

HEMASIRI FERNANDO
v.
HON. MANGALA SAMARAWÉERA,
MINISTER OF POSTS, TELECOMMUNICATIONS
AND MEDIA AND OTHERS

SUPREME COURT
DHEERARATNE, J.,
WIJETUNGA, J. AND
BANDARANAYAKE, J.
S.C. (FR) APPLICATION NO. 14/99
APRIL 29, 1999

Fundamental Rights – State controlled commercial company – Removal of a Government Director without adducing any reason – Arbitrary and capricious action – Article 12 (1) of the Constitution.

The 3rd respondent (Secretary to the Treasury) purporting to act on behalf of the Government of Sri Lanka (GOSL) in the exercise of his power under Article 19.2 of the Articles of Association of the 4th respondent, Sri Lanka Telecom Ltd., (SLT) removed the petitioner from the post of Director/Chairman of the company. No reasons were given to the petitioner as to why he was removed.

After the incorporation of Sri Lanka Telecom Corporation as a public company in terms of the conversion of public corporations or Government Owned Business Undertakings Act, No. 25 of 1987, Nippon Telegraph and Telephone Corporation (NTTC) of Japan purchased 35% of the shares of SLT and approximately 3.5% Shares were given over to employees. Thus, the Government retained approximately 61.5% shares. In terms of the share purchase agreement between the GOSL and NTTC, 6 Directors including the Chairman were the nominees of GOSL while 4 Directors were to be nominees of NTTC. This arrangement is also reflected in the Articles of Association.

Held:

1. Behind the veneer of the commercial company is the State. The power of the State is conferred on the 3rd respondent to be held for the benefit of the public.

Per Dheeraratne, J.

"As observed by Wade and Forsyth (7th edition) at 391. . ." the truth is that in a system based on the rule of law", 'unfettered Government discretion is a contradiction in terms'."

2. The action of the 3rd respondent was arbitrary and capricious and the petitioner's fundamental right for equal protection of the law has been violated.

APPLICATION for relief for infringement of fundamental rights.

Faisz Musthhapha, PC with Sanjeewa Jayawardena, Ananda Kasturiarachchi and Ms. Chandrika Silva for the petitioner.

K. C. Kamalabayson, PC SG with Uditha Egalahewa, SC and Mohan Gopallawa, SC for 1st and 3rd respondents.

Shibly Aziz, PC with Kalyani Jayawardene and Ms. Thaheeda Barrie for the 4th respondent.

Romesh de Silva, PC with Hiran de Alwis for the 5th respondent.

P. A. D. Samarasekera, PC with Harsha Amarasekera and Ms. Kumudini Wijetunga for the 6th respondent.

Aritha Wickramanayake with Aruna Samarajeewa for the 8th respondent.

Gomin Dayasiri with Arawinda R. I. Atharupana and Ms. Niranjalee Wijesinghe for the 9th respondent.

Cur. adv. vult.

July 29, 1999.

DHEERARATNE, J.

In 1990 a corporation known as the Sri Lanka Telecom was established in terms of the State Industrial Corporations Act, No. 49 1957. The corporation took over the functions, *inter alia* pertaining to telecommunications which were discharged by the Department of Telecommunications. By letter dated 15. 9. 94 the 1st respondent Minister, acting under sections 12 and 13 of the State Industrial Corporations Act, appointed the petitioner as a Director and Chairman of the Sri Lanka Telecom for a period of 3 years. On 14. 11. 94 the petitioner was appointed Secretary to Hon. Prime Minister.

In September, 1996, Sri Lanka Telecom was incorporated as a public company Ltd. (4th respondent) in pursuance of an order published in the government *Gazette* made in terms of the Conversion of Public Corporations or Government Owned Business Undertakings Act, No. 25 of 1987 and the shares of the company vested with the Secretary to the Treasury for and on behalf of the Government of Sri Lanka. The Articles of Association of the new company empowered the Government of Sri Lanka to dispose of shares in the company provided that the Government retained not less than 51% of the total number of shares. Nippon Telegraph and Telephone Corporation (NTTC) of Japan purchased approximately 35% of the shares of Sri Lanka Telecom Ltd. and approximately 3.5% shares were given over to employees thus the Government retaining approximately 61.5% shares. In terms of the share purchase agreement signed between the Government of Sri Lanka and NTTC, the Government of Sri Lanka remains the sole beneficial owner of the shares purchased by NTTC. By the shareholders agreement entered between the Government of Sri Lanka and NTTC out of the Board of Directors of Sri Lanka Telecom Ltd. 6 Directors including the Chairman were to be nominees of the Government of Sri Lanka while 4 Directors were to be nominees of NTTC; this arrangement is also reflected in the Articles of Association.

The shareholders agreement also provided that the Government of Sri Lanka and the investor (NTTC) "shall procure the appointment or continuation of "the petitioner and 5 others as nominee directors of the Government of Sri Lanka and the petitioner in addition as non-executive chairman of Sri Lanka Telecom Ltd. By letter dated 27. 09. 1996, the then Secretary to the Treasury nominated the petitioner as a director of Sri Lanka Telecom Ltd. and the letter further stated that the nomination had been made "in terms of Articles of Association after consultation with Hon. Minister of Finance and Planning and Hon. Minister of Posts and Telecommunications". The Secretary to the Treasury wrote letter dated 6th August, 1997, addressed to the Secretary of Board of Sri Lanka Telecom Ltd. stating that in terms of section 19.2 of the Articles of Association the petitioner and 3 others were appointed to the Board of Directors of Sri Lanka Telecom Ltd. with immediate effect. The letter further stated: "I confirm that these appointments are made in consultation with Hon. Minister of Finance and Planning and the Hon. Minister of Posts and Telecommunications and Media".

Petitioner alleges that as Chairman of Sri Lanka Telecom Ltd., he had several disagreements with the 1st respondent Minister over certain highly contentious issues especially with the introduction of 2 private operators Suntel (Pvt.) Ltd. the 8th respondent and Lanka Bell (Pvt.) Ltd. the 9th respondent who were licensed to operate fixed radio telephone systems in Sri Lanka about 1995. In the 1st part of 1996 both the 8th and 9th respondents commenced their commercial operations as Wireless Local Loop Telephone Operators (WLL) and the petitioner alleges that they received favoured treatment from the 1st respondent.

The petitioner states that his relationship with the 1st respondent suffered a total breakdown as a result of the media publicity given to an incident relating to the 1st respondent's obtaining a credit card from the 4th respondent and using the same during his visits overseas. The petitioner states that the 1st respondent suspected him of having supplied the information. The petitioner further states that the 6th

respondent had issued a personal cheque in order to settle the 1st respondent's credit card bills and the 1st respondent suspected that it was done on his advice. The contention of the petitioner was that because of these incidents the 1st respondent got the petitioner removed from the post of Director/ Chairman of the Sri Lanka Telecom Ltd. This is denied by both the 1st and 3rd respondents.

On 28th December, 1998, the petitioner received a copy of a letter dated 24. 12. 1998 addressed to the 4th respondent. That reads:

"HIGHLY CONFIDENTIAL.

24th December, 1998

Sri Lanka Telecom Ltd.,
Telecommunications Headquarters,
Lotus Road,
Colombo 1.

I, Dixon Nilaweera, Secretary to the Treasury, acting on behalf of the Government of Sri Lanka, in view the powers vested with me in terms of Articles (*sic*) 19.2 of the Articles of Association of Sri Lanka Telecom Ltd., hereby remove Mr. Hemasiri Fernando from the post of Director / Chairman of Sri Lanka Telecom Ltd., with immediate effect.

Dixon Nilaweera,
Secretary to the Treasury for and on behalf of the Government of Sri Lanka."

The petitioners position is that his removal is grossly arbitrary, capricious, and unreasonable and has been influenced by collateral considerations and made for accusations which do not bear any form of objective scrutiny. It was contended on behalf of the 5th respondent, that the petitioner's removal was a matter purely falling within the Company Law and therefore within the purview of Private Law as opposed to Public Law, the former of which does not attract the

fundamental rights jurisdiction of this Court. The position of the 1st and 3rd respondents was that in terms of Article 19.2 of Articles of Association, the Government of Sri Lanka has a right to remove the petitioner from the office of a director representing the Government and there is no requirement either to give the petitioner notice or reasons for his removal; the petitioner could be removed without any reason being given.

As observed earlier the Government of Sri Lanka owns 61.5% of the shares of the company and it is the beneficial owner of 35% of the shares held by the NTTC. Behind the veneer of the commercial company is the State. The power of the State is conferred on the 3rd respondent to be held for the benefit of the public. As observed by Wade and Forsyth (7th edition) at 391 ". . . the truth is that, in a system based on the rule of law, unfettered Government discretion is a contradiction in terms".

No reasons have been given to the petitioner as to why he was removed. We hold that the action of the 3rd respondent is arbitrary and capricious and the petitioner's fundamental right for equal protection of the law has been violated. As regards the relief to be granted, when this matter was being argued, we indicated to counsel, that in the event of the petitioner succeeding in his application, we will not order reinstatement, as the petitioner would then find himself in the position of a square peg in a round hole. We order the State to pay a sum of Rs.1,00,000 as compensation and Rs. 25,000 as costs.

WIJETUNGA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Relief granted.