the provisions expressly conferring jurisdiction which I have cited above give this

Court a jurisdiction to revise its own decisions. Nor has the Legislature acting in terms of Article 118 (*g*) conferred such a jurisdiction by law. On the other hand the language in certain of the Articles indicates to my mind, not only that it is the Court of last resort in appeal, (Article 118 (*c*)) but also that there is finality in its judgment whether it be right or wrong. Article 126 (5) stipulates that this Court shall "finally dispose of" the petition within three months. The use of the word "finally" indicates to my mind that the limitation is not confined to the period of time, viz., three months, but also refers to the effect of the order made. I would take the same attitude which Harman, J. adopted in a similar situation. "The thing is over". There is nothing more that can be done. There must be certainty in the law–*Re Exchange Street, Manchester* (1). Article 127 states that all judgments and orders of this Court in its appellate jurisdiction shall be "final and conclusive" The use of these words primarily means that there can be no further appeal to a higher court or institution. *Waterhouse & Co., v. Gilbert* (2) and *Lyon v. Morris* (3). It might be said that such a phrase is superfluous because the Supreme Court is the final Appellate Court. This is a plausible statement. But it appears to me that it was meant to emphasise the fact that as far as the matters which are the subject of the decision are concerned it is all over. There is an end to such litigation – as needs must be with all litigation. *Ut sit finis litium*. That is the policy of the law. That is the purpose of Chapter XV of the Constitution. A like view was taken of the Supreme Court that existed up to the time of the Constitution of 1978. In the case of *Mapolathan v. Elayavan* (4) an application was made to revise the earlier decision of the Supreme Court in the same case. That decision was based on the premise that the Deed of Transfer was signed by two transferors. It was later pointed out that there were in fact four transferors. It was alleged that if the original Deed filed of record had been properly scrutinized this fact would have been discovered and the decision of the Court would have been in favour of the petitioner. It was held that while the Courts Ordinance gave the Supreme Court power to deal by way of revision with cases tried or pending in original courts it had no power to revise cases decided by the Supreme Court itself. See also *Loku Banda v. Assen* (5) and *Elo Singho v. Joseph* (6). I hold that this Supreme Court has no jurisdiction to act in revision in cases decided by itself.

Counsel for the petitioner submitted that this Court possessed inherent powers which were sufficient to enable it to grant the relief

prayed for by the petitioner. He relied on the provision of Article 105 (3) which reads as follows :

"(3) The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit."

Counsel contended that the powers of a Superior Court of record "included an inherent jurisdiction to correct its own decisions". As a Superior Court of record there is no doubt that it has inherent powers to make corrections to meet the ends of justice. In *Mohamed v. Annamalai Chettiar* (7) the Court used its inherent powers to free an insolvent from arrest pending the decision of his appeal to the Privy Council although there was no statutory authority for such an Order. Costs have been awarded to a successful party from the inception of the Supreme Court using its inherent power – *Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents* (8). Inherent powers have been used to correct errors which were demonstrably and *manifestly* wrong and it was necessary in the interests of justice to put matters right. Decisions made *per incuriam* have been corrected. Vide *In Revision* (9), *Alasupillai v. Yavetpillai* (10), *Ranmenikhamy v. Tissera* (11). In the case of *King v. Baron Silva* (12) the Supreme Court upheld the conviction of the accused in the case on a charge of conspiracy to commit extortion. Sometime later it was brought to the notice of the Supreme Court that such offence of conspiracy did not exist at the time of the alleged commission. The Court held that its decision had been made *per incuriam* and altered the conviction. These powers are adjuncts to existing jurisdiction to remedy injustice–they cannot be made the source of new jurisdictions to revise a judgment rendered by that Court. Can such powers avail the petitioner in this case ?

Counsel for the petitioner formulated two issues for consideration and decision by this Court. The first issue is as follows :

A The Supreme Court acted *per incuriam* in deciding Appeal No. 20/83 for the following reasons :

(1) It has made the finding against the Petitioner in respect of an infringement not complained of to Court by Mrs. Gunawardena (petitioner-respondent) and in fact disowned by her. Such Order was in disregard of Article 126 (2) read with rule 65 (1) (*a*) of the Supreme Court Rules.

(2) The power to grant relief or give directions which the Supreme Court deems just and equitable under Article 126 (4) is restricted to the Petitioner's allegation and complaint to Court under Article 126 (2).

(3) In any event the Court acted *per incuriam* in making its finding in that it disregarded–

(i) Article 126 (2) read with Rule 65 (1) and Rule 65 (4) (ii).

(ii) The rule of natural justice–*audi alteram partem*.

(iii) The rule of natural justice that justice must be seen to be done.

The second issue is as follows :

B. The Supreme Court has the jurisdiction to grant the Petitioner (Ganeshanantham) relief in respect of the aforesaid *per incuriam* finding either in the exercise of its inherent jurisdiction or powers of revision.

The jurisdiction granted to this Court by Article 126 of the Constitution concerns fundamental rights and language rights declared by Chapters III and IV of the Constitution. In exercising this jurisdiction the Court has to make a dual finding, viz.,

(1) Whether there is an infringement or threatened infringement of a fundamental right, and

(2) Whether such infringement or threat is by executive or administrative action.

If the answer to the first is in the negative the second does not arise for consideration. If the answer to the first is in the affirmative then the question arises as to whether the act complained of constitutes executive or administrative action. It may not always be possible for the petitioner to allege in his petition that the act was that of a particular officer of State. His name may not be known to the

petitioner, and he may only be able to identify him by other means. For example in the course of the inquiry he may be able to establish that it was a police officer of a named Police Station. This Court would then have jurisdiction to act in terms of Article 126. On the other hand it may be that in the course of the inquiry it transpires (as happened in the instant case), and it is established to the satisfaction of the Court, that the infringement was by a State Officer other than the one named in the petition. This Court would still have the power to act in terms of Article 126. The jurisdiction of this Court does not depend on the fact that a particular officer is mentioned by name nor is it confined to the person named. The unlawful act gives the Court jurisdiction to entertain the petition and to make a declaration accordingly. The fact that it was committed by an Officer of State empowers the Court to grant a remedy. The provisions of Article 126 (2) do not limit the inquiry to the person named in the petition. Such a limitation is apparent in the provisions of Article 126 (3) where the inquiry is confined to the party named in the application for a writ in respect of whom the Court of Appeal makes the reference. Article 4 (*d*) of the Constitution enjoins all organs of Government to respect, secure and advance the fundamental rights declared and recognized by the Constitution. This Court being a component part of the judiciary, which is one of the organs of Government, must necessarily obey such command. It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, it yet dismisses the petition because it is established that the act was not that of the Officer of State named in the petition but that of another State Officer, such as a subordinate of his. The provisions of Article 126 (2) cannot be confined in that way. This Court has been given power to grant relief as it may deem just and equitable–a power stated in the widest possible terms. It will be neither just nor equitable to deny relief in such a case. Counsel for the Petitioner referred to the provisions of Rule 65 and called in aid its terms to buttress his argument. Rule 65 merely states that the Petitioner shall name the person who he alleges has commited the unlawful act. This by no means exhausts the avenues available to a petitioner. As I have stated earlier it does not provide for a situation where the petitioner is unable to name the Officer of State who commits the act. Furthermore Rule 65 concerns procedure and like most rules cannot detract from the powers of Article 126. I therefore reject the contention raised in issues A 1 and 2 by Counsel for the petitioner.

I now turn to issue 3 (1) (ii) and (iii). There has been no disregard of the provisions of Article 126 (2) read with Rule 65 (2) and (4) (ii). Before I deal with these issues I desire to dispose of another matter that was raised by Counsel for the petitioner. In para 5 of his affidavit dated 9.5.1983 the petitioner stated that he "questioned the lady at the head of the procession whether they had a permit to go in procession and no permit was produced by the said lady or any other member of the procession". He states that when he became aware that the procession was being conducted "without the authority of a lawful permit" it became his lawful duty to prevent the conduct of the procession. The Court held that no permit or permission was required for the procession. The petitioner now states that had he been given an opportunity to defend himself he would have explained what he meant by the word "permit", suggesting that when he used that word it did not have its ordinary English meaning. If that be so he has only himself to blame. The Court was entitled to take it to mean as the Inspector-General of Police the 2nd respondent did what it ordinarily means in the English language and it is too late now to state that he used the word in a sense different to its ordinary connotation.

Another submission of Counsel was that the arrest complained of to Court by the petitioner-respondent was not the arrest by the petitioner and the Court therefore had no jurisdiction to inquire into this latter arrest, more so because the petitioner-respondent denied this in her counter affidavit. This arrest by the petitioner was one episode and the Court has treated it as one transaction in which there was only one arrest and that was by the petitioner. The implication is that the arrest was mistakenly attributed to the first respondent. That finding cannot now be questioned in these proceedings. Moreover it was based on facts disclosed by the petitioner in his affidavit.

Counsel for the petitioner next submitted that the petitioner was not a party to the proceedings in question and had not been told that his conduct was being impugned and therefore would be the subject of inquiry by the Court. Further, that a finding of guilt had been made against his client without hearing him. This procedure, it is submitted, violated the principle of natural justice–*audi alteram partem*. "Justice must be seen to be done", he said, "Justice has not been seen to be done". In the result, he states, the finding that the arrest was made unlawfully by the petitioner was made *per incuriam* and must be expunged or declared invalid. When confronted with the position that

the Court would be stultifying itself if it made such an order because the award of damages was based on such finding and therefore could not stand if such finding was expunged or declared invalid, Counsel went the whole hog and asked that the entire order be set aside.

Counsel contended that the rule of natural justice – *audi alteram partem* – applied not only to a party to a case but also to any person against whom findings are made or strictures passed without either being made a party to the proceedings or being informed that his conduct is being impugned and would therefore be inquired into. Counsel has sought to establish this contention with the aid of some decisions of the English Courts. I will now deal with these cases cited by him. The first of them is the case of *The Seistan (13)*. The Motor Vessel Seistan sank on 19th February, 1958, in the Persian Gulf off Bahrain as a result of an explosion. A Court of formal investigation consisting of a Wreck Commissioner and three assessors was set up. The Chief Engineer of the Vessel, Mr. Robertson, was seriously ill and therefore was unable to give evidence in person but did so by means of three statements signed by him. The final report was signed by the Commissioner and the three Assessors. One of the Assessors, Captain Parfitt by name, added a rider in these words–

> "I concur in the above but in my opinion the advice given by the chief officer, Mr. Jones, as to flooding the lower hold offered the better chance of a quicker extinction of the fire. The conduct of the chief engineer in misinforming the chief officer regarding No. 5 bilge line non-return valve was reprehensible."

The Minister of Transport and Civil Aviation ordered a re-hearing restricted to so much of the case heard at the formal investigation as related to the conduct of the Chief Engineer. The real object of the re-hearing was to inquire into the merits of the censure. The last of questions answered by the Commissioner and Assessors was–

> "Was the loss of the Motor Vessel Seistan caused or contributed to by the wrongful act or default of any person or persons.?"

All except Captain Parfitt answered "No". Merriman, J. expressed the opinion that there was no justification for the censure. He further stated that the question required the Court to pronounce on the culpability of a person or persons and the rider implied that the Chief Engineer misinformed the Chief Officer regarding No. 5 bilge line non-return valve and thereby caused retardation of the flooding of the

hold. It then behoved the Assessor and the Court to give the officer an opportunity of exculpating himself. This was not done and Merriman, J. stated that in the circumstances the censure was "wholly irregular". The Court did not expunge or set aside the rider. It merely stated that there was "no justification for censuring George Robertson". During the whole of the inquiry there does not appear to have been any suggestion that the Chief Engineer had misinformed the Chief Officer regarding the cause of the explosion. There was no inkling of such a suggestion nor was such an allegation inquired into. The Chief Engineer therefore had no occasion to explain or justify any conduct of his. Such a situation does not arise in the instant case. The next case cited is the case of *Sheldon v. Bromfield Justices* (14). The facts are simple. One Charles Wilfred Marsh, was charged with assaulting his mother-in-law, Mary Elizabeth Sheldon. She and her husband, Thomas William Sheldon, gave evidence for the prosecution. The charge was dismissed but the justices bound over the accused and the two Sheldons to keep the peace for a period of 12 months. This order was set aside as being contrary to natural justice. Lord Parker, the C.J. was of the view that a mere witness who comes to testify against an accused should at least be told that his conduct was also in question and he must be given a reasonable opportunity of knowing the nature of the allegation and of making his answer to it. A similar situation arose in the case of *Appuhamy v. Regina* (15). The witness was summarily punished for having given false evidence. The Commissioner of Assize acted upon a rider to that effect brought by the jury. This conviction was set aside. It was clearly wrong as the provisions of section 440 (1) of the Criminal Procedure Code permitted the Court to convict if in the Court's opinion he had given false evidence in which event the witness should have been told accordingly and an indication given of the evidence alleged to be false. The Commissioner had no power to act summarily on the opinion of the jury that the witness had given false evidence. This decision was based on a statutory provision. The Privy Council held that the witness had not been told the "gist and substance" of the accusation against him. The next case cited is the case of *Rex v. The Thames Magistrate's Court* (16). The facts show that the prosecution and the lay justices were in an inordinate hurry. Summons was served on a Captain of a Greek Vessel at 10.30 a.m. on the 17th July returnable at the Magistrate's Court at 2.00 p.m. that very day. The Greek Captain knew little or no English. His Solicitors found it impossible to prepare

the defence before 2.00 p.m. and therefore applied for a postponement. They were granted an adjournment till 4.00 p.m. It was later taken up that day by a Stipendiary Magistrate. He heard the case out that very day and found the case proved. The Captain was fined £5,000. The Court held that there was a breach of natural justice. The facts showed clearly that the defendant had not been given a reasonable chance to prepare his defence. Lord Widgery, C.J. said–

> "To start with, nothing is clearer today than that a breach of the rules of natural justice is said to occur if a party to proceedings, and more especially the defendant in a criminal case, is not given a reasonable chance to present his case. It is so elementary and so basic it hardly needs to be said. But of the versions of breach of the rules of natural justice with which in this Court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case to the Court, and of course the opportunity to present a case to the Court is not confined to being given an opportunity to stand up and say what you want to say ; it necessarily extends to a reasonable opportunity to prepare your case before you are called on to present it. A mere allocation of Court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense."

There is no complaint of this kind in the instant case and it is therefore not applicable. The next case cited is the case of *General Council of Medical Education and Registration of the United Kingdom v. Spackman* (17). In this case Dr. Spackman had been found guilty in the Divorce Court of adultery with a female patient of his who was suing her husband for divorce. The doctor was ordered to pay £1,000 damages to the husband. He was charged before the General Medical Council with infamous conduct in a professional respect. Before the Council the doctor sought to negative the Court's finding of adultery by tendering evidence which, though available, was not called in the divorce proceedings. The Council refused to hear such evidence and directed that the doctor be struck off the Medical Practitioners' Register. This order was challenged by Writ of Certiorari. The King's Bench Division issued the Writ which was affirmed by the House of

Lords in appeal. The decision turned on the construction of the words" "due inquiry" in section 29 of the Medical Act of 1858. The House of Lords held that it was incumbent on the Council to hold due inquiry and judge guilt. It cannot rely upon an inquiry by another Tribunal or a judgment of guilt by another Tribunal. I cannot see how this decision supports the contention of the Counsel for the petitioner.

Mr. Choksy referred us to a decision of the Privy Council in the case of *Mahon v. Air New Zealand Ltd* (18) reported in a newspaper dated October 21, 1983. It is an abridged version and therefore not reliable. A Law Report containing the judgment is not available here in Sri Lanka. However as Mr. Choksy laid great stress on this decision I propose to refer to it (a photostat copy has been made available to me) mindful of the fact that a reading of the judgment itself later might prove that the editor's summary of the judgment is either wrong or inaccurate. It appears that the Governor-General of New Zealand had appointed a Royal Commission to inquire into the "cause and circumstances" of the crash of the DC 10 aircraft operated by Air New Zealand on a sight seeing trip of the Antarctic. The 237 passengers and the crew of 20 were killed. The appellant (a Judge) had been appointed Commissioner. In his report he ordered Air New Zealand to pay to the Ministry of Justice a sum of New Zealand $ 150,000 as a contribution to the costs of the inquiry. The reason he gave for this order is quoted as follows :

> "But in this case, the palpably false sections of evidence which I heard could not have been the result of mistake, or faulty recollection. They originated I am compelled to say, in a pre-determined plan of deception. They were very clearly part of an attempt to conceal a series of disastrous administrative blunders and so, in regard to the particular items of evidence to which I have referred, I am forced reluctantly to say that I had to listen to an orchestrated litany of lies."

The parties to the deception and conspiracy were readily identifiable in the body of the report. Four flight operators also were identified as conspirators. The report states that the Privy Council disposed of the appeal on the ground that the Judge had inadvertently failed to apply the applicable rules of natural justice set out in the case of *R. v. Deputy. Industrial Injuries Commissioner : ex parte Moore* (19). They are–

(1) A finding must be based on evidence of probative value.

(2) The Judge must listen fairly to the relevant evidence conflicting with the finding (sic.) the arguments placed by those whose interests are affected or would have so wished to place had he been *made aware of the risks of the findings being made.*(The emphasis is mine).

As regards the first proposition it is reported that the Privy Council found that on the facts it was not conceivable that individual witnesses falsely disclaimed knowledge of low flying on previous trips in a concerted attempt to deceive. Nor had there been evidence of probative value to base a finding of concealment of documents. We are not concerned with the first proposition or the Privy Council's decision on it in the instant case. As regards the second proposition the Privy Council is stated to have held that the Judge's finding of concerted concealment of Air New Zealand's adoption of a new Southerly way point for Antarctic Sightseeing flights was rightly rejected by the Court of Appeal because he had failed to hear both sides and the inferences he drew were based on a logical fallacy. Either reason would have been sufficient to reject the finding. Here again I must point out that the editor's reporting may be inaccurate. Assuming that he is correct it means that Air New Zealand should have been in some way or other made aware that there was a risk of such a finding. Apparently the airline had no such knowledge up to the time they were confronted with the finding against them. Once again I must state that the position of the petitioner in the instant case is different in that he had knowledge and was aware that his act in arresting the petitioner-respondent would be the basis of any finding against the State and that such arrest must be justified in law. He was more fortunate than the airline because he ran no risk of being mulcted in damages simply because he was not a party to the case.

In the instant case the Petitioner tendered to Court an affidavit which was filed by the head of his Department, the Inspector-General of Police (2nd respondent). In his affidavit he stated the fact that he arrested the petitioner-respondent on the pavement opposite the Police Station and took her with others into the Police Station. He was thereby representing to court that until such time as she was released from custody she was detained under arrest made by him and not by the 1st respondent. It must have been clear to him and to all others

involved in the case that there could not have been a second arrest in the Police Station. It would have been equally clear that that was the arrest which was the subject of inquiry by Court, and therefore had to be justified in law. The petitioner therefore pleaded as follows :–

> "I state that I along with Police Constables 11085, 7634, 12071 and 5224 questioned the lady at the head of the procession whether they had a permit to go in a procession and no permit was produced by the said lady or any other members of the procession. I state that when I became aware that the said procession was being conducted without the authority of a lawful permit and that the participants were committing offences under section 77 of the Police Ordinance it became my lawful duty under section 56 of the Police Ordinance to prevent the conduct of that procession."

Why was he seeking "to justify the arrest in law" ? If his purpose was only to absolve the 1st respondent all he had to state was that he made the arrest in question and stop there. The fact that he proceeded to justify the arrest establishes two important facts. Firstly, that he was aware that it was the arrest by him that was the real issue in the case and secondly, that the legality of the arrest had to be established. His affidavit was accepted by Court and we were informed by Counsel at the Bar that Counsel appearing for the 2nd and 3rd respondents and the defence addressed the Court on the legality of this arrest. The written submissions tendered on behalf of the second and third respondents, i.e., the Inspector-General of Police and the Attorney-General respectively, endorsed this action "as being in accordance with procedures established by law". The petitioner was heard by affidavit as is normally done in cases of this kind. Oral evidence is rarely led or permitted. In fact all evidence relevant to the matter was adduced by affidavit. The petitioner cannot state, as was stated in the case of the *Seistan*, that he had no inkling of the fact that the arrest by him was to be called in question or was in fact in question in the matter. Nor can he plead, as in the *Sheldon* case, that he, a witness to another's act, suddenly found himself being accused and dealt with for an offence. I have no doubt that the petitioner knew at the time he swore the affidavit that it was filed for the purpose of establishing that there was only one arrest and that arrest was made by him and not by anyone else, that it was that very arrest and its legality that would be in issue in the inquiry and that it was necessary to justify the arrest in law. His Counsel submitted that had the

petitioner been heard he would have succeeded where the 2nd and 3rd respondents failed. The matter that was argued was the legality of the arrest. It was purely a legal argument based on statutory provisions. The Additional Solicitor-General argued for the 2nd and 3rd respondents. The petitioner thinks he could have done better. He is entitled to his opinion but I do not think he could have added anything useful to the argument. The parties to the case were heard by affidavit. Likewise the petitioner was heard by affidavit. Counsel contends that "justice has not been seen to be done"– all because the petitioner had not been told that his conduct was being impugned in the case. Appearances are sometimes deceptive and it is so in this case. As I stated earlier the petitioner knew all along that it was the arrest by him and its validity that was in issue in the case. He has suffered no prejudice as a result of not being given an opportunity to enter into the fray and take part in the legal argument. "No one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing"– per Brandon, L.J. in *Cinnamond v. British Airports Authority* (20). There is another matter to be taken into account. Article 134 (1) states that in an application under Article 126 the Attorney-General shall be heard and parties to such proceedings have the right to be heard in person or by an Attorney-at-law. Any other person may be heard at the Court's discretion. Article 134 (3) reads –

> "The Supreme Court may in its discretion grant to any other person or his legal representative such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter."

The petitioner was given such hearing as the Court considered necessary. It is not for this Court now to say that such hearing was insufficient. I hold that that the rule of natural justice – *audi alteram partem* – has been observed. In any event the provisions of Article 134 (3) have been satisfied. I therefore reject the contentions raised in issue 3 (ii) and (iii).

The only issue left is issue B. I have already held that that this Court has no power to revise its own decisions. As for the exercise of inherent powers I need only state that there is no justification for exercising any of the inherent powers of this Court.

I dismiss the petitioner's application. The petitioner-respondent will be entitled to costs.

SHARVANANDA, J. – I agree.

WIMALARATNE, J. – I agree.

COLIN-THOME, J.– I agree.

WANASUNDERA, J.

I am in complete agreement with the judgment of the Chief Justice on all the matters dealt with by him. But I would like to take this opportunity of adding my own observations briefly on one or two of the legal issues before us.

The petitioner's complaint is that in the judgment of the Supreme Court in S. C. Application No. 20/83, this court, without affording the petitioner an opportunity of being heard, had made "an adverse finding in respect of the petitioner's conduct as a Police Officer by holding that the petitioner was guilty of an unlawful arrest in contravention of the Constitutional prohibition of arrest."

In that case, which was filed by Mrs. Viviene Goonewardena under Article 126 of the Constitution for a violation of fundamental rights, the respondents to the application were Hector Perera, the Officer-in-Charge of the Kollupitiya Police Station (1st respondent) Rudra Rajasingham, I.G.P. (2nd respondent) and the Attorney-General (3rd respondent). The order of the court was that the State should pay a sum of Rs. 2,500 as compensation to the petitioner Mrs. Viviene Goonewardena. No punishment, fine, penalty or liability has been imposed on the petitioner or anyone else.

In S. C. Application No. 20/83, the present petitioner came before the court in the capacity of a witness. In terms of the procedure laid down, a petition under Article 126 has to be decided on affidavit evidence. The petitioner's affidavit was submitted to court by the I.G.P., in support of the I.G.P.'s own case. In disposing of that application and in the course of coming to findings of fact and law before court, the court made the following observations on the present petitioner's affidavit–

> "On his own showing Sub-Inspector Ganeshanantham was guilty of arresting the petitioner in contravention of the constitutional prohibition of arrest, except according to the procedure established

by law. The arrest constitutes an infringement of a fundamental right. Sub-Inspector Ganeshanantham's action no doubt proceeds from a wrong appreciation of the law, but the infringement remains."

Considering Mr. Choksy's submissions to us, three matters–all interconnected–immediately arise for consideration. They are the following : Is a court in the course of deciding a case entitled to make an adverse finding in respect of the conduct and evidence of a witness ? Second, is such a witness then entitled to a further hearing, that is to say an opportunity of explaining why such a finding should not be made against him. Third, if the second question is to be answered in the affirmative, should such a hearing be granted only in certain limited and special circumstances ?

The answer to the first question posed by me is decidedly 'yes'. People take their grievances to the courts for decision. It is the duty of a court in deciding a case to consider all the evidence placed before it, determine the several issues of fact and law involved and then make an order in accordance with the law disposing of the matter. In the course of arriving at its finding a court has necessarily to believe and disbelieve the evidence given by the witnesses for the respective sides. A judge has a wide discretion in forming his judgment and is given a wide latitude in expressing his views. It is quite legitimate for him to make his comments on the evidence and this can be expressed in language which he considers suitable though it may reflect favourably or unfavourably on a witness.

It is not a requirement of the law of this country that a witness who has given evidence should be informed prior to the judgment of the proposed reasons for disbelieving him and be afforded an opportunity of making representations. The principle of audi alteram partem relied on by the petitioner has become an important legal topic in modern times due to its relevance in the field of administrative law. As far as the courts are concerned, our courts are courts of law and justice and are meant to be the embodiment of justice and fairness. This principle is inherent in the practice and structure of the courts.

Article 126 of the Constitution shows that in an application under that Article the accusation is made against the State and the State through its principal Law Officer, the Attorney-General is required to defend the action. It is a legal requirement that the Attorney-General

should be heard. There are Rules providing for particulars to be given regarding the acts and the persons concerned in respect of the alleged violation of fundamental rights. Such persons, if disclosed are, no doubt, given the status of respondents. But the Rules cannot derogate from the substantive constitutional provisions and alter the nature and composition of a proceeding under Article 126. As the Chief Justice has pointed out, a proceeding under Article 126 is against the State and the State has to bear the liability for unlawful executive or administrative action.

The case law cited however shows that when a punishment, penalty or liability has to be imposed on a person, whether he be party or witness, the law would generally require that that person concerned be apprised of the charge, allegation or complaint against him, and he be afforded an opportunity of giving an explanation. Now the question is whether the observations made by the court in this case can amount to the imposition of a punishment, penalty or liability. Mr. Choksy pointed to the following passage in the judgment–

> "Sub-Inspector Ganeshanantham was guilty of arresting the petitioner in contravention of the constitutional prohibition"

Seizing upon the use of the word "guilty", he submitted that this language indicates unlawful conduct and a finding of guilt as in the case of an offence. The word "guilty" does not necessarily mean only criminality, it can also mean culpability, namely blameworthiness. We find it often used in ordinary parlance in the latter sense. The observation made by the court in my opinion by no means imposes or is intended to impose any punishment, penalty or liability on the petitioner. It constituted a necessary step in the process of the judge's reasoning and without it he could not have come to a proper determination of the case.

I have so far been considering the case of a witness who is disbelieved by the court. That however is not the case here. On the contrary, in the present case, the petitioner's statements on the factual matters which would be equivalent to oral evidence in a normal court action, were accepted by the court in toto. It is in regard to the applicable legal provisions that the court has chosen to differ from the witness.

The petitioner had gone out of his way to justify the arrest and sought cover for his actions in certain legal provisions. This is a matter of law falling within the province of the judge.

It is a common occurrence in our Courts to find a judge differing from a lay witness as to what the law is. Witnesses are often mistaken about the law and their legal rights. When the views of a witness are not acceptable does such a witness have a right to ask that he be resummoned and be heard on the matter? This appears to be the real issue in this case. Incidentally the wrong conduct of a person, especially a public officer under a misapprehension of the law cannot amount to a finding of moral turpitude unless such action is malicious. The *Air New Zealand* case cited by Mr. Choksy to which I shall now turn deals with this aspect of the matter at some length.

The Air New Zealand case *Mahon v. Air New Zealand Ltd.*(18) of which we have been furnished only with an abridged newspaper report and the case of *The Seistan* (13) both deal with public inquiries held by Commissioners. Commissions of Inquiry as we know, are generally given broad and vague terms of reference. It is the duty of a Commission to hold an inquiry and to make specific findings in respect of the matters referred to it and to identify any person or persons responsible for any wrongful act and on whom liability should be imposed. Generally at the inception of the work of the Commission, all persons summoned before the Commission, come before it as mere witnesses. When sufficient material is available the Commission may be in a position to prefer charges against specific persons. From that stage onwards such a person would be in the position of a party, in contradiction to that of a witness; if the language and the analogy of Court proceedings can be adopted in that context. Once the conduct of a person is the subject of the inquiry, he must be afforded all the rights and privileges of a party.

In the *Air New Zealand* case Mr. Mahon, a Judge of the High Court, was appointed to a Royal Commission as the sole Commissioner. The Commission was required to inquire into an aircraft disaster involving an aircraft of the New Zealand Air Lines. After inquiry the Commission found that the dominant cause of the disaster was the act of the New Zealand Air Lines changing the aircraft computer track without informing the air crew. The Commissioner held that the air line officials who had prepared the flight had made a mistake and this was due to the incompetent administrative procedure in existence. The Commission exonerated the air crew but went on to observe that there had been a concerted attempt by certain officers of ANZ to conceal a series of disastrous administrative blunders and this was a

predetermined plan of deception. These persons could be identified in the report. They were the senior officers employed in the flight operation department and the four members of the Navigation section. The Commissioner followed this up with an order against ANZ, ordering it to pay to the Department of Justice as a punishment, a sum of 150,000 New Zealand dollars, being the public cost of the inquiry.

Naturally ANZ filed papers in the Court of Appeal for quashing the findings. It would appear, judging from the available report that not only were these persons not before the Commission at all but the strictures that were passed were based on a logical fallacy and could not be supported by the material before the Commission. Here we have a case where a substantial penalty has been imposed and adverse findings made against persons who apparently took no part whatsoever in the proceedings. That is very different from the case we are now considering.

It is somewhat ironical to observe that the Commissioner Mr. Mahon who had erred on the law appears to have shown an undue sensitiveness to the criticism of his order by the Court of Appeal. The appeal to the Privy Council seems to have been taken at his instance. To allay any misconception he may have entertained on this score the Privy Council went out of its way to make a pronouncement on this matter. These observations are pertinent to the case before us since here too the petitioner's conduct has been criticised for his wrong view of the law. I shall quote the relevant passage in extenso–

> "His Lordship added that to say of a person who holds judicial office that he had failed to observe a rule of natural justice might sound to a lay ear as if it were a severe criticism of his conduct which carries with it a moral overtone.
>
> But that was far from being the case. It was a criticism which might be and in the instant case was certainly intended by Their Lordships in making it to be wholly dissociated from any moral overtones.
>
> Earlier Their Lordships had set out the two rules of natural justice that applied to the appeal.
>
> It was easy enough to slip up over one or other of them in civil litigation, particularly when one was subject to pressure of time in preparing a judgment after hearing masses of evidence in a long and highly complex suit.

In the case of a judgment in ordinary civil litigation such failure to observe rules of natural justice was simply one possible ground of appeal among many others and attracted no particular attention.

All Their Lordships could remember highly respected colleagues who as trial Judges had appeals against judgments they had delivered allowed on that ground and no one thought any the worse of them for it.

So Their Lordships recommendation that the appeal ought to be dismissed could not have any adverse effect upon the reputation of the Judge among those who understood the legal position and it should not do so with anyone else."

In *Appuhamy v. Regina* (15) there was a finding against a witness that he had given false evidence. The Court however did not stop with this pronouncement but proceeded to try him summarily and punish him. Apart from this course of action being contrary to certain express statutory provisions that are applicable, as a matter of principle it was only just and fair that the witness facing a criminal charge should have been given a fair hearing.

In *Sheldon v. Bromfield Justices* (14) the prosecution witnesses were bound over, which is a punishment without prior intimation of the course of action the Court intended taking. The binding over order was referable to the merits of the main case. This was held to violate the principle of natural justice. However in *R. v. Woking Justices, ex parte Gossage* (21), *Sheldon's* case has been explained. In this case an acquitted defendant was bound over to keep the peace. Here too the defendant had no notice of such proposed action. The Court however held that this did not constitute a breach of natural justice because the defendant had every opportunity at the main trial of adverting to all the relevant matters. Both these cases have been distinguished in *R. v. Hopkins, ex parte Harward* (22). In this case the complainants who were making counter complaints before the stipendiary Magistrate were immediately bound over for making a disturbance in Court. They were not given the opportunity of making representations. The Court was of the view that since there was an imminent danger of a breach of the peace if the complainants left the Court premises the order was lawful and certiorari was refused. Widgery, C.J., said–

"We must keep in mind all the time that we are dealing with natural justice and it is not desirable that natural justice should be

divided up into rigid compartments. It is a matter which in its very essence requires to be kept fluid and flexible to deal with the justice of a particular case."

The rule of audi alteram partem should be applied only in appropriate circumstances. It should not be used mechanically in every situation when an order reflecting on or affecting a person has to be made by a court or tribunal. The *Gossage* case and the *Hopkins* case show that when a disturbance is committed in the face of the court, the principle of the audi alteram partem rule will not apply, even though a punishment is imposed. By a parity of reasoning the principle ought not to apply when a judge passes strictures on a witness in the course of deciding a case. It is only an episode in a single trial and constitutes part and parcel of one proceeding, conducted according to the known standards of fairness and where the principle of natural justice cannot be divided, apportioned and compartmentalised. If the rule is to be applied in situations like the present case it would result in trials within trials and the prospect of interminable litigation. Surely that would be carrying the principle of audi alteram partem to absurd lengths.

There remains one final matter. Mr. Choksy stated to us quite frankly that the present application is being made by the petitioner because he anticipates that at some future time, a future government may take action prejudicial to the petitioner on the basis of the judgment in S.C. Application No. 20/83. If the impugned order properly interpreted can have an adverse effect on the petitioner, then the petitioner would certainly be running a risk of such consequences. But on the other hand if the anticipated adverse consequences were to flow from some action based on a misunderstanding of that order, then the petitioner must seek relief not against the order but against the person or persons who perform such wrongful act and move in the matter at the appropriate time. It was admitted by counsel that the petitioner had been promoted by the government subsequent to the court order. Hence it is apparent to everyone that the court order he is now seeking to canvass has not affected the petitioner as a Police Officer or stood in the way of his promotions in the police force. In the face of these developments is not the petitioner trying to blow both hot and cold ? He cannot be allowed to say at one and the same time that the impugned order affects him both adversely and not adversely. To say the least the petitioner's present application is misconceived. In any event his present application is premature, contingent and based on mere speculation.

For the above reasons and the reasons given by the Chief Justice, I am of the view that the court has neither the power to allow this application nor is it one where we ought to grant relief. I agree to the order made by the Chief Justice.

RANASINGHE, J.

The above named petitioner-respondent, who is a well-known figure in the political life of this Island Republic, filed in this Court, on 8.4.83, Application bearing No. 20/83, in terms of the provisions of Article 126 (2) of the Constitution and the Rules of Court made by this Court under the said Constitution, against the aforementioned 1st to the 3rd respondents (who were also the 1st to 3rd respondents respectively in the said application) on the ground : that, on 8.3.83 – which was the International Women's Day–when she went into the Kollupitiya Police Station, she was illegally arrested and detained therein by the 1st respondent, the Officer-in-Charge of the said Police Station, who did also, within the said Police Station, subject her to cruel, inhuman and degrading treatment : that such conduct on the part of the 1st respondent constituted a violation of the fundamental rights guaranteed to her by Articles 11 and 13 (1) of the Constitution : that she was, therefore, entitled to seek relief and redress in terms of the provisions of Article 126 (2) of the Constitution.

The 1st respondent filed an affidavit repudiating the allegations made by the petitioner-respondent against him. He denied that he either arrested the petitioner-respondent or subjected her to any form of degrading treatment as alleged by her in her petition and affidavit. The 2nd respondent also filed an affidavit in which he too repudiated the allegations set out by the petitioner-respondent. The proxies of the 2nd and 3rd respondents were both filed by an officer of the Attorney-General's Department : and the learned Additional Solicitor-General, who appeared for the 2nd and 3rd respondents at this inquiry before this Court, appeared for both the 2nd and 3rd respondents at the inquiry into the said Application No. 20/83. In the said earlier proceedings, an affidavit, dated 9.5.83 and marked 2R1, from the petitioner, Inspector Ganeshanantham, was tendered to Court by the Attorney-at-law appearing for the 2nd and 3rd respondents. In that affidavit the petitioner-Inspector Ganeshanantham – averred that : he arrested the petitioner-respondent on the Galle Road close to the Kollupitiya Police Station : that she was, at that time, participating in a procession,

which was being conducted without the authority of a lawful permit, along Galle Road from the direction of the Galle Face junction towards the Kollupitiya junction : that he directed the members of the said procession to disperse : that the petitioner-respondent thereupon pushed him aside and proceeded with the procession, disobeying his directions and did obstruct him in the discharge of his duties : that he then, along with several police constables, arrested the petitioner-respondent and four others, : that the said arrest was in accordance with the law, and that they were informed of the reason for their arrest. A consideration of 2R1 makes it clear that the petitioner was, in that affidavit, specifically answering the several averments set out in the petition and affidavit which had been filed by the petitioner-respondent, and that the petitioner has expressly denied any conduct which would amount to a violation of any of the fundamental rights pleaded by the petitioner-respondent.

In answer to the aforesaid affidavits of the 1st and 2nd respondents and also the said affidavit 2R1, the petitioner-respondent filed her further affidavit, dated 16.5.83. In the said affidavit the petitioner-respondent specifically denied that she was arrested outside the Kollupitiya Police Station and reiterated her position that she went into the Kollupitiya Police Station of her own accord and that she was not taken into the said Police Station under arrest. Thus the petitioner-respondent, far from accepting any arrest along the Galle Road, not only categorically repudiated the petitioner's allegations, but also flatly contradicted the petitioner. It is not as if she was uncertain in her own mind as to what had happened outside the premises of the said Police Station with the resulting possibility that the version given by the petitioner could well have been the true version of what happened at the time in question. Far from it ; for, there was not even a hint of uncertainty. As far as she was concerned her version was the truth, the whole truth , and nothing but the truth. The position taken up by her was quite clearly that what was averred not only by the 1st respondent but also by the petitioner was a tissue of falsehood, unworthy of any consideration whatever.

It was in this state of the evidence that the Court came to make its order at the conclusion of the said earlier inquiry into the said Application No. 20/83. This Court, by its Order dated 8.6.83, held : that the allegation of degrading treatment, made by the petitioner-respondent, has not been established by proof to the high

degree of probability required : that the petitioner-respondent has not affirmatively proved, in the manner required, that she was first arrested by the 1st respondent inside the Police Station : that, on his own showing, Sub-Inspector Ganeshanantham, the petitioner, was guilty of arresting the petitioner-respondent in contravention of the Constitutional prohibition of arrest except according to procedure established by law. The said findings of the Court make it clear that, although the Court did not accept and act upon the evidence of the petitioner-respondent, and that which was led on her behalf, but accepted the 1st respondent's denial that he committed either of the wrongful acts alleged by the petitioner-respondent, yet, the Court has proceeded to give relief to the petitioner-respondent upon a basis which was not only not accepted by the petitioner-respondent but which had also been categorically repudiated by her right up to the end of the proceedings. A perusal of the said judgment also shows that, whilst the Court has considered the failure on the part of the petitioner to have disclosed in his affidavit 2R1 the reason which he had given the petitioner-respondent at the time he arrested her, as a grave lapse, the Court has, however, proceeded to test the validity of the said arrest on the footing of a reason communicated to court by learned Counsel who appeared for the respondents at the said inquiry.

The petitioner has now come before this Court complaining of the said Order of this Court, made on 8.6.83, in the aforementioned Application No. 20/83. Learned Senior Attorney, appearing for the petitioner, has formulated the grounds of complaint, and the basis upon which relief is being prayed for as follows :

A (1) That this Court has, in making the said Order, acted per incuriam for the reasons that :

(i) it has made a finding against the petitioner, in respect of an infringement not complained of to Court by the petitioner-respondent, and which, in fact, was disowned by her in disregard of Article 126 (2) of the Constitution read with Rule 65 (1) (*a*) of the Rules of this Court ;

(ii) the power to grant relief or make directions which the Supreme Court deems just and equitable under Article 126 (4) was restricted to the petitioner-respondent's allegations and complaint made to Court under Article 126 (2) ;

(iii) in making the said finding it disregarded Article 126 (2) read with Rule 65 (1) (*b*) and Rule 65 (4) (ii) of the Rules of this Court.

(2) That the rule of natural justice, audi alteram partem, has been violated ;

(3) That the rule of natural justice, that justice must not only be done but must undoubtedly and manifestly be seen to be done, has been violated :

B This Court has jurisdiction to grant the petitioner relief in respect of the aforesaid per incuriam findings in the exercise of either its inherent jurisdiction or the powers of revision.

Chapter 3 of the Constitution sets out the fundamental rights which are declared and recognised by the Constitution and which have, in terms of Article 4 (*d*) of the Constitution to be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent provided by the Constitution itself thereinafter. Article 17 provides that every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of any infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of the said Chapter 3. Article 126 (1) confers upon the Supreme Court sole and exclusive jurisdiction to hear and determine all such infringements of fundamental rights ; and sub-article (2) of Article 126 requires all applications for relief and redress in respect of such infringements to be made within one month of the infringement so alleged in accordance with such rules of Court as may be in force. Such an application so made can however be proceeded with only with leave to proceed, first had and obtained from the Supreme Court. Article 126 (4) empowers this Court to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of a petition presented under Article 126 (1).

Rule 65 of the Rules of the Supreme Court, made under the provisions of Article 136 of the Constitution, regulates the procedure to be followed by a person who desires to invoke the aforesaid jurisdiction vested in the Supreme Court in terms of Article 126 of the Constitution. An applicant so desirous of obtaining relief or redress has, inter alia.

(i) to file a petition setting out–

(a) all relevant facts to show what particular fundamental right he claims,

(b) all facts to show what infringement of such right has taken place, and

(c) details of the executive or administrative action which he alleges has resulted in the infringement complained of ;

(ii) name in his petition the Attorney-General and any person or persons, who he alleges have infringed his fundamental right, as respondents ;

(iii) support his petition by an affidavit and any other documentary material ; and

(iv) pray for leave of the Court in the first instance ; and

(v) tender the specified number of copies of the petition and of the written submissions in support of his case.

If the petitioner obtains leave of court, then the Registrar of the Court shall forthwith serve notice of the said application along with a copy of the written submissions on each of the respondents who then have the right to file counter-affidavits and counter- submissions with notice to the petitioner.

The nature of the liability incurred upon an infringement of a fundamental right by a State officer and the real basis upon which relief or redress is granted has been set down by Lord Diplock, in the Privy Council, in the case of *Maharaj v. The Attorney-General of Trinidad and Tobago (No. 2)* (23) as :

"This is not vicarious liability, it is a liability of the State itself. It is not a liability in tort at all, it is the liability in the public law of the State . . . . . "

This view of the underlying principle has also been hitherto followed by this Court. Even though the liability arising upon an infringement by executive or administrative action of a fundamental right guaranteed by the Constitution has been determined to be principally a liability of the State, yet, before such liability is brought home to the State, it is necessary for the aggrieved person to establish that his fundamental

right has been infringed by an executive or administrative act. Any such act has to be committed by a State Officer or by any other person who could be held to be an organ of the State. It is only on account of such an act by such an individual that the liability cast upon the State would arise. It is in recognition of this position and of this principle that Rules 65 (1) (*a*) and (*b*) and 65 (4) (ii), in particular, have been framed in the way they have been framed. Not only the particulars set out in paragraphs (*a*) and (*b*) of sub-rule (1) of Rule 65, but also the presence of the alleged wrongdoer himself before Court is regarded as being necessary for the State to defend itself. Even after the requirements set out in Rule 65 (1) (*a*) and (*b*) have been complied with, the petitioner can proceed further only if and after he obtains the leave of this Court. Even a cursory examination of the contents of the said Rule 65 shows the emphasis placed upon the necessity not only to identify the particular individual against whom the wrongful conduct is alleged but also to make him a party to the proceedings and give him notice of the proceedings and also to furnish him with all the information relating to the petitioner's claim so that not only he but also the State could have every reasonable opportunity of defending themselves. That this is the object of the said Rules there is and could be no question.

Although, on a consideration of the provisions of Article 126 (1) and (2) and also the provisions of Rule 65 of the aforesaid Rules of this Court, it does seem to me that the submissions A (1) (i), (ii) and (iii) set out above – in regard to the extent and the scope of the relief which this Court could grant to a petitioner upon a petition presented under Article 126 of the Constitution – require serious consideration, yet, having regard to the peculiar circumstances in which the present application has come to be made to this Court, I would prefer to found my consideration of the issues arising in this case on the much broader principles embodied in the learned Senior Attorney's aforementioned submissions A (2) and (3), on the assumption that this Court could have, in view of the provisions of Article 126 (4) of the Constitution, proceeded to consider whether the petitioner-respondent should be granted relief on the basis of any act on the part of the petitioner even though it took the view that the petitioner-respondent's claim based upon the 1st respondent's own acts must fail.

Jurisdiction of this Court

The petitioner's application to this Court has been presented to this Court, inter alia, "in that most attractive form, an appeal to the inherent jurisdiction of the Court" – per Humphreys, J. in *Re A Solicitor* (24). It has, however, been contended : that the judgment of this Court pronounced on 8.6.83 in Application No. 20 of 1983 is final and cannot now be interfered with by this Court in any way : that, even if this Court has jurisdiction to intervene on the basis that an earlier decision of this Court has been made per incuriam, such interference must be limited only to those cases where decisions are as a general rule held to have been given per incuriam, viz, decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned : that this Court constituted as it is under the provisions of the 1978 Constitution has no powers by way of Revision : that the petitioner, who does not, in his prayer for relief, expressly pray that the earlier judgment be set aside, nevertheless makes a subtle attempt to render nugatory the said judgment by moving that the said finding, which constitutes the very basis of the said judgment, be expunged.

Article 105 of the Constitution which deals with the establishment of Courts, provides, in sub-article (3), that the Supreme Court, and the Court of Appeal shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt. What the powers of a 'Superior Court' are, are not set out in the Constitution or in any other statutory enactment. What they are will therefore have to be gathered from earlier decisions, local and foreign.

In England the House of Lords has asserted the right to award costs on the basis of an inherent jurisdiction vested in it. In 1896, in the case of *Guardians of Westham Union v. Churchwardens of Bethnal Green* (25), Lord Herschell said :

> "Costs have been awarded for upwards of two centuries. I see no foundation on which the power to order their payment can rest except the inherent authority of this Court as the ultimate Court of Appeal ; " and

Lord MacNaghten observed that :

> "The House of Lords, as the highest Court of Appeal has and necessarily must have an inherent jurisdiction as regards costs."

The Supreme Court of Ceylon established under the now repealed Courts Ordinance (Chapter 6) too did not, prior to Act No. 39 of 1953 which on 2.11.1953 introduced Sec. 51 A, possess statutory authority to award costs ; and Gratiaen, J. did, in the case of *Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents,* (8) invoke the inherent jurisdiction of the Supreme Court, as " the only superior court of record " in the country, to make an appropriate order as to costs where there was no statutory authority to make an order for costs. It must be noted that Gratiaen, J. did so resort to such inherent jurisdiction "especially as it is in aid of justice".

Sec. 7 of the said Courts Ordinance No. 1 of 1889 (Chapter 6) established the Supreme Court of the Island of Ceylon to be " the only superior court of record ". Sec. 839 of the Civil Procedure Code (Chapter 101) – as it stood before December 1977 and now stands after its revival in December 1977 – which said section was brought in by Ordinance 42 of 1921, provides that nothing in the said Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be neccessary for the ends of justice or to prevent abuse of the process of court. The "Court" referred to in the said section did, in view of the definition of the word "Court" in section 5 of the self-same Code, include the Supreme Court as established by Sec. 7 of the Courts Ordinance (*supra*). During the period the provisions of both the said Courts Ordinance and the said Civil Procedure Code were in operation at the same time the courts have by invoking their inherent jurisdiction : undone a wrong done to a party by an act of the court itself (*Sirinivasa Thero v. Sudassi Thero,* (26)); laid by a case pending the decision of an action in another court between the same parties (*Selvadurai v. Rajah* (27)); enforced obedience by warrant, on a failure to appear without lawful excuse, when summoned to appear before it (*Narayan Chetty v. Jusey Silva* (28), *Eswaralingam v. Sivagnanasunderam* (29)) ; extended the time for the execution of its own process (*Andiris Appu v. Kolande Asari* (30)); directed a case to be laid by for a period of 3 months to enable the defendants in an action to obtain a rectification of a deed (*Olagappa Chettiar v. Reith,* (31)); issued orders to the fiscal to stay a sale (*Victor de Silva v. Jinadasa de Silva,* (32)) ; stayed its own process of execution (*Commissioner of Inland Revenue v. Ranaweera* (33)) ; dealt with obstructions to commissioners of Court in partition actions instituted under the earlier Partition Ordinance (*Edirisinghe v. D. J. of Matara* (34)); stayed proceedings conditionally in divorce proceedings

(*Sinnathamby v. Yokammah*, (35)) ; amended the decree (of the Supreme Court) to bring it into conformity with the judgment (*De Costa and Sons v. S. Gunaratne*, (36)) ; granted an application of an insolvent for protection from arrest pending an appeal to the Privy Council in the case of *Mohamed v. Annamalai Chettiar*, (7), in which said case Garvin, S. P. J. also observed :

> " I should be reluctant to subscribe to the proposition that this Court has no powers other than those derived from express legislation. Like other courts in the Empire and in particular Superior Courts, this Court has always been considered to possess a certain reserve of powers which are generally referred to as its inherent powers It has been said that these powers are equal to its desire to order that which it believes to be just. This is perhaps too wide and somewhat misleading a statement. No court may disregard the law of the land or purport in any case to ignore its provisions. Where a matter has been specifically dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court of its inherent powers can arise."

Although a decision per incuriam was said to be one given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the particular court – *Huddersfield Police Authority v. Watson* (37)–yet, that definition was said to be not necessarily exhaustive but that cases not strictly within it which can properly be held to have been decided per incuriam should be of the rarest occurrence – *Morrelle Ltd. v. Wakeling* (38). After a review of these English cases Samarakoon, C. J. in the case of *Billimoria v. Minister of Lands* (39) decided after the 1978 Constitution came into operation, has taken the view that : where an interim order had been made by the court after consideration such order was not one made per incuriam : that a stay order could be made as an interim measure by a court in the interests of Justice : that while it is competent for one Bench to set aside an order made per incuriam by another Bench of the same Court, the practice, however, has been for the parties or their Counsel to bring the error to the notice of the Judge or Judges who made the error so that he or they can themselves correct the Order. The Chief Justice was no doubt dealing with the powers of the Court of Appeal. The powers of the Court of Appeal and those of the Supreme Court in regard to this matter, should, in view of Article 105 (3), be identical.

The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of *Menchinahamy v. Muniweera*, (40). In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for *restitutio-in-integrum*" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents : that there was no merit in the application : that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court : that the Supreme Court cannot interfere with the orders of the Supreme Court itself. In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words :

> " In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

The fundamental rights jurisdiction vested in this Court by Article 126 of the Constitution is an original jurisdiction from the exercise of which there is no appeal to any higher court. The words " finally dispose " appearing in Article 126 (5) were relied on as showing that an order made by this Court in the exercise of the fundamental jurisdiction vested in this Court is final and cannot be vacated, set aside, modified or in any way interfered with subsequently by this Court. It seems to me that the word " finally " set out therein is not intended to impress the order with any particular characteristic, but rather that the matter must be fully and effectively concluded without anything further left to be done to bring the proceedings to an end. The finality is in regard to the procedural aspect, and not in regard to the character of the order that has to be pronounced at the

conclusion of the proceedings. In any event any acceptance of the position that an interference at least to a limited extent on the ground of a decision being made per incuriam would detract from the argument of " untouchability " sought to be advocated.

On a consideration of the foregoing, I am of opinion that this court has an inherent jurisdiction to grant, in appropriate circumstances, relief against or in respect of even previous judgments of this Court itself in order " to do justice ". This Court shall exercise this jurisdiction only in matters for which no express statutory provision has been made ; and, in exercising this jurisdiction, this Court shall not act in a capricious or arbitrary manner and shall be careful to see that its decision is in harmony with sound general legal principles and is not inconsistent with the intention of the Legislature – *Selvadurai v. Rajah (supra).*

The Supreme Court, as constituted under the 1978 Constitution, is not vested with the revisionary powers as exercised by the Supreme Court which was created by the aforesaid Courts Ordinance (Chapter 6). The petitioner, in his application, seeks relief not only by way of revision but also, as already stated, in the exercise of the inherent jurisdiction of this Court.

Another technical argument that was advanced may be disposed of at this stage. It was contended that the petitioner has not, in his prayer to the petition, prayed expressly that the judgment of this Court, delivered on 8.6.83 in the aforesaid Application No. 20 of 1983, be set aside, and that, therefore, he cannot obtain any relief which would have the effect of even indirectly rendering the said judgment nugatory or inoperative. It, however, seems to me that the averments of paragraph 31 of the petition read with paragraph (*c*) of the prayer would be sufficient for a court, in an application invoking the inherent jurisdiction of the court, to grant an aggrieved party, who the court is of opinion should be granted relief, whatever relief which the court considers fit and proper to grant. Where the court is of opinion that it should intervene, technical objections such as these should not stand in the way of the court doing justice.

For these reasons I am of opinion that this Court has jurisdiction to entertain and determine the petitioner's application.

Rule of Audi Alteram Partem :

Natural justice has been defined as "the basic of Justice which in any particular day and age offend the sensibilities of the judges" – *Ex p. Brown, Re Tunstall* (41) referred to by *Paul Jackson on Natural Justice (2 edt.)*, – and as "only fair play in action" – per Harman, L. J. in *Ridge v. Baldwin* (42). The two principles which are pre-eminently connoted by the phrase natural justice are embodied in the Latin maxims *audi alteram partem* and *nemo judex in re sua*, and have been considered to be "so vital and essential to the due performance of the office of the judge that without them the judge is no judge at all" (*Jackson; p. 7*). Of these two rules the rule of *audi alteram partem* has been said to be the more far-reaching ; and it could embrace almost every question of fair procedure.

Although the literal meaning of this Latin maxim is "hear the other party", the essence of it is that "no one should be condemned unheard". This rule has been recognized as an obvious principle of justice sprung from its native judicial soil, and which the courts have also succeeded in enforcing widely in cases where legal rights or status of the members of the public are affected by the exercise of administrative power. Courts of law had taken up the position several centuries ago on the very broad principle that any person or body of persons entrusted with legal power should not and could not validly exercise such power, be it judicial or administrative, without first hearing the person who was going to suffer by the exercise of such power, and that it was just as much a canon of good administration as it was of good legal procedure. (*Wade – 4 edt – Administrative Law, pp. 421-2*). It has also been judicially accepted that it is a principle not limited to judicial proceedings, and is a rule "of universal application and founded on the plainest principles of justice" and that, even if there are no express words in a statute requiring that a party be heard, before a decision affecting him is made, yet, "the justice of the common law will supply the omission of the legislature" – *Cooper v. The Board of Works for Wandsworth District* (43). This judgment has since been approved, in the year 1964, by the House of Lords in the case of *Ridge v. Baldwin* (42), in a judgment, which has been hailed as a "landmark decision" and which put an end to "judicial backsliding" arising from a retreat from the principles of natural justice during a period of about fifteen years prior to 1963 – during which such cases as the *Stevenage case, Franklin v The Minister of Town and Country Planning* (44), and *Nakkuda Ali v. Jayaratne* (45) were decided. The

duty to comply with the principle of audi alteram partem in making decisions which affect the rights of others has been epitomised in the words of Lord Loreburn, that "they must act in good faith and listen fairly to both sides, for that is a duty lying upon every one who decides anything", in the case of *Board of Education v. Rice* (46). Its undeniable importance has been stressed in the words : ". . . . . The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case"–per Lord Reid in *Ridge v Baldwin (supra)*.

Judicial decisions, since *Ridge v. Baldwin (supra)*, have "advanced its frontiers considerably and natural justice now connotes also 'acting fairly', 'common fairness', 'fairness of procedure', and a 'fair crack of the whip'. The principles of natural justice have, since 1963, been once again firmly ensconced both in the established courts of law and in the area of decision-making process in the executive and administrative spheres. Lord Pearson in 1972 stated in the case of *Pearlberg .v Varty* (47) :

> "A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles (i.e. the rules of natural justice) in performing those functions unless there is provision to the contrary."

The rule that no man shall be condemned unless he has been given prior notice of the allegation against him and a fair opportunity to be heard is now a cardinal principle of justice.

It has, however, been emphasised that it is not possible to lay down rules as to when the principles of natural justice are to apply, nor as to their scope and extent, and that everything depends on the subject-matter (*Wade : p. 451*): and that, outside the well known classes of cases such as dismissal from office, deprivation of property and expulsion from clubs, no general rule can be laid down as to the application of the principle in addition to the language of the provision – *Durayappah v. Fernando* (48) : and that the right to a fair hearing is in no way confined to cases of the taking of property and cases based on personal conduct (*Wade : p. 452*): that the courts generally and the House of Lords in particular have rightly advanced the frontiers of natural justice considerably, but have, at the same time, taken an increasingly sophisticated view of what it requires in individual cases – (Lord Hailsham, L.C. in *Pearlberg v. Varty (supra)*) and that,

though the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary, yet, such unusual kind of power must be exercised only where the statutory procedure is clearly insufficient to achieve justice and the taking of any additional steps would not frustrate the apparent purpose of the legislation–Lord Reid in *Wiseman v. Borneman* (49). Among the interests in respect of which procedural protection may be accorded, *De Smith : Judicial Review of Administrative Action – 4 edt* – sets out, at page 177, interests in preserving one's livelihood and reputation ; (vide also *Jackson : Natural Justice* – p. 211). *Smith* further states, at page 196 that it is not easy except at a high level of generality, to state what kinds of interests are entitled to the protection of the rules of natural justice. Charges of inefficiency or failing to be diligent or to set a good example have been subject to the principle of *audi alteram partem* – vide *Durayappah's case (supra) at page 271, per* Lord Upjohn. The view has also been expressed that it ought to operate in the case of loss of livelihood, and that, before being expelled for failure in examinations or for misconduct, students are entitled to be treated fairly and given a hearing, that in preliminary steps, even though in themselves they may not involve immediate legal consequences, but could lead to acts or orders which do so, the protection of fair procedure may be needed throughout ; that even in the making of preliminary investigations and reports which may lead to serious legal consequences the tendency now is for the Courts to favour the observance of natural justice. (*Wade (supra) – pages 452, 479, 480-1).* Statutory provisions cannot be made to cover every possibility of unfairness being caused to a person who would be affected by an order made by a decision-making authority. In order to avoid any such unfair procedure, any gaps in the statutory procedure would have to be filled by calling in aid "the justice of the common law."

The Privy Council has stated that, in considering whether the said principle of *audi alteram partem* should be applied or not, the Courts have to bear in mind three matters : the first being the nature of the property, the office held, status enjoyed or services to be performed by the person who complains of injustice ; the second being the circumstances in which or the occasion upon which the person, claiming to be entitled to exercise the measure of control, is entitled to intervene ; and finally what sanctions in fact the person, entitled to intervene, is entitled to impose upon the complaint of

injustice – *Durayappah's case – (supra)*. On an application of these considerations to the facts and circumstances of the case now before this court it becomes clear ; that the petitioner, who now complains to this Court of injustice, holds a responsible post in the Sri Lanka Police Force ; that the person exercising the measure of control – in this case the Supreme Court itself – could do so upon it being established that the petitioner had illegally arrested the petitioner-respondent and thus violated a fundamental right which has been guaranteed to her by the Constitution ; that the sanction, which the Court could, upon it being established that the Court can and must intervene, impose, is "such relief or make such directions as it (the Court) may deem just and equitable in the circumstances". It is indeed a serious matter to hold that a citizen of a country has been guilty of such conduct as would amount to a violation of a fundamental right which the Constitution of the land has guaranteed to another person within such land. Where, however, such a finding is against a person, who not only holds an extremely responsible position in a unit of the executive arm of the state, which is itself responsible for the maintenance of law and order and the protection of the citizens against any unlawful invasion of their rights and liberties as free citizens of an independent country, but who is also a person who is under an express obligation, imposed by the Constitution itself, to "respect, secure and advance . . . . . and . . . . . not deny" the very right which he is found to have violated, it is needless to say that such a finding becomes even more serious. It becomes still more serious, where such a finding could also not only entail consequences such as orders for the payment of damages, but could also put in motion steps which could have serious repercussions upon his employment as well, if not immediately at some later point in his career. That the Court has not in a particular case followed up a finding of guilt with an order decreeing the payment of damages does not affect the seriousness of the possible consequences. The possibility of the imposition of an order, which would cause financial loss, and the likelihood of other consequences are ever present. In any event the mere finding by a court of law of such wrongful conduct, without more, against an officer of the State, such as the petitioner, can and must expose him to serious perils which it would not, under modern principles, formulated and advanced by the Courts themselves, be "fair" to expose him to without giving him an opportunity to show that he does not deserve to be so condemned.

A contention, which has been very often put forward to meet a plea of violation of the rule of *audi alteram partem*, is that a fair hearing would have made no difference to the result, or that "such hearing could only be a useless formality" – per Lord Simon in *Malloch v. Aberdeen Corporation* (50) *Jackson (supra)* at page 137 sets down three justifications for requiring a hearing even where there appears to be no answer to a charge : "First, experience shows that unanswerable charges may, if the opportunity be given, be answered ; inexplicable conduct be explained : Secondly, the party condemned unheard will feel a sense of injustice. Thirdly, suspicion is inevitable that a body which refuses a hearing before acting does so because of the lack of evidence, not because of its strength". *Wade at page 454* states that, in principle, it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly. A vivid and extremely effective disposal of the contention, that "the result is obvious from the start", has been made by Megarry, J., in the case of *John v. Rees* (51) in the words :

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not ; of unanswerable charges which, in the event, were completely answered ; of inexplicable conduct which was fully explained ; of fixed and unalterable determination that by discussions suffered a change".

This contention had also appealed to the trial judge in the case of *Ridge v. Baldwin (supra)* ; but the House of Lords rejected this reasoning decisively.

Although the argument that a fair hearing would make no difference was decisively rejected by the House of Lords in *Ridge v. Baldwin* yet, the contention in the form that such a fair hearing would in any event be a 'useless formality' has made a reappearance in several later cases. These deviations have been viewed with disfavour on the basis that it is important that they should not be allowed to weaken the basic principle that fair procedure comes first, and that it is only after hearing both sides that the merits can be properly considered (*Wade : p. 455*); and that such cases will be rare (*Jackson : p. 137*); or that such decisions could perhaps be explained on the ground that the relief sought was discretionary (*De Smith : p. 244*).

The contention that in any event when one looks at the matter as a whole that it is obvious that the applicant has no merit in his case was also strongly rejected by Lord Widgery, Chief Justice, in the year 1974 in the case of *R. vs. Thames Magistrate's Court, Ex. parte Polemis* (52) in the following words :

> "I reject the submission. It is basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done . . . . . it seems to me that it is no answer to the applicant to say 'well even if the case had been properly conducted the result would have been the same'. That is mixing up doing justice with seeing that justice is done, so I reject that argument".

The right to be heard and defend oneself will be illusory and meaningless without knowledge of the case to be met, of the charge or the subject matter of dispute to be decided by the court or tribunal, and also without an adequate opportunity of placing that which has to be put forward in defence, either in person or through Counsel of one's own choice.

It has been stated that in this case the petitioner has "on his own showing", been guilty of illegally arresting the 1st respondent and that, as the Court has based its findings upon the very facts and circumstances set out in the Petitioner's affidavit, 2R1, affirmed to of his own accord on behalf of the 2nd respondent, and in which he sought to justify his conduct and which said conduct was also sought to be vindicated in Court during the hearing by eminent Counsel appearing on behalf of both the 2nd respondent and the 3rd respondent who is the Attorney-General, the requirements of the rule audi alteram partem have in any event been satisfied in this case, and that, therefore, there is no room for complaint by the petitioner on this score.

In 2R1 the petitioner's position, as indicated earlier is : that the petitioner-respondent, who was the petitioner in the earlier inquiry, was arrested by him : the petitioner-respondent was so arrested by him on the Galle Road itself and then brought by him, under arrest, to the Kollupitiya Police Station : that, as the petitioner-respondent was participating in a procession which was being conducted without the authority of a lawful "permit", she and the other participants were directed by him to discontinue the said procession and to disperse :

that the petitioner-respondent then pushed the petitioner aside, disobeyed his directions and obstructed him in the performance of his lawful duty : that thereupon he, with the assistance of several police constables, arrested the petitioner-respondent and four others under the provisions of sec. 32 of the Criminal Procedure Code 15 of 1979 : that the petitioner-respondent was arrested in accordance with the procedure established by law : that the petitioner-respondent was informed of the reason for her arrest.

Learned Additional Solicitor-General, who had appeared for the 2nd and 3rd respondents at the earlier inquiry, in which the present petitioner-respondent was the petitioner, informed this Court at this inquiry that the 2nd respondent had produced the petitioner's affidavit at that inquiry, marked 2R1 as "Counsel for the State proceeded on the basis that Ganeshanantham's arrest was relevant to meet the charge of an arrest by Inspector Hector Perera (who was also the 1st respondent in the earlier inquiry) within the station", and that the "State sought to justify Ganeshanantham's conduct in order to meet any consequential impact of Hector Perera's conduct. Not on the basis that Ganeshanantham's conduct was to be the subject-matter of inquiry for granting of relief".

Mr. Choksy S. A., appearing for the petitioner contended that, when the affidavit 2R1 was tendered the petitioner became, on the basis of the said affidavit a witness at the earlier inquiry : that the petitioner swore the said affidavit in order to answer expressly the specific case put forward by the 1st respondent, viz., that she had been arrested and harassed by Inspector Hector Perera within the Kollupitiya Police Station, after she had voluntarily entered the said Police Station premises along with several others, to find out what had happened to a press photographer who, she had been informed, had been taken into the said Police Station by some Police officers : that it was not meant to be an answer to a charge laid against him of having illegally arrested the 1st respondent : that, had it been intended to be an answer to a specific allegation of wrong conduct on his part, the affidavit would have given far more details, inter alia, in regard to the document referred to as a "permit", which would have had to be furnished by one, whose own conduct and culpability was under inquiry, in order to justify the legality of one's own conduct : that the petitioner, who came before Court only as a witness in support of Inspector Hector Perera's defence had himself been found guilty of

the conduct alleged against Inspector Hector Perera himself by the petitioner-respondent, without the petitioner being informed that the Court was inquiring into the legality of the arrest, which he the petitioner himself has stated was effected by him and without the petitioner being afforded an opportunity of satisfying the Court that such arrest was legal, even though the petitioner-respondent did not only not accept any arrest made by the petitioner but also expressly and categorically repudiated, right to the end, the petitioner's assertion of an arrest of her by him outside the Police Station along the Galle Road.

It is no doubt true to say that a witness, who gives testimony before a Court – either orally or by way of an affidavit – runs the risk of being disbelieved and of having his evidence rejected by court as being untrue. The disbelief of a witness is not a circumstance which is not inherent in the process of deciding whether such evidence is true or not ; and an adverse finding in regard to his credibility, is not, ordinarily an altogether unexpected or unforeseen turn of events. The position, however, is altogether different where a witness, who furnishes evidence in writing merely to support a defendant to repudiate a claim made against the defendant, finds that, whilst the defendant is exonerated from responsibility in respect of the claim so put forward against the defendant he himself, without any indication being given to him, is held to be responsible for the wrong, in respect of which the claim against the defendant was put forward and that relief is given on that basis. Such situations, though rare, have occurred even in the regular courts of law.

In the year 1964 in the case of *Sheldon v. Bromfield J.J.* (14), proceedings were held before the justices against M. on a charge of assaulting the female appellant. At the end of the proceedings the charge of assault framed against M. was dismissed ; but the justices proceeded to bind over M: and two prosecution witnesses, one of whom was the female appellant, to keep the peace. The witnesses had not being warned of the possibility that they might be bound over. They were not heard in defence. In delivering the order of the Divisional Court setting aside the binding over order of the appellant on the ground that the justices had acted contrary to natural justice. Lord Parker observed :

"It has been argued here on behalf of the justices that provided, as in this case, the person whom it is proposed to bind over had, in effect, their say by being examined, cross-examined and

re-examined, there is no need at all that they should know what is passing through the Court's mind, and indeed that the justices can bind them over without giving them any advance notice or any opportunity of dealing with it. I must say that I shudder at any idea that that can be done although it is said that it is done quite generally. It seems to me to be elementary justice that, in particular, a mere witness before justices should, at any rate, be told what is passing through the justices' minds and should have an opportunity of dealing with it"

This principle was once again upheld in the case of *R. v. Hendon Justices, ex p. Gorchein* (53) where G who had instituted a private prosecution against P. was bound over, along with P. who was convicted. G. and P. had both been asked, at an early stage of the proceedings, by the magistrates whether they were prepared to be bound over and both had refused. G. successfully claimed that the binding over order made against him was in violation of the principles of natural justice. Similar views were also expressed in the case of *The Seistan,* (13) ; and by the Privy Council in the case of *Mahon v. Air New Zealand Ltd.* (18).

Even though the material upon which the impugned order has been made is material which has been furnished by the person who complains of the injustice, yet, it is not a justification for the failure to observe the rule of *audi alteram partem.* In *Ridge v. Baldwin (supra)* it was contended that the material upon which the order was made had been evidence which the chief constable himself had given, and that he had convicted himself out of his own mouth. This contention did not find favour with the House of Lords ; and the House of Lords finally decided that the chief constable had not had a proper hearing. The principle that a fair opportunity should be given to a person to correct or contradict any relevant statement to his prejudice even though there existed, as in *Spackman's case* (17), a judgment of a civil Court holding that the fact has been proved, found favour with Chief Justice (H.N.G.) Fernando in the case of *V. Hindu Educational Society Ltd., v. Minister of Education* (54). The principle, that information which has been supplied by a person for a particular purpose should not be utilised against him for another purpose without first informing him of such an intention and affording him an opportunity to be heard, has been upheld in the Indian case of *Kapoor v. Jagmohan,* (55).

In 2R1 the petitioner has not made an unqualified admission of liability on his part in respect of the claim put forward by the petitioner-respondent in her petition to Court. Even in regard to the "lawful permit", referred to in 2R1,, learned Senior Attorney for the petitioner submitted certain factual matters, which, if established, would have been relevant to the consideration of the legality of the arrest admittedly made by the petitioner. Furthermore : in the judgment delivered on 8.6.83, the Court has, as earlier indicated, observed that, although the petitioner in 2R1 states that he informed the petitioner-respondent of the reason for her arrest he has not, however, disclosed therein what the said reason was. The judgment, having thereafter stated that the omission to mention the reason given at the time of the arrest is no doubt a grave lapse, then proceeds to consider the legality of the said arrest on the footing of a reason communicated to Court by learned Counsel for the respondents as the reason which the petitioner had given to the petitioner-respondent. The counsel, who so communicated the reason to Court, would have been the Additional Solicitor-General, who appeared before us too for the 2nd and 3rd respondents. He, it must be noted, held no proxy from the petitioner-respondent at any stage of the proceedings. What is more, judging from the statement made by him from the Bar, it is not even certain whether either he (the Additional Solicitor-General) or any other officer of the Attorney-General's department would, have appeared for the petitioner had the petitioner-respondent's petition to Court based her claim against the 3rd respondent upon the arrest referred to in 2R1, and the petitioner himself had been named, instead of Inspector Hector Perera, the 1st respondent to her application. In any event where a person is entitled to be heard by Counsel it must be through Counsel of his choice.

The petitioner had averred that the arrest he made was lawful. The legality of an arrest is not always a pure question of law. It is very often–as the arrest referred to in 2R1–a mixed question of fact and law. Even, if in a particular case it becomes a pure question of law, yet, the person defending the legality of such arrest should be heard before a decision is made–vide *Jackson (supra) p. 63.*

The position accorded to a wrong-doer named in the petitioner's own application at the very commencement of the proceedings has already been discussed earlier. That being so, the position of a person, whose conduct is picked out, after the proceedings had commenced

against the person named by the petitioner as the wrong-doer, and such conduct is thereafter probed as a possible basis on which relief could actually be granted to the petitioner against the State, cannot be any the weaker or less favoured–in regard to the requirement of being informed of the inquiry to be held against him, and also in regard to being afforded a reasonable opportunity to defend himself if necessary by Counsel of his own choice. There is no express rule in the aforesaid Rules of this Court in regard to any service of notice on, and the affording of an opportunity to defend himself to such a person. Such a lacuna can and must, in my opinion, be filled by the court by resorting to "the justice of the common law". A person in the position of the petitioner in this case would not, even though he filed the affidavit 2R1, have had any reasonable grounds to anticipate that the arrest referred to by him therein would be made the subject-matter of granting the petitioner-respondent relief against the State without any notice to him. Leave had been granted by Court to the petitioner-respondent to proceed with a complaint of wrongful conduct on the part of the first respondent. The affidavit 2R1 was filed by him specifically in answer to the averments set out in the petitioner-respondent's petition. After he filed his affidavit 2R1 the petitioner-respondent even filed a further affidavit repudiating and contradicting what the petitioner himself had averred in 2R1. There were also express provisions in the Rules of this Court, referred to earlier, requiring the service of notice and of certain documents upon the wrong-doer whose conduct is sought to be made the basis of the liability of the State. Against this background I do not think it reasonable to take the view that, at the time the petitioner affirmed to the contents of the affidavit 2R1, he had reasonable grounds to anticipate that the court would, having dismissed the petitioner-respondent's own allegations against the 1st respondent, then initiate a probe into his own conduct as set out by him in his affidavit 2R1–even though what he averred had subsequently been clearly and categorically repudiated by the petitioner-respondent–and relief given to the petitioner-respondent on that basis, without he himself being made aware of what was passing through the mind of the Court, and without being given an opportunity to show the court that the court's thinking was not correct.

It cannot now be contended that the failure to hear the petitioner before the order was made was due to the fact that the Court was pressed for time as the matter of the petitioner-respondent's

application had to be concluded within the period of two months specified in Article 126 (5) ; for, this Court has now held that the said period is only directory. In any event, if one or the other of the two parties must be penalised for such a situation being brought about, then it should be the petitioner-respondent and not the petitioner–for failing to bring before court in time the person, who, in the opinion of the Court, was the real wrong-doer.

The maxim that "justice should not only be done but should manifestly and undoubtedly be seen to be done" (per Lord Hewart, C. J. in *R. v. Sussex Justices, ex p. McCarthy (56)*), is also a principle which must always be adhered to. This principle becomes applicable not so much when the court is concerned with a case of actual injustice as with the appearance of injustice or possible injustice. Dealing with this principle, Lord Widgery, C.J., in *R. v. Thames Magistrate's Court case (supra)* stressed the importance of both limbs of this principle. The need for the appearance that justice is being done is as important as the requirement that justice should actually be done. The requirement that justice must also be seen to be done is also one of the best ways of winning for the Court public confidence and respect. The fundamental principle at stake here is that public confidence in the fairness of adjudication or hearing procedures must not be allowed to be undermined (*De Smith, p 245*).

Having regard to the principles set out above it seems to me that, had the situation, which arose at the inquiry into the application (bearing No. 20 of 1983) made by the petitioner-respondent, arisen before a decision making body in the field of administrative law, there would then have been no question but that the principle of *audi alteram partem*, of "fair-play" and also the maxim that justice should also be seen to be done (this principle being applicable both to courts of law and other statutory tribunals–*Jackson (supra) pages 87, 91, 92, 96*) would have rendered it obligatory on such tribunal to have noticed the petitioner, informed him of what they intended to do, and then to have given him a reasonable opportunity of stating what, if any, he, the petitioner, had to state. If that were the obligation cast on a statutory tribunal, how much greater and how much more solemn would be the duty cast on a court of law, had such a situation arisen before it.

On a consideration of all that has been stated above, I am of opinion that the moment the Court took the view that the petitioner-respondent's version of the incidents of the day in question

has not been established, but that the Court should nevertheless consider granting relief to the petitioner-respondent on the basis of an act, which the petitioner himself had set out in his affidavit 2R1, a duty was then cast on the Court to give the petitioner "a reasonable opportunity of knowing what was passing through the Court's mind and being able to answer to it".

The relief to be granted

The question, which now arises for consideration, is the relief which the petitioner should be granted. I have already indicated earlier that this is an application in which the appeal has been to the inherent jurisdiction of this Court and that the exact nature and the form of the relief to be granted to the petitioner is a matter entirely in the discretion of the Court. The Court intervenes on the footing that the petitioner has been prejudiced by an act – or, as in this case, an omission – of the Court itself and that it is necessary for the Court to grant relief in order " to do justice". Technical objections should not tie the hands of the Court. In any event, as set out earlier, the averments in paragraph 31 of the petition read with paragraph (*c*) of the prayer thereof would justify the grant of relief which would affect even the principal relief which has been granted by the judgment. In doing so no injustice would be caused to the petitioner-respondent herself ; for, she is one who not only never accepted at any stage what the petitioner averred in 2R1, but also categorically repudiated, right up to the conclusion of the proceedings, the petitioner's version. The expunging of the findings set out in the aforesaid judgment would by itself operate to remove the very foundation of the judgment entered in favour of the petitioner-respondent, and thereby bring about a somewhat incongruous position. The question whether a decision, which has been arrived at in proceedings in which the principles of natural justice have been violated, is void or voidable, becomes, in the circumstances of a case such as this where the aggrieved party himself has come forward to obtain relief, academic. Having regard to all the circumstances in which the petitioner has come before this Court, it seems to me that the fairest order to be made in order to remove the "real sense of grievance" which the petitioner clearly harbours–and which would also not, as set out above, cause any injustice to the petitioner-respondent herself,–is to set aside the aforesaid judgment and to grant the petitioner an opportunity of establishing the legality of his act, and thereafter have judgment

entered accordingly as he, the petitioner, succeeds or not in defending his conduct. If authority is necessary to support the order which I propose to make, it is supplied by *Halsbury (4 edt) Laws of England, Vol. 1, page 97, paragraph77,* where it is stated that the effect of failure to accord an adequate hearing or opportunity to be heard prior to a decision may be repaired by rescission or suspension of the original decision followed by a full and fair hearing or rehearing ; and the following decisions are cited : *De Verteuil v. Knaggs, (57) ; Ridge v. Baldwin (42) ; Vasudevan Pillai v. City Council of Singapore, (58) ; Rose v. Humbles, (59).*

therefore, make order :

(i) setting aside, pro forma, the judgment of this Court pronounced on 8.6.83 in Application No. 20 of 1983 ;

(ii) that the petitioner be noticed and given an opportunity to establish the legality of his arrest of the petitioner-respondent, which he has, in his affidavit 2R1, averred he did make on 8.3.83 ;

(iii) that, if the petitioner succeeds in establishing the legality of the said arrest, the petitioner-respondent's said application No. 20 of 1983 shall stand dismissed ;

(iv) that, if the petitioner fails to establish the legality of the said arrest, then the aforesaid judgment, entered in favour of the petitioner-respondent shall stand affirmed ;

(v) that, at the further inquiry to be held in terms of this Order, the petitioner may, if he so desires, file a further affidavit, and if such further affidavit is so filed, the petitioner-respondent is to be permitted to file, if she so desires, a counter-affidavit ;

(vi) that the 2nd and 3rd respondents may be heard at such further inquiry at the discretion of the Court ;

(vii) that the parties do bear their own costs of this application ; and the costs of the further proceedings are to abide the final decision.

In view of the opinion I have now formed in regard to the issues arising in this case, it has become necessary to refer to the case of *Mariyadas Raj v. The Attorney-General and another (60)* where I was a member of the three-judge Bench of this Court which decided that case. Even though there are two significant circumstances which

distinguish that case from the facts of this case viz; that the specific arrest, which was said to constitute the infringement in that case, was not in dispute between the parties, and that there was no counter-affidavit from the petitioner in that case expressly contradicting the averments in the affidavit of the police-officer, who averred that it was in fact he, and not the officer named in the petition, who made the arrest testified to by the petitioner–yet, if the principles, which I have referred to earlier in this judgment, had then been placed, as was done at this inquiry, in their proper perspective in relation to the issues that arise in a matter of this nature, the relevant issues would undoubtedly have appeared to me then as they appear to me now ; and I would even then have certainly taken the same view as I have set out in this judgment.

I would like to conclude this judgment with the words, which Lord Diplock himself had, according to the report tendered to us of the Privy Council decision in the case of *Mahon v. Air New Zealand (supra)*, used on a similar occasion :

> "It was easy enough to slip up over one or the other of them in civil litigation, particularly when one was subject to pressure of time in preparing a judgment after hearing masses of evidence in a long and highly complex suit.
>
> In the case of a judgment in ordinary civil litigation such failure to observe rules of natural justice was simply one possible ground of appeal among many others and attracted no particular attention.
>
> All their Lordships could remember highly respected colleagues who, as trial judges, had appeals against judgments they had delivered allowed on that ground : and no one thought any the worse of them for it.
>
> So their Lordship's recommendation that the appeal ought to be dismissed could not have any adverse effect upon the reputation of the judge among those who understood the legal position and it should not do so with anyone else".

The petitioner is accordingly granted relief as set out above.

RODRIGO, J.

These proceedings relate to an application by an Inspector of Police to this Court to have us revise or vacate in the exercise of our alleged inherent jurisdiction, a finding reached in a judgment delivered by this Court on June 8th, 1983, said by him to concern him and harm him. He was not a party-respondent to the application in which that judgment was given or otherwise noticed. He says this Court violated the *audi alteram partem* rule in respect of him.

The judgment mentioned was given in an application to this Court by Mrs. Vivienne Goonewardene, a veteran Marxist politician and who does not need an introduction in this country, for relief in respect of an alleged unlawful arrest, among other complaints, by an Inspector of Police (not the petitioner in these proceedings) at the Kollupitiya Police Station. Unlawful arrest is a breach of a fundamental right guaranteed by the Constitution to every person. A person unlawfully arrested is entitled to petition this Court for relief in the form of a just and equitable order and directions – Art. 13 (1); and Art 126 (4).

To Mrs. Goonewardene's petition the Inspector of Police in question who was also the Officer-in-Charge (O.I.C.), the Inspector-General of Police (I.G.P.) and the Attorney-General were made respondents. In the course of the proceedings an affidavit was filed from the present petitioner, Inspector Ganeshanantham, by the I.G.P. to the effect that it was he who lawfully arrested Mrs. Goonewardene on the day in question and that too not at the Kollupitiya Police Station as alleged but on Galle Road between the American Embassy and the Police Station. This affidavit was intended to contradict Mrs. Goonewardena and by implication to lend support to the O.I.C. that he did not arrest Mrs. Goonewardena. It is noteworthy, however, that Mrs. Goonewardena promptly filed a counter-affidavit contradicting the affidavit of Inspector Ganeshanantham and re-asserted that it was the O.I.C. and no other that arrested her and that in fact she was not arrested anywhere else before her arrest at the Police Station. She further affirmed that she voluntarily reached the Kollupitiya Police Station of her own accord and free will.

With these affidavits filed, the hearing had commenced before a three-Judge Bench of this Court. In the course of that hearing it is now said by Counsel appearing for Mrs. Goonewardena in these

proceedings (the same Counsel who appeared for her in her application) and not contradicted by the Deputy Solicitor-General appearing for the State (who also appeared at the other hearing) the spotlight was kept focussed for a whole day on the question of whether the arrest if any by I.P. Ganeshanantham was lawful.

Eventually judgment was delivered. Relief was granted to Mrs. Goonewardena holding that she had been unlawfully arrested on the day in question but not by the O.I.C. as alleged and asserted by Mrs. Goonewardena but by Sub-Inspector Ganeshanantham as he then was.

This, Inspector Ganeshanantham says, is unfair. He had filed a limited affidavit for a limited purpose – the argument runs as I understand it as follows. Though he said in his affidavit that the arrest made by him was lawful it was an affirmation made incidental to contradicting an alleged arrest by the O.I.C. He had not given all the facts and circumstances relating to the arrest. It was not necessary. It was not called for. His conduct was not in issue. To say in a judgment that he has made an unlawful arrest adversely affects him in his office as a Police Officer and causes prejudice to his career and he is entitled to claim relief from such a finding because he had not been put on notice that the lawfulness of the arrest made by him was being inquired into, as required by the Constitution and by the common law as expressed in the *audi alteram partem* rule.

Objection even to the entertainment of this application by Inspector Ganeshanantham and still less to the grant of relief to him is taken by Counsel for Mrs. Goonewardena. Inasmuch as inherent jurisdiction is invoked by the petitioner, Counsel for Mrs. Goonewardena says, there is no such thing as inherent jurisdiction of the Court. He continues; we are a creation of a statute (Constitution) unlike English common law Courts and we must see within the four corners of the statute for our jurisdiction, and equally we have no power to revise our own judgments : that once a judgment is given by this Court, right or wrong, even if it contains slip-ups or evidence of forgetfulness or failure to follow leading precedents still this finding, becomes an act of a final superior Court. Grant of relief is also objected to in any form even to a limited extent as claimed by Inspector Ganeshanantham such as expunging the adverse finding only or by simply declaring that the finding was reached without hearing him, on the ground that such

a claim if granted would cut the heart out of the matter and indirectly render the substantial order in the judgment given ineffective and the judgment itself meaningless.

Counsel for Inspector Ganeshanantham, however, insistently argued that we have inherent power to look into his complaint. He draws our attention to Art. 118 which enacts that the Supreme Court "shall be the highest and final superior Court of record in the Republic" and to Art. 105 (3) which gives the Supreme Court all the powers of a superior Court of record including the power to punish for contempt of itself. This phrase " Superior Court of Record " is not defined. It appears, however, in the Courts Ordinance – s. 7 – " The Supreme Court shall continue to be the only superior Court of Record." Counsel for Mrs. Goonewardena cited Stroud's Judicial Dictionary to show that this phrase is not helpful to determine the powers of the Court. However, there are a fair number of instances when the Supreme Court at the time governed by the Court's Ordinance before its repeal in 1972 claimed for itself and enforced an inherent jurisdiction. In *Menchinahamy v. Muniweera* (40) an interlocutory decree had been entered in a partition case without the heirs of a party-defendant who had died in the meantime being noticed or substituted in place of the deceased defendant. On an application made by the widow and children of the deceased defendant after the interlocutory decree had been upheld by the Supreme Court in the appeal, for *restitutio in integrum*, Dias, S.P.J. observed at page 414 :–

"We now come to the substantial point which has been urged in this case, namely, that not only are there no merits in the present application of the petitioner, but also that if we grant her the relief she seeks we will in effect be sitting in judgment on a two-Judge decision of this Court in the earlier appeal and which is now embodied in a decree of the Supreme Court which has passed the Seal of the Court. It was argued that the Supreme Court by means of *restitutio in integrum* cannot vary its own decrees, especially after they have passed the Seal of the Supreme Court. It is pointed out that the powers of this Court are not unlimited. It is urged that s. 36 of the Courts Ordinance (*Chapter VI*) defines the jurisdiction of this Court, while s. 37 only permits this Court to interfere with the judgments of an original Court and it cannot interfere with the orders of the Supreme Court. It is pointed out that s. 776 of the Civil Procedure Code deals with the sealing of decrees of the Supreme

Court, and that once a decree has been sealed, such decree, if it is a judgment of two Judges of this Court, cannot be varied by another Bench of two Judges."

In the instant case the present Bench is comprised of seven Judges as against the three Judges who delivered the judgment. Dias, S. P. J. continues :–

"It is everyday practice in a case like that (where no service of summons had been effected–the interpolation is mine) for this Court to hold that all the earlier proceedings are abortive and of no effect. If authority is needed this is supplied by the following cases :– *Caldera v. Santiagopillai* (61) *Juan Perera v. Stephen Fernando* (62) and *Thambiraja v. Sinnamma* (63). . . . We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary to do justice . . . . . I would go further and say that in view of the irregularity in not joining Saineris heirs, in my opinion both the interlocutory decree in this action and the subsequent judgment of this Court in appeal are of no effect, because by reason of the non-observance of the steps in procedure no proper interlocutory decree was, in fact, entered in this case."

This judgment was followed in *Ranmenikhamy v. Tissera* (11) by T. S. Fernando, J. wherein an appeal that had been preferred to the Supreme Court had been rejected on the ground that notice of appeal had not been served but subsequently it was proved to the Court that notice in fact had been duly served on the party who was a minor represented by a duly appointed guardian ad litem. It was conceded that the rejection of the appeal was a mistake. T. S. Fernando, J. held that :

"Inasmuch as the order rejecting the appeal was made per incuriam the Court had inherent jurisdiction to set aside its own order."

Then in *Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents* (8) the Supreme Court consisting of Gratiaen, J. and Gunasekera, J. awarded costs holding :

"Subject to such statutory limitation as may be prescribed in particular instances, the Supreme Court possesses inherent power to award costs when exercising either its *original* or appellate jurisdiction."

The Court in this case (*Karuppannan's* (8)) cited the case of *Guardians of Westham Union v. Churchwardens of Bethnal Green* (25) where Lord Herschell said :

"Costs have been awarded for upwards of two centuries. I see no foundation on which the power to order their payment can rest except the inherent authority of this Court as the ultimate Court of appeal."

Also Lord Macnaghten is quoted as having observed that,–

"The House of Lords, as the highest Court of Appeal, has and necessarily must have an inherent jurisdiction as regards costs."

It was observed by Court in *Karuppannan's* case (8) that,

"The unbroken line of precedents which have been brought to our notice is by itself sufficient proof that the jurisdiction does exist, and even if it be 'difficult to maintain it upon a nice foundation' we are content to say, as Lord Hardwicke did in *Burford (Corporation of) v. Lenthall* (64) that we 'ought to be bound by those precedents, *especially as it is in aid of Justice.*'

In *Craig v. Kanssen* (65) the Court of Appeal upheld an order by the King's Bench Division which is a superior Court of Record setting aside its own order in the exercise of its inherent jurisdiction on the ground that the applicant, not having being served with summons was entitled to have it set aside *ex debito justitiae*.

It is thus seen that this Court has an inherent jurisdiction in situations,–

(1) where decisions have been made *per incuriam*

(2) where the Court has *violated a principle of natural justice.*

(3) where the Court is required *to act in aid of justice.*

(4) where a claim is made *for costs* and,

(5) where a party is entitled to move the Court *ex debito justitiae*

Counsel for Inspector Ganeshanantham submits that the decision in question had been made per incuriam. The categories of decisions per incuriam have been stated in a decision of this Court by the Chief Justice in the case of *Billimoria v. Minister of Lands* (39) as follows :–

"In *Young v. Bristol Aeroplane Co. Ltd.* (66) Greene M.R. pointed particularly to the classes of decisions per incuriam :–

(i) a decision in ignorance of a previous decision of its own Court or of a Court of co-ordinate jurisdiction covering the case, and,

(ii) a decision in ignorance of a decision of a higher Court covering the case which binds the lower Court.

Lord Denning, M. R. was inclined to add another category of decisions–one where a long standing rule of the common law has been disregarded because the Court did not have the benefit of a full argument before it rejected the common law."

Then again in *Morrelle Ltd v. Wakeling* (38) the Court observed :–

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned ; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive . . . . . "

I am not too sure whether the grievance complained of in the instant case can strictly fall within the definition of decisions per incuriam mentioned above, unless this grievance could be brought within the category given by Lord Denning, M. R. as stated earlier. The grievance here would appear to be, if at all, more in line with the Privy Council judgment in *Mahon v. Air New Zealand Ltd.* (18). In that case a New Zealand judge holding an inquiry in his capacity as a Royal Commissioner into the causes of a crash of an airliner operated by Air New Zealand Ltd. observed :

"No judicial officer ever wishes to be compelled to say that he has listened to evidence which is false. He always prefers to say as . . . . . hundreds of judgments which I have written illustrate that he cannot accept the relevant explanation or that he prefers a contrary version set out in the evidence. But in this case, the palpably false sections of evidence which I heard could not have been the result of a mistake or faulty recollection. They originated, I am compelled to say, in a pre-determined plan of deception."

Lord Diplock delivering the Privy Council judgment said :

"The parties to the plan of deception and conspiracy to commit perjury there referred to were readily identifiable in the body of the record. They were Security Officers employed in the Flight

Operations Department of Air New Zealand. The report also identifies as conspirators all four members of the Navigation Section of Flight Operations."

Lord Diplock held that this Commissioner failed to adhere to the two rules of natural justice that a finding has to be based on material which tended logically to reveal the facts to be determined and *that any person represented at the inquiry who would be adversely affected by a finding should be made aware of the risk of that finding being made.* Lord Diplock continues :

" The relevant rules of natural justice referred to in *R. v. Deputy Industrial Injuries Commissioner* (19) which dealt with the exercise of *investigative* jurisdiction were (1) a person making a finding had to base his decision on evidence that has some probative value, (2) he had to listen fairly to any relevant evidence conflicting with the finding and to any rational argument against the finding that a person represented at the inquiry whose interests might be adversely affected by it might wish to place before it or *would have so wished, had he been made aware of the risks of the finding being made."*

The case of *The Seistan* (13), also has a close resemblance to the complaint of the petitioner in the instant case. There a motor vessel carrying a crew of sixty-six with two supernumeraries sank off Bahrain in the Persian Gulf as a result of an explosion with the loss of fifty seven lives. A Court of formal investigation consisting of a Wreck Commissioner and three assessors held an inquiry into the circumstances attending the sinking of the vessel. One of the assessors added a rider to the finding of the Court that the loss of the motor vessel was not the result of the wrongful act or default of any person. The rider was as follows :–

"I concur in the above . . . . but, in my opinion, the advice given by the chief officer, Mr. Jones, as to the flooding of the lower hold offered a better chance of a quicker extinction of the fire. The conduct of the chief engineer in misinforming the chief officer regarding No. 5 bilge line non-return valve was reprehensible"

The Chief Engineer appealed to the Minister of Transport and Civil Aviation against the finding in the rider and, on a re-hearing being ordered, Lord Merriman, P. observed with regard to the passage quoted in the rider as follows :–

"Having regard to the absence of any charge against the chief engineer, and the consequent lack of any opportunity to meet any such charge, this expression of censure by one assessor in the rider was wholly irregular *whatever view may be taken of the merits.*"

In considering the approach to the determination of this matter one has to bear in mind that this Court is exercising an original jurisdiction when disposing of complaints of breaches of fundamental rights. The inquiry is investigative and more in the nature of an inquest than a lis inter partes – see *R. v. Deputy Industrial Injuries Commissioner* (above). This Court is given powers "to grant to *any other person* or his legal representative such hearing as may appear to the Court to be necessary in the exercise of his jurisdiction under this Chapter."– Art. 134 (3). The inquiry required is whether the alleged infringment of a fundamental right is by executive or administrative action. It would thus appear to me to be not restricted to ascertaining whether it is the State Officer against whom the specific allegation made in the petition in terms of the Rules of the Court that committed the infiringment. If that were so whether the inquiry is regarded as a lis inter partes or as an inquest, I think any witness as in the case of *Mahon v. Air New Zealand* (above) who would be adversely affected by a finding should be made aware of the risk of that finding being made against him.

The problem here is that the Deputy Solicitor-General had made submissions on behalf of the State and the I.G.P. on the basis of Inspector Ganeshanantham's affidavit. It is now submitted that this application is therefore without merit. But in the case of *Menchinahamy v. Muniweera* (supra) Dias, S.P.J. was also confronted with the submissions that the application before him for *restitutic in integrum* was not sustainable on its merits. Likewise in the case of *The Seistan* (supra) Lord Merriman, P. observed that the " expression of censure by one assessor in the rider was wholly irregular *whatever view may be taken on the merits.*"

Dias, S.P.J. was not prepared to look into the application on its merits. He said at page 415 :

" In so far as the petitioner is concerned there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice."

As I have already said the affidavit filed by the petitioner was not intended to disclose facts justifying the alleged arrest by him of Mrs. Goonewardene. Though arguments had been advanced by the Deputy

Solicitor-General, it must necessarily have been against the background of the counter affidavit of Mrs. Goonewardena categorically contradicting Inspector Ganeshanantham on the matter of the arrest. He was drawn in as a witness (on an affidavit) and not as an accused. He was not present in Court. Having tendered his affidavit he had no further personal interest in the proceedings. It must have been farthest from his mind that the focus of prosecution had turned on him.

On a consideration therefore of both principle and authority I reach the view that the petitioner is at least entitled to a declaration as in the case of the judgment referred to by Dias, S.P.J. that there has been a violation of the principles of natural justice in so far as the petitioner is concerned. But it is not fair by the State to leave our determination in the air with a mere declaration that the finding in the judgment that the present petitioner is guilty of unlawful arrest is contrary to the *audi alteram partem* rule. This vice will affect the order itself granting relief in the judgment as it is umbilically connected to this finding of guilt. I therefore, as Dias, S.P.J. did in the case cited above, would go further and say that in view of this irregularity in violating the *audi alteram partem* rule the petitioner is entitled to move this Court *ex debito justitiae* and, that in my opinion, both the order granting relief to Mrs. Goonewardena and the finding of guilt against the petitioner in the judgment in question are of no effect.

Application dismissed.