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DIGEST

CONSTITUTIONAL LAW – Memorandum of Understanding for Tsunami Operation Management Structure - Power of President and Government to sign the MoU - Articles 12(1) and 12(2) of the Constitution - Grant of part interim relief against exercise of governmental powers contrary to the Constitution - Articles 149(1) and 154 of the Constitution - Siting of an important Committee in Kilinochchi.

Weerawansha and Others v. Attorney-General and Others 377

DEBT RECOVERY — Debt Recovery (Special Provisions) Act, No. 2 of 1990 — Jurisdiction of the District Court and jurisdiction of the Commercial High Court — High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 — Transaction in respect of which the District Court has jurisdiction — Whether a loan facility may be sued in the District Court or whether only a fixed loan can be sued in the District Court.

Eassuwaran and Others v. Bank of Ceylon 365

FUNDAMENTAL RIGHTS — Article 12(1) of the Constitution — Authority to operate a stone quarry in 2002 — Delayed due to protests by neighbours and proceedings in the Provincial Council on a petition — Refusal of renewal of authority after 2002 — Justified by protests of neighbours who were affected — Refusal not arbitrary.

Vishvanath v. Divisional Secretary, Madhurawala and Others 369

CM 6973 – 2,500 (2006/11)

EASSUWARAN AND OTHERS
VS
BANK OF CEYLON

SUPREME COURT
S. N. SILVA, CJ
TILAKAWARDENA, J AND
RAJA FERNANDO, J
SC APPEAL NO. 25/2004
CA (LA) NO. 146/2003
D.C. COLOMBO CASE NO. 917/DR
17TH JANUARY, 2005

Debt Recovery — Debt Recovery (Special Provisions) Act, No. 2 of 1990 — Jurisdicion of the District Court and jurisdiction of the Commercial High Court — High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 — Transaction in respect of which the District Court has jurisdiction — Whether a loan facility may be sued in the District Court or whether only a fixed loan can be sued in the District Court.

Plaintiff respondent (Bank) gave Eassuwaran Brothers Food (Pvt) Ltd. a loan facility of 100 million rupees, on the guarantee provided by the defendant-appellant (petitioners) and sued the defendants thereon for Rs. 114.1 million and interest in the District Court under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.

The defendants applied under section 6(2)C of the Debt Recovery Act for unconditional leave to defend. The District Judge ordered them to deposit Rs. 38 million as a pre-condition for filing answer. The defendants then applied to the Court of Appeal with leave against that order on the basis that the District Court had no jurisdiction over the claim as it was not in relation to a fixed term loan but related to a credit or overdraft facility. The defendants argued that the jurisdiction over that claim was in the Commercial High Court under the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996. The Court of Appeal dismissed the appeal.

HELD:

(1) The claim was a debt within the meaning of section 21(2) of the Debt Recovery (Special Provisions) Act, No. 2 of 1992 and such debt was excluded from the jurisdiction of the High Court of the Provinces (Commercial High Court) by the First Schedule to the High Court of the Provisions (Special Provisions) Act, No. 10 of 1996.

(2) In the circumstances, the District Court had jurisdiction over the claim of the plaintiff respondent.

APPEAL from a judgment of the Court of Appeal.

M. A. Sumanthiran with *Prasansani Bandaranayake* for defendants petitioner (appellants).

M. K. Muthukumar with *Kumara Seneviratne* for the plaintiff respondent.

Cur.adv.vult.

October 06, 2005
RAJA FERNANDO, J.

The Plaintiff-Respondent-Respondent Bank (hereinafter referred to as the Plaintiff Bank) filed action in the District Court of Colombo under the Debt Recovery (Special Provision) Act No. 2 of 1990 to recover a sum of Rs. 114.1 million from the Defendant-Petitioners-Petitioners (hereinafter referred to as the Defendant-Petitioner).

The Plaintiff-Bank's case was that Eswaran Brothers Food (Pvt.) Ltd. a limited liability company obtained a loan facility of Rs. 100,000,000 (Hundred million) from the Plaintiff-Bank on the guarantees provided by the Defendant-Petitioners and that Eswaran Bros. Food (Pvt.) Ltd., defaulted in the repayment of the loan facilities granted to them and the sum of Rs. 114,111,103.46 as at 02.09.2001 and a further interest at 21:5% on Rs. 97,172,734 from 03.09.2001 plus B.T.T. and defence levy thereon is due to the Plaintiff-Bank.

Upon action being instituted together with an affidavit from an authorized officer of the Plaintiff Bank and the other documents supporting this claim the Court entered decree *nisi* which was served on the Defendant-Petitioners.

The defendant-petitioners filed papers seeking unconditional leave to appear and defend the action under Section 6(2)C of the Debt Recovery (Special Provisions) Act.

The learned Addl. District Judge by his order dated 24.4.2003 ordered the defendant-petitioners to deposit Rs. 38 million (1/3rd of Rs. 114.1 million the amount claimed in the plaint) by way of security within 90 days of the Order to be permitted to file answer.

Being aggrieved by the said order the defendants-petitioners sought leave to appeal from the Court of Appeal on the ground that the learned Addl. District Judge erred in not addressing his mind to the fact that the subject matter of the purported action is a series of commercial transactions coming under the exclusive jurisdiction of the High Court of the Western Province exercising civil jurisdiction (Commercial High Court) under Act No. 10 of 1996 and that action in respect of such commercial transactions cannot be instituted under the Debt Recovery (Special Provision) Act No. 2 of 1990 in the District Court.

The Court of Appeal refused the application for special leave and the defendant petitioners filed special leave to appeal application No. SC Special Leave to Appeal No. 62/2004 in this court and obtained special leave from the court on 25.03.2004 on the following questions.

(1) Was the Court of Appeal wrong in holding that the District Court had jurisdiction in respect of this matter ?

(2) Does the definition of "debt" in terms of the Debt Recovery (Special Provisions) Act include the transaction which is the subject matter of this action ?

It is the submission on the Defendant-Petitioners that Debt Recovery (Special Provision) Act is not applicable to claims based on recovery on credit facilities or on overdraft facilities and that Debt Recovery (Special Provision) Act is applicable only to fixed/term loans where the amount due is clearly ascertainable.

The position of the Plaintiff-Bank is that the claim falls well within provisions of the Debt Recovery (Special Provision) Act and therefore the District Court has jurisdiction.

The High Court of the Provisions (Special Provision) Act No. 10 of 1996 in Section 2 states :

"Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have **exclusive jurisdiction** and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, **all actions, applications and proceedings specified in the First Schedule** to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the Province for which such High Court is established".

According to the above provision High Court shall have **exclusive jurisdiction** in respect of all matters specified in the **First Schedule.**

The First Schedule to this Act reads :

"(1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export or import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding three million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, **other than actions instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990."**

Thus it is clear from the wording of the First Schedule that if the claim in the plaint is one that comes within a "debt" under the Debt Recovery (Special Provision) Act No. 2 of 1990 as amended by Act No. 9 of 1994 the District Court will have jurisdiction.

In Section 21(2) of Act No. 9 of 1994, "debt" is defined as '**a sum of money** which is ascertained or capable or being ascertained at the time of the institution of the action, and **which is in default**, whether the same be secured or not, or owed by any person or persons, jointly or severally or as **principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution**, but does not include a sum of money owed under a promise or agreement which is not in writing ;'

The matter to be ascertained in this appeal is : Does the sum claimed in the plaint come within the definition of a debt as stated in the Debt Recovery (Special Provision) Act ?

The Plaintiff Bank is a Lending Institution in terms of Section 30(a) of the Debt Recovery (Special Provision) *Act* (vide P1 attached to the Plaint).

The Defendant-Petitioners are guarantors for the loan facility granted to Eassuwaran Brothers (Pvt.) Ltd. by the Plaintiff-Bank (*vide* P4 attached to the plaint).

In paragraphs 79 and 81 of the plaint of the Plaintiff-Bank the sum claimed has been set out and the details of the computation is also specified.

This sum is alleged by the Plaintiff-Bank as having arisen from a transaction in the course of Banking, lending, financial or other allied business activity.

The original loan application, the Guarantee Bond together with the specific requests by the Principal borrower for sub loans under the above loan agreement have been produced together with the Plaint marked P4 to P 72(a).

On the material before Court there was sufficient evidence to show that the transactions which were referred to in the Plaint of the Plaintiff-Bank fell well within the definition of "debt" in terms of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 and that the Defendant-Petitioners are the guarantors of the loan.

In the circumstances it is clear that the District Court had the jurisdiction to hear and determine this matter under the Debt Recovery (Special Provision) Act No. 2 of 1990 as amended by Act No. 9 of 1994.

The appeal of the Defendant-Petitioner-Petitioner is accordingly dismissed with costs.

S. N. SILVA, C. J. — I agree.

TILAKAWARDANE, J. — I agree.

Appeal dismissed.

VISHVANATH
vs
DIVISIONAL SECRETARY, MADHURAWALA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J
WEERASURIYA, J AND
FERNANDO, J
SC (FR) APPLICATION NO. 174/2003
8TH OCTOBER, 28TH JANUARY, 2004,
27TH MAY, 13TH JULY, 22ND AUGUST, 2005 AND 5TH JANUARY
AND 1ST FEBRUARY, 2006

Fundamental Rights — Article 12(1) of the Constitution — Authority to operate a stone quarry in 2002 — Delayed due to protests by neighbours and proceedings in the Provincial Council on a petition — Refusal of renewal of authority after 2002 — Justified by protests of neighbours who were affected — Refusal not arbitrary.

After consideration by different authorities namely 1st to 6th respondents, the petitioner was given authority and a trade permit to operate a stone quarry for 2002. Then the 1st respondent (Divisional Secretary) directed him to

suspend the work on the stone quarry as the matter was being considered by the Western Provincial Council on a petition by 7th to 20th respondents. Thereafter when he applied for a renewal of the authority including a permit under the Explosives Act, the 2nd respondent District Secretary informed him that due to protests by neighbors and the harm to the environment, the petitioner's authority will not be renewed.

HELD :

(1) The refusal to extend the petitioner's authority was not arbitrary and was justified by the protests of (neighbours) affected parties and environmental considerations.

(2) There was no infringement of the petitioner's rights under Article 12(1) of the Constitution.

Cases referred to :

1. *E. P. Royappa* vs *State of Tamil Nadu* – (1974) Air (SC) 555

2. *Jayawardena* vs *Akmeemana Pradeshiya Sabha and Others* – (1998) 1 Sri LR 316

3. *Gabcikovo* vs *Nagymaros - Project* Environmental Aspects of Sri Lanka's Ancient Irrigation System, Sarvodaya Vishva Lekha Publishers page 27.

APPLICATION for relief for infringement of fundamental rights

Saliya Pieris with *A. Devendra* for petitioner.
Rajiv Gunatillake, State Counsel for 1st to 4th and 21st respondents.
Upul Jayasuriya with *P. Radhakirishna* for 5th and 6th respondents.
Sunil A de Silva for 7th to 9th and 11th to 20th respondents.

Cur.adv.vult.

February 17, 2006
SHIRANI A. BANDARANAYAKE, J.

The petitioner came before this Court alleging that his fundamental rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution were infringed as the 2nd and 3rd respondents had refused to renew his permit under the Explosives Act and the 5th and 6th respondents had refused to renew the trade permit in respect of the petitioner's quarry.

According to the petitioner he had made an application to the 1st respondent seeking permission to operate a quarry in his land situated at

Ballapitiya. The 1st respondent had referred this application to the Grama Niladhari of Ballapitiya (West) Division and to the Environmental Officer of the Divisional Secretariat, Madhurawala. Both officers had recommended the said application. Thereafter, the said application was forwarded to the 4th respondent by the 1st respondent for necessary approval A representative of the 4th respondent had inspected the site and after conducing several tests had granted the petitioner a permit for a term of one year commencing from 21.06.2001 (P4). The petitioner's contention is that according to the aforesaid permit (P4) he was granted permission to operate a quarry in a portion of his land depicted as Lot B of the Plan bearing No. 538B dated 05.05.1962. According to the conditions set out in the said permit (P4) the petitioner was required to obtain an Environmental Protection License (EPL) from the Central Environmental Authority (hereinafter referred to as the CEA) prior to commencing operations in the quarry. The petitioner had therefore made an application to the CEA seeking an Environmental Protection License. The CEA had visited the site, had conducted several tests and had granted an Environmental Protection License in terms of Chapter 23A of the National Environmental Act, No. 47 of 1980 for a period of three years commencing from 31.08.2001 (P5). Thereafter the petitioner had made an application to the 5th respondent for a trade permit. The 5th respondent had referred the said application to a Health Officer for an inspection of the site. A Public Health Inspector had visited the site and had submitted a report and the 5th respondent had issued a trade permit for the year 2002 (P6). Thereafter the petitioner had made an application to the 3rd respondent for a permit under the Explosives Act, which was issued in January 2002 after obtaining reports from the 1st respondent and the Grama Niladhari of the area.

The petitioner averred that thereafter he had commenced developing the necessary infrastructure to quarry the land and for that purpose he had prepared a building plan and obtained permission from the 5th respondent to install a metal crusher at the site. After obtaining the approval for the building plan, the petitioner had made an application for the supply of electricity from the Ceylon Electricity Board for which he had paid Rs. 82,697 (P8, P9, P10 and P11).

According to the petitioner, while he was developing the infrastructure facilities at the site, the 7th to 20th respondents established an organization known as 'Environment Protection Organization' and launched a protest campaign against the petitioner's business, alleging that it would cause environmental pollution. Thereafter this dispute was brought to the notice of the Public Petitions Committee of the Western Provincial Council by a member of the Provincial Council. By letter dated 24.01.2002 the 1st respondent had informed the petitioner to refrain from operating the quarry since the matter was pending before the Public Petitions Committee of the Western Provincial Council (P12).

An inquiry was held and the report of the said inquiry was forwarded to the 1st respondent by the Public Petitions Committee informing that since the petitioner had obtained permits for his business, the Public Petitions Committee had no objection in respect of the petitioner's business (P16). Thereafter by letter dated 28.05.2002 the 1st respondent had informed the decision of the Public Petitions Committee and had revoked P12 (P17).

According to the petitioner, by this time the permit granted under the Explosives Act and the permit granted by the 4th respondent had expired and he had to obtain new permits, which were issued by the 3rd and 4th respondents (P18A and P18B). The permit under the Explosives Act was valid from August 2002 to November 2002, (P18A) while the permit for Industrial Mining was valid for one year with effect from 21.06.2002 (P18B).

The petitioner thereafter had made applications to renew his permits for the year 2003. By his letter dated 13.03.2003, the 2nd respondent had informed the petitioner that he would not be granted the permit under the Explosives Act as the 1st respondent had not recommended the petitioner's application due to the protest by the 7th to 20th respondents and that if the quarry is to be operative, it would interfere with the biological, physical, social, economical and cultural patterns of the area (P31). Further the petitioner averred that although he had made an application to the 5th respondent to renew his trade permit in January 2003, he had not received a reply, but the 5th respondent is declining to issue the trade permit.

The petitioner averred that he had spent around Rs. 450,000 for the purpose of purchasing the land, for infrastructure development, to obtain permits and licenses, to obtain the connection for three-phase electricity and for the purchase of explosives.

The petitioner accordingly averred that the decisions of all the relevant respondents in refusing to issue a permit under the Explosives Act and the refusal and/or suspend the trade permit for the year 2003 are illegal, arbitrary, unlawful and unreasonable.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

The Petitioner's complaint is mainly against the 2nd and 3rd respondents for not issuing a permit under the Explosives Act and the 5th and 6th respondents for not issuing a trade permit for the year 2003.

The 2nd and the 3rd respondents' contention was that they had faced difficulties in renewing the explosives license as there had been protests

by the people of the area, who were residing in and around the petitioner's quarry. The residents were complaining of the adverse effects the operation of the quarry would have on their environment and the safety of themselves and their children. Referring to the report on their environment, the residents had shown deep concern of the effects of the operation of the quarry on the natural surroundings, peace and tranquility that prevailed in and around their residences as well as the historical value of the area, where the said quarry was to operate. In view of these complaints made by the residents it had become necessary for the 2nd and 3rd respondents to re-evaluate the decision to renew the explosives license.

Learned State Counsel for the 1st to 4th and 21st respondents submitted that for the commencement of a quarry it was necessary for the petitioner to fulfil the following :

(a) a permit from the Geological Survey and Mines Bureau ;
(b) an environment protection license issued by the CEA ;
(c) a trade permit from the Local Authority to carry out the business ;
(d) an explosives permit to carry out the work in the quarry.

For the purpose of operating a quarry as well as for carrying out the blasting operations it would be necessary to have all the aforementioned permits and licenses issued by different authorities, which had been obtained by the petitioner. Learned State Counsel submitted that the purpose of requiring permits and licenses for various activities revolves around the three concepts of regulation, revenue and renewal. The contention of the petitioner was that since he had fulfilled all the necessary requirements at the time he applied for all the permits and licenses and moreover as all the relevant authorities had granted the required permits and licenses, that he is entitled to get the relevant permits and licence renewed, subject to the payment of relevant renewal fees. His position was that if it is a matter of renewal of a permit or a license, then he would be automatically entitled for such renewal.

Learned State Counsel for the 1st to 4th and 21st respondents categorically stated that renewal of permits and licenses are not done either automatically or as of right. His contention was that the three concepts, viz., regulation, revenue and renewal are inter connected. When an application is made for a specific purpose, the kind of activity is regulated to ensure that it is not harmful. After the issuance of the permit when an application is made for renewal, it would be necessary for the relevant authorities to asses the suitability of granting the requested permits and licenses.

Considering the aforementioned submission, it is evident that since the activity of the petitioner in question was directly linked with the question of environmental pollution that it became necessary for the respondents to re-consider the effects of the blasting operations prior to taking a decision in renewing the necessary licenses and permits to carry out a quarry by the petitioner. Moreover, it is also necessary to take into consideration the 1st respondent's averment that the residents of the area in and around the quarry had held demonstrations and had launched poster campaigns against the petitioner's activities and had forwarded complaints to the 1st respondent and other authorities for permitting the petitioner to operate the quarry (1R1).

It was in the backdrop of the aforementioned circumstances that the authorities involved in issuing the relevant permits had to re-assess and re-evaluate the possibility of renewing the permits and licenses issued to the petitioner.

Thus the question that has to be considered by this Court would be as to whether the allegations made by the petitioner, being the decision of the 1st to 6th respondents not renewing his licenses and deciding to carry out further assessments, would be in violation of his fundamental right guaranteed in terms of Article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and states that,

> "All persons are equal before the law and are entitled to the equal protection of the law."

Article 12(1) thus embodies a guarantee against arbitrariness in the decision making process as in Article 14 of the Indian Constitution. Referring to Article 14 in *E. P. Royappa* v *State of Tamil Nadu*[1] it was stated that,

> "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination ..... We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness."

In such circumstances it would become necessary to consider not only the allegations made by the petitioner, but also the grievances of the 1st to 6th respondents, the 7th to 20th respondents and the villagers of the area, thus making it necessary to consider the effects of the blasting and the operation of the quarry of the petitioner. The grievances of the

residents based on the aforementioned grounds were three fold, which included the destruction to the road, damage to their residences and the damage to the environment.

Access to the quarry was from the only approach way available to the residents of the area. This road is a narrow 8 foot road, which had houses on both sides. The District Land Usage Planning Officer, Kalutara had indicated in his report that, mining or quarrying could cause soil erosion and that the road was not suitable for use by heavy vehicles, which would be used for transport to and from the quarry (1R4). The report of the Geological Survey and Mines Bureau dated 13.03.2004 had observed that the houses in the vicinity of the quarry were those made of mud walls. The residents were concerned that continuous and consistent blasting over a prolonged period of time might cause the walls of the houses, especially made out of mud, to crack and later collapse.

More importantly it is to be borne in mind that several representations were made by the residents to state that there is a natural rock formation in the area and that caves in the area would be destroyed and the underground water table could be affected as a result of the operation of the quarry (1R4). Accordingly the stability of the surroundings would be threatened by way of earth slips. The culmination of all the aforementioned factors, according to the contention of the 7th to 20th respondents, was the damage to their environment in an irreparable manner.

Leaned Counsel for the petitioner contended that if the 1st to 6th respondents were to refuse the grant of permits to the petitioner to carry out blasting operations and to operate the quarry, why was he given the permits in the first instance, which decision had caused him financial loss as he now has to abandon his business venture.

As correctly pointed out by the learned State Counsel for the 1st to 4th and 21st respondents, the question at issue is not the cancellation of the permits, but the refusal by the relevant authorities of their renewal. The permit for blasting operations under the Explosives Act and the trade permit, as referred to earlier was issued only for a limited period. At the end of the stipulated duration, if it becomes necessary, the applicant would have to apply for the renewal of the licence and/or the permit. At the stage of renewal the relevant authorities would have to take into account an assessment based on the impact on the environment due to the actions taken on the basis of the permit given to him. As correctly stated by the learned Counsel for the 5th and 6th respondents, the issuance of a trade permit is not for the mere purpose of tax collection, as it entails an immense statutory responsibility on the part of the local authority in protecting and promoting the comfort, convenience and welfare of the people within its area of administration.

It is to be borne in mind that by the time the petitioner had applied for the renewal of his permits, there had been intense protests from the residents of the area in and around the petitioner's quarry on the adverse effect the quarry would have on their environment. In *Jayawardane* v *Akmeemana Pradeshiya Sabha and others*[2] considering a cancellation of an existing quarrying license this Court held that 'the strong protest of the affected, community underscored the urgency to take remedial action' and upheld the cancellation of the said existing quarry licence as it amounted to noise and air pollution. Therefore the relevant authorities had rightfully carried out the necessary assessments in order to consider whether it is appropriate to renew the permits issued to the petitioner.

Continuous assessments and monitoring process cannot be regarded as a practice alien to the issuance and renewal of permits. In a situation where permits have to be issued to operate a quarry, the assessment of the impact on the environment over such an operation will also have to be carried out from time to time and therefore will have to continue until the venture is completed. There would be no possibility for the authorities to be satisfied with the initial assessment as it would not be possible to gauge the impact only on an initial assessment. In fact this position was considered in the well known decision in the case concerning *The Gabcikovo – Nagymaros Project*[3] involving a dispute between Hungary and Slovakia on the damming of the river Danube where Justice Weeramantry in his separate opinion had clearly stated that,

> "Environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact the EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have some unexpected consequences ; and considerations of prudence would point to the need for continuous monitoring."

In fact Clause 5 of the Environmental Protection licence issued to the petitioner clearly stipulates that there should be no harm to persons or property arising from blasting activity (P5). Accordingly if there are complaints based on such blasting operations then it would certainly be necessary for the relevant authority to assess the impact on the environment. Considering all the surrounding factors regarding the operation of the quarry it is quite obvious that the 1st to 6th respondents had no possibility to renew the licence and the permit granted to the petitioner. Giving due consideration for a suitable environment for adequate living and well-being,

is included in the Universal Declaration of Human Rights, as Article 25, states that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family'. Accordingly, considering all the facts and circumstances in this case, it cannot e stated that the 1st to 6th respondents had acted arbitrarily or unreasonably when they refused the petitioner's application to renew the permits and licences issued to him.

With regard to the economical loss the petitioner has complained of, it is to be noted that, the purchase of the land and the electricity connection cannot be considered a loss since the expenditure on purchase of the land could be recovered if necessary by selling the property and the electricity connection would be considered as an improvement to the property, which would have enhanced its value. Moreover, the expenditure on the permits cannot be recovered from the respondents since there has been no cancellation of those permits. The allegation against the respondents was only on the basis of the refusal of the renewal of the permits.

For the reasons aforementioned, I declare that Article 12(1) of the Constitution had not been violated by the 1st to 6th respondents. I accordingly make order dismissing this application, but in all the circumstances of this case without costs.

WEERASURIYA, J. — I agree.

FERNANDO, J. — I agree.

Appeal dismissed.

WEERAWANSHA AND OTHERS
vs.
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT,
S. N. SILVA, CJ
FERNANDO, J AND
AMARATUNGA, J
SC FR 228/2005 WITH
SC FR 229/2005
SC FR 230/2005
8TH AND 12TH JULY, 2005

Constitutional Law - Memorandum of Understanding for Tsunami Operation Management Structure - Power of President and Government to sign the MoU - Articles 12(1) and 12(2) of the Constitution - Grant of part interim relief against exercise of governmental powers contrary to the Constitution - Articles 149(1) and 154 of the Constitution - Siting of an important Committee in Kilinochchi.

The petitioners who are members of the Janatha Vimukthi Peramuna and Members of Parliament, some of whom had been Ministers or Deputy Ministers complained that the Agreement between the Government and the LTTE (MoU) for a Tsunami Operation Management Structure is violative of Articles 12(1) and 12(2) of the Constitution, the Supreme Law of the land and the rights of voters and the people of Sri Lanka. The 3rd respondent (in FR 228 and 229) who was the 2nd respondent in FR 230 was the Secretary, Ministry of Relief, Rehabilitation and Reconstruction. He signed the MoU for and on behalf of the Government.

The MoU was mainly designed to provide relief to coastal communities in the Tsunami Disaster Zone (TDZ) constituting of Amparai, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee District and any additional lands which may be brought in by the High Level Committee.

The MoU provides for a management structure at three levels (i) the High Level Committee consisiting of a member representing the Government one nominee of the LTTE and one nominee of the Muslim Parties. That Committee lays down the policy regarding the allocation of donor funds. (ii) Regional Committee consisting of two nominees of the Government, five LTTE nominees and three nominees of Muslim Parties. Decisions have to be of consensus or by majority vote ; where the decision is prejudicial to a minority a 2/3 majority is required. The seat of the Regioinal Committee is Killinochch. That Committee is charged with the implementation of relief. The funds (foreign and local are deposited in a "Regional Fund" under a custodian jointly appointed by the Government and the LTTE to assist in the operation of relief (*vide* Clauses 6 and 7 of MoU). The fund would serve the 6 Districts referred to. (iii) District Committees which according to the MOU have already been established and are functioning. They shall continue their work in identifying the needs of the respective Districts.

The petitioners sought a declaration that the MoU infringed Article 12(1) and 12(2) of the Constitution and is void particularly as the Committees are not authorized by law and in particular since the Regional Committee exercises Governmental powers contrary to Articles 149(1) and 154 of the Constitution. They also challenged the authority of the 3rd respondent Secretary, to sign the MoU and the power of the President in that regard. They further complained that the establishment of the Regional Committe in Kilinochchi was unconstitutional in that Kilinochchi is an exclusively LTTE controlled area to which other communities had no free access. They also alleged that the LTTE had no legal standing to sign the MoU, being a terrorist organization.

The petitioners applied for a stay of the MoU, pending hearing and determination of the applications.

HELD :

(1) The MoU was placed before Parliament ; and there is no evidence that the Cabinet of Ministers was not apprised of it. If there was default in

that respect, it is for the Cabinet of Ministers and not for the court to rule on that matter.

(2) The MoU with the LTTE was valid especially in the context of the ceasefire agreement on 23.02.2002.

(3) The President was empowered by the Constitution to enter into or authorize the MoU in terms of Articles 4(b) and 33 of the Constitution.

(4) The Committee structure under the MoU is lawful even though it is not supported by a specific law. In this connection, the strict theory of positivism by Austin is untenable as explanined by Prof. H. L. A. Hart who departed from Austin's theory.

(5) As such the petitioner failed to make out a *prima facie* case for a stay of the entire MoU. But they succeeded in demonstrating that powers of the Regional Committee are govenmental and the provision for a "Regional Fund" and its administration are contrary to Article 149(1) and 154 of the Constitution as the powers are not subject to central control and audit by the Auditor General. These arrangements are ultra vires and infringe rights under Articles 12(1) and 12(2) of the Constitution. The establishment of the Regional Committee in Kilinochchi is also unconstitutional.

(6) The MoU may, therefore, be implemented after removing the illegalities pointed out by court, by depositing funds in an account with a custodian appointed according to law. Parties may also agree on a different site for the Regional Committee, other than Kilinochchi.

Cases referred to :

1. *Billimoria vs. Minister of Lands and Mahaweli Development* (78-79)1 Sri LR 10
2. *Jinadasa vs. Weerasinghe* 31 NLR 33

APPLICATION for relief for infringement of fundamental rights.

H. L. de Silva, P. C. with S. L. Gunasekara, Gomin Dayasiri and Manoli Jinadasa for petitioners in SC (FR) 228/05

S. L. Gunasekara with Gomin Dayasiri and *Manohara de Silva* for petitioners in SC (FR) 230/05

Gomin Dayasiri with Manoli Jinadasa for petitioners in SC (FR) 230/05

K. C. Kamalasabayson, P. C. Attorney-General with *P. A. Ratnayake, P. C.* Additional Solicitor General, *D. Dias Wickramasinghe,* Senior State Counsel and *Viraj Dayaratne,* State Counsel for 1st respondent (Attorney-General)

R. K. W. Goonesekera for 3rd respondent in SC (FR) 228/05

Nigal Hatch P. C. with *K. Geekiyanage* for Secretary, Ministry of Relief, Rehabilitation and Reconstruction (2nd respondent) in SC (FR) 230/05

Cur.adv.vult

15th July, 2005

SARATH N. SILVA, C. J.

The thirty-nine Petitioners in these applications are Members of Parliament. They are from a single political party, the Janatha Vimukthi Peramuna (J. V. P.) and successfully contested the general election in April, 2004, as nominees of the United Peoples Freedom Alliance (UPFA) being an alliance entered into by certain political parties including the JVP. The Petitioners have been constituents of the UPFA Government formed after the general election. The 2nd to 5th Petitioners were Ministers and Members of the Cabinet of Ministers. The 6th to 9th Petitioners have been Deputy Ministers.

The Petitioners have filed these applications alleging an infringement of their fundamental rights guaranteed by Articles 12(1) and 12(2) of the Constitution. It is contended that while the impugned executive or administrative action infringes the fundamental rights of the Petitioners directly, such action generally affects the rights of their voters and of the People of Sri Lanka.

The alleged infringement of fundamental rights relate to the Memorandum of Understanding (MoU) for the establishment of a Tsunami Operation Management Structure (P-TOMS), which has been agreed and accepted on 24.06.2005 by the 3rd Respondent, the Secretary, Ministry of Relief Rehabilitation and Reconstruction for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th Respondent for and on behalf of the Liberation Tigers of Tamil Elam (LTTE).

The preamble to the MoU refers to the tsunami that struck Sri Lanka on 26.12.2004, which destroyed human life and property on an unprecendented scale. It recites the need for all communities to co-operate on humanitarian grounds to ensure an equitable allocation of "post-tsunami funds" to all affected areas. It is further stated that in recognition of the urgent need and in a spirit of partnership the GOSL and LTTE have resolved to work together in good faith and use their best efforts to deliver relief to the coastal communities in the six Districts *viz.* Ampara, Batticaloa, Jaffna, Kilinochchi, Mullaitivu and Trincomalee.

The MoU provides for a management structure at three levels of a :

(i) High Level Committee ;
(ii) Regional Committee ; and
(iii) District Committees.

These Committees have to address the concerns of the persons in the Tsunami Disaster Zone (TDZ) defined as an extent upto 2 kilometers landwards from the mean low water line of the tsunami affected area within Sri Lanka.

The purview of the High Level Committee appears to extend to the entirety of the TDZ and clause 2(d) of the MoU empowers the Committee

to bring within the TDZ additional land area affected, provided that such areas have been directly impacted by the tsunami or directly affected by the displacement and resettlement of persons as a result of the tsunami. This Committee comprises of three members :

(i) One nominee of GOSL ;
(ii) One nominee of the LTTE ;
(iii) One nominee of the Muslim parties.

Decisions of the Committee have to be based on consensus. According to clause 5(b) the main function of the Committee is to formulate policies for the equitable allocation and disbursement of donor funds in the TDZ, based on needs assesssments that are submitted to the Committee and guided by the principle that funds should be allocated in proportion to the number of affected persons and the extent of damage.

At the next level is the Regional Committee (Clause 6 of the MoU). The geographic scope of this Committee is the area of the TDZ in the six districts mentioned above. The functions of the Regional Committee include the development of strategies for the implementation and prioritization of post-tsunami relief, project approval and management in respect of projects for post-tsunami relief, rehabilitation, reconstruction and development ; the over-all monitoring of projects and fund management as provided in Section 7. This section provideds for the establishment of a Post-Tsunami Coastal Fund for the six districts to be called the "Regional Fund". The fund consists of "unspecified (program)" and "secretariat funds". The "unspecified (program)" funds consist of exclusively of foreign funds, whilst "secretariat funds" consist both foreign and local funds.

It is provided that parties meaning, the GOSL and the LTTE shall appoint a suitable multi-lateral agency to be the Custodian of the Regional Fund. The purpose of the Regional Fund shall be to expeditiously make funds available following the approved procedures to facilitate and accelerate relief, rehabilitation, reconstruction and development of tsunami affected areas of the six districts referred to above.

It futher provides that the parties meaning the GOSL and LTTE and the Custodian shall agree on a mechanism for the establishment and operation of the Regional Fund.

According to section 6(c), the Regional Committee will consist of (i) Two members nominated by the GOSL (ii) Five members nominated by the LTTE one of whom shall serve as Chairperson (iii) Three members nominated by the Muslim parties.

The decision making process given in clause 6(e) is that they will be based on consensus and in the event that a consensus cannot be reached by a simple majority.

It further provides that if the decision has an adverse effect on a minority group as acknowledged by at least two members of the Regional Committee, the decision will require the approval of 2/3 majority. In the event a proposal from a District Committee does not get a simple majority and if required by two members the rejection of such request will require 2/3 majority. In terms of section 6(f) the Regional Committee shall be located in Kilinochchi.

At the next level are District Committees, provided for in section 8. The functions of each District Committee is to identify the needs of the TDZ within the District Prioritization of needs, the submission of recommendation to the Regional Committee and monitoring and reporting on progress to the Regional Committee. There is no specific provision with regard to the composition of a District Committee and section 8(c) states that the Committee "already established and well functioning shall continue their work"

The Petitioners contend that the entering into of the MoU, the management structure of P-TOMS, and the respective powers and functions constitute an infringement of their fundamental rights guaranteed by Article 12(1) of the Constitution, for the following reasons :

(i) The 3rd Respondent does not have any authority to enter into the MoU for and on behalf of the Government of Sri Lanka ;
(ii) The MoU does not specify that the 3rd Respondent has been authorized by the President in this matter and in any event, even the President cannot grant such authority on her own responsibility in view of the provisions of Articles 42 and 43 (1) of the Consitution.
(iii) There is no legal basis to enter into the MoU with the LTTE, which is not an entity recognized by law and which is identified with terror, violence, death and destruction.
(iv) The powers and functions of the Committee especially that of the Regional Committee are governmental in nature and content and cannot be validly conferred on such Committee in the manner contemplated in the MoU.
(v) The foreign funds committed by the donors to carry out tsunami relief through the Government, from part of the funds of the Republic and should be disbursed and accounted for in the manner provided in the Constitution and the applicable laws and procedure. The provisions in the MoU for the Regional Fund and its management by the Regional Committee are inconsistent with these legal requirements.

On the basis of the foregoing it is contended that the MoU set up a structure and lays down procedures that are contrary to the rule of law and deny the Petitioners equal protection of law as guaranteed by Article 12(1) of the Constitution.

It is further contended that the MoU with special provisions in relation to six districts only of the TDZ with the establishment of a Regional Committee and a Regional Fund, discriminate against citizens in the area outside their districts who have been equally or worse affected by the tsunami, on the basis of place of birth and residence and as such the fundamental rights guaranteed by Article 12(2) of the Constitution is infringed.

The matters drawn in issue by the Petiontioners in relation to :

(i) The ambit of Executive power of the President ;
(ii) The MoU ex-facie agreed and accepted by the Government and the LTTE ;
(iii) Structure intended to be set up under the MoU in the form of Committees and their composition ;
(iv) The powers and functions of the Committees and the financial arrangements.

are indeed unique and unprecedented in every respect.

The final relief sought by the Petitioners is that the MoU be declared void and invalid in law as being an infringment of their fundamental rights guaranteed by Article 12(1) and 12(2) of the Constitution. They have sought interim relief to restrain the Respondents from taking any steps to implement the MoU pending the final determination of these applications.

From the Petitioners' perspective, if the impugned executive or administrative action is continued pending the final determination of these applications, which would necessrily take considerable time, the final relief would be of no avail. On the other hand, as contended by Counsel for the 1st - 3rd Respondents, if the MoU is not implemented forthwith, urgent humanitarian assistance could not be granted to people of this country, especially in the six districts referred to, who have suffered and continue to suffer, untold hardship and tragedy from the natural disaster that befell them. In this connection, it cannot be disputed that the interest of these helpless people should be borme firmly in mind.

As regards the matter of granting interim relief, I think it appropriate to refer to the provisions of Article 126(4) of the Constitution, which sets out the powers of the Court to grant relief in the exercise of its jurisdiction for the protection of fundamental rights.

Article 126(4) reads as follow :

"The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances"

It is implicit in any provision conferring power that such power should be exercised according to law. This is the basic premise of legality which would necessarily be attached to the exercise of power. If the element of legality is read into Article 126(4) the provision would read as follows :

"The Supreme Court shall have power to grant such relief or make such directions, *according to law* as it may deem just and equitable in the circumstances.

The words in italics have been included by way of interpretation as concomitant of the power to grant relief. Accordingly the relief granted by this Court should have the effect of converting the illegality, if any, which constitutes the infingement, to a situation of legality, in a manner that is just and equitable in the circumstances of the case.

It has been contended that these applications have been filed in the public interest. Therefore the just and equitable effect of the relief granted should permeate the entirety of the public interest drawn in issue and necessarily include the interests of the victims of the tsunami in the six districts referred to above. The observations made above with regard to the relief that may be granted in these applications would in my view apply with equal force to the matter of granting interim relief. However, an interim order cannot encompass the entirety of the relief that may be considered at the end of the case since an interim order does not follow upon a full adjudication of the matter.

An interim order is generally referred to as "Stay Order" because it is primarily intended to preseve that status quo that prevailed prior to intervention of the impugned action. The Court cannot be unmindful of the consequences that may necessarily follow from such an order. In view of these ramifications, it is appropriate at this stage to consider the basis and the criteria generally applicable to the granting of interim relief.

In the case of *Billmoria vs Minister of Lands, and Mahaweli Development*[1]. this court considered the aspects relevant to an interim order to stay all proceedings in an acquisition of land under the Land Acquisition Act. Samarakoon C. J. at page 13 made the following observations :

".....In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherernt or implied powers of Court. Without such power the Court's final orders in most cases would if the Petitioner is successful be rendered nugatory and the aggrieved party will be left holding an empty decree worthless for all purposes"

I would describe this observation as setting out the object or purpose for which interim relief is granted. It is to prevent the injustice that would otherwise result to the party invoking jurisdiction if the final relief obtained by him is of no avail since the impuged illegality has by then run its course to an extent that may be considered as irretrievable or irremediable. Counsel for the Petitioners contended, as noted above, that the MoU has a limited span of operation and if the Management Structure provided for is established and become functional whatever final relief they may obtain would be of no avail.

The Petitioners who have been constituents of the Government some holding Ministrial portfolios contend that they have been kept in the dark as to the terms of the MoU, which was made public only as a fait accompli. The contention of Mr. R. K. W. Goonesekera, for the 3rd Respondent is that the MoU culminated a process of "germination" that spanned several months. Whilst this contentioin may be correct, considering the submission of the Petitioners that they being an integral part of the Government were kept in the dark, it has to be surmised that the "germination" referred to did not take place in the public domain. Be that as it may the Court has to note that transparency being an essential component of good governance has not been there in the process of "germination" referred to by Mr. Gunasekara. The submission of the Petitioners is that the MoU hatched in secrecy with its manifest illegalities amounting to an infringement of their fundamental rights should not be allowed to run its course pending as adjudiction of their rights by this Court. These consideration bring the Petitioners case for interim relief fairly withn the dicta in Billimoria's case provided they satisfy the criteria applicable to grant interim relief.

In considering the nature and the extent of the interim relief to be granted it is relevant to advert to the criteria generally applicable to the grant of interim relief. The criteria that is generally applicable is to be discerned from the judgments of this Court constituting precedents that date to the judgment in the case of *Jinadas vs. Weerasinghe*[2]. The criteria fall under 3 different heads. I would summariase the criteria under the following heads :

(i) **Prima Facie Case**

The party seeking interim relief should make out a strong *prima facie* case of an infringement or imminent infringement of a legal right. That, there is a serious question to be tried in this regard with the probability of such party succeding in establishing the alleged ground of illegality.

(ii) **Balance of Covenience**

Under this head the main factor to be considered is the uncompensatable disadvantage or irreparable damage that would result to either party by granting the interim relief or the refusal thereof.

(iii) **Equitable Considerations**

This involves the consideration of the conduct of the respective parties as warrants the grant of interim relief.

The alleged infringement relates to the MOU which provides a management structure with functions and powers assigned to Committees at three levels and in examining the criteria set out above the question to be considered is whether the Petitioners have established a strong prima facie case in respect of the entirety of the MOU or in respect of any clearly

severable part or parts of the MOU. If so, the interim relief has to be restricted to such parts only.

The criteria generally described as balance of convenience and equitable consideration would encompass the matters stated above with regard to the relief that may be granted for the protection of fundamental rights, as set out in Article 126(4), and considered in the preceding section of this judgment. On the basis of the analysis, it would be necessary to consider the disavantage and damage in relation to both parties. Since the MOU is intended to deliver urgent humanitarian assistance to the persons who suffered from the tsunami in the six districts referred to above, if there are any parts of the MOU in respect of which the Petitioners establish a strong prima facie case, it is incumbent on this Court to take the further step of converting the alleged illegality in respect of which a strong prima facie case has been made to a situation that is legal and according to law and thereby ensure that the interim relief would not result in undue hardship to the persons who suffered from the tsunami in these districts.

In the background stated above I would now examine the matters drawn in issue by the Petitioner and itemized as (i) and (ii) above, relating to the ambit of the executive power of the President and whether the M.O. U. could have been validly entered into for the objectives as set out in the preamble.

Mr. H. L. de Silva, P. C. contended that although the President is identified in Article 4(b) as the single authority to exercise the executive power which forms part of the sovereignty of the People, the exercise of such power by the President is circumscribed by the provisions of Articles 42 and 43(1) of the Constitution. These Articles read as follows :

42. "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Consitution and any written law, including the law for the time being relating to public security.

43. (1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

On a careful scrutiny it is seen that Article 42 specified the responsibility of the President to Parliament for the due exercise, perfomance and discharge of the powers and duties under the Constitution and the law. Article 43(1) similarly lays down the collective responsibility of the Cabinet of Ministers to Parliament in respect of the direction and control of Government. These two provisions relating to responsibility and answerability for the exercise of executive power. The fact that these provisions lay down the element of answerability bring home the point that the exercise, performance and discharge of executive power and

functions is primarily vested with the President. The stage at which answerability arises is upon the exercise of power. It could not be contended on the basis of these provisions that the President should consult or seek prior concurrence of either the Parliament or Cabinet of Ministers for the exercise of Governmental power. However, the element of responsibility and answerability postulates that the President, where it is necessary may seek the concurrence of the Cabinet of Ministers and of Parliament.

In this instance the MOU has been tabled in Parliament and there is no evidence before this Court that the Cabinet of Ministers has not been apprised of the MOU at the time of its execution. In any event if there is a default in these respects on the part of the President, they are matters for immediate concern of the Cabinet of Ministers and Parliament and not of this Court.

Counsel for the Respondents contended that the ambit of executive power of the President should be considered in the light of the provisions of Article 4(b) and 33 of the Constitution. The relevant provisions of Article 33 which specifically deals with the powers and functions of the President reads as follows :

In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power—

(a) .....
(b) .....
(c) .....
(d) .....
(e) .....
(f) *to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, customs or usage he is required or authorized to do.*

These provisions in my view confer on the President not only specific powers but also a residuary power, in respect of functions that broadly come within the realm of the executive, It cannot be disputed that as Head of the State, Head of the Executive, and of the Government, being the description of the status of the President in Article 30(1), in appropriate circumstnaces the President may lawfully act on behalf of the Republic and enter into agreements and arrangements that may be necessary to carry out essential Governmental functions.

The preamble to the MoU sets out the basis on which it was entered into, being the need to provide urgent humanitatian assitance to the persons who have extensively suffered on an unprecedented scale from the tsunami that struck Sri Lanka in December 2004. As Head of the Executive and of

the Government it is the duty of the President to ensure that essential relief and assistance for rehabilitation, reconstruction and development be made available to the persons who have thus suffered. Hence in my view there is no illegality in the President entering into a MOU for the objectives and reasons set out in the preamble. The Petitioners have failed to make out a strong prima facie case in respect of matters (i) and (ii) drawn in issue by them.

Mr. S. L. Gunasekara, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organization that caused tremendous loss of life and property in this country. The contention is that even assuming that the President could enter into a MOU for the objectives and reasons stated in the preamble, the other party to the MOU is not an entity recognized in law and should not be so recognized due to antecedent illegal activities of the organization.

In this regard I have to note that the matter so strenuously urged by Counsel cannot by itself denude the status of the 4th Respondent to enter into the MOU. The circumstances urged by Counsel cannot and should not have the effect of placing the 4th Respondent and the Organization that he seeks to represent beyond the pale of law. We have to also to bear in mind that already a Ceasefire Agreement has been entered into on 23.02.2002 between the Government of Sri Lanka and the LTTE. which according to section 2(b) of the MOU, "shall continue in full force and effect".

In these circumstances there is no illegality in entering into the MOU with the 4th Respondent for the purpose of rendering humanitarian assitance as contemplated in the preamble to the MOU. The Petitioners have failed to establish a strong prima facie case in respect of this matter as well. In the result the Petitioners have failed to make out a strong prima facie case on any ground that warrants interim relief as to the entirety of the MOU.

From this point, I have to examine the submissions with regard to the specific provisions of the MOU in relation to the Committees and their respective powers and functions.

The basic submisison of the Counsel for the Petitioners in this regard is that the three Committees proposed to be set up as the Operational Management Structure would not derive authority from any law that is applicable. The Respondents' reply is that these Committee are adhoc structures intended solely to ensure the effective disbursement of post-tsunami relief in the six districts referred to above. The Respondents have not identified the provisions of any statute or any other applicable law on the basis of which the Operational Management Structures are being set up. Considering the objectives as set out in the preamble to the MOU and the fact that the structure is set up to facilitate the disbursement of

urgent humanitarian assistance, it would not be ncecessary, in my view to derive any specific authority from a statute, as contemplated by the Petitioners. The submission of the Petitioners that even in such circumstances the Structure sought to be established should dervie authority from a statute imposes an undue rigidity to a process that must retain a degree of flexibility to ensure that all persons who have been affected are adequately cared for.

In this connection I would refer to a relevant passage from a book on Jurisprudence under the title the "Concept of Law" by Professor H. L. A. Hart. In this book, regarded as a leading work on Jurisprudence, Hart has departed from the strict theory of positivism expounded by Austin that authority should flow down from a clearly defined sovereign body which would in this instance be the legislature. Hart has posed the difficulties that would result in strict legality to cover every situation that may arise, as follws :

".....if the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provisions could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.

Plainly this world is not our world : human legislators can have no such knowledge of all the possible combination of circumstances which the future may bring....."

(Concept of Law — H. L. A. Hart — 2nd Ed. Page 128)

Hart has continued the analysis and postulated what he described as the open texture of law stated at page 135—

"The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case....."

The tragedy brought about by the tsunami, the human suffering and the loss of property could not have been anticipated in its full dimension in any preceding statute. Furthermore, the matter of reaching the persons who have been affected by this tragedy in certain parts of the six districts referred to is compounded by the presence of LTTE with which organization a Cease-fire Agreement has been entered into as noted above. This combination of circumstances necessarily lead to a situation where an arrangement could be made by the Head of Government to ensure effective distribution of humanitatrian aid. The Management Structure set up in

MOU has to be primarily seen in this light. In the Circumstances in so far as the Management Structure is not reposed with any power that would impinge on the rights of the people or detract from the normal and statutory functions of Government and of financial control. there would be no basis to restrain the functions of the structure by way of an interim order issued by this Court.

Counsel for the Petitioners, when narrowed down to this issue, quite rightly viewed the matter in the light stated above and did not move for any interim relief in respect of the High Level Committee and the District Committee, since their functions are purely to assist the Governmental authorities on whom the final responsibility lay. However, they urged strongly that interim relief be considered in relation to the Regional Committee which is in terms of the MOU, vested with Governmental powers and control in relation to public finance. In this connection it is to be seen section 6(b)(ii) and (b)(iv) deal specifically with Governmental functions and management of public finance. Section 6(b) (ii) reads as follows :

"Project approval and management, with respect of projects for post-tsunami relief, rehabilitation, reconstruction and development;

This is necessarily a function that comes within the executive to be handled by the Ministry of which the 3rd Respondent, is the Secretary, in accordance with the provisions that have been laid down in applicable law and procedures.

Sub-section (iv) reads as follows :

"Fund management, with respect to the fund specifically defined in Section 7"

The provisions of section 7 which establish the Regional Fund have been reproduced before. The Fund consists of foreign funds and secretariat funds, including both foreign and local funds. It is clear from the provisions of the MOU that the foreign funds referred to are the donations to be received by Sri Lanka from multi-lateral and bi-lateral donors. These funds when received by the country should in terms of Article 149(1) of the Constitution be paid into the Consolidated Fund and be disbursed in terms of the Constitution and the applicable law. Expenditure from this fund would be subject to audit by the Auditor General, as provided for in Article 154 of the Constitution. These are salutary safeguards included in respect of public finance to ensure transparency in the matter of disbursement of funds and proper accountability. Multi-lateral and bi-lateral donors being fully committed to the rule of law, transparency and good governance would necessarily insist that funds committed by them magnanimously for a humanitarian objective be properly dealt with and accounted for in this country, according to the applicable law. The provisions in section 7 read with 6(b)(iv) are plainly inconsistent with the Constitution

and applicable law. Thus the Petitioners have in my view established a strong *prima facie* case for interim relief in respect of section 6(b)(ii) and 6(b)(iv) and section 7 of the MOU. A question now arises as to whether any measures could be imposed by this court to convert the situation of a *prima facie* illegality referred to above to one of legality so that it would be just and equitable from the perspective of all parties concerned.

In this connection it is relevant to note that section 6(i) coming within the purview of the Regional Committees provides for a Project Management Unit (PMU) to be established to manage the projects approved by the Regional Committee. When the operation of section 6(b)(ii) with regard to project approval and management by the Regional Committee is stayed, necessarily the provisions of sub-paragraph (i) would have no effect. However, considering the objectives as set out in the preamble it would be necessary to establish a Project Management Unit that would exercise the Governmental functions in respect of projects for relief, reconstruction, rehabilitation and development in these districts. Therefore the 2nd and 3rd Respondents are at liberty to establish a Project Management Unit in accordance with applicable procedures. The unit so established would take into account the measures recommended by the Regional Committee in terms of section 6(b)(i) and the Regional Committee would retain its functions in terms of section 6(b)(iii) of overall monitoring of projects to ensure that relief is equally received by all persons who have been affected by tsunami.

A specific submission has been made with regard to the provisions of section 6(f) being the location of the Regional Committee. It is provided that the Regional Committee shall be located at Kilinochchi. Counsel for the Petitioners contended that persons from certain part of the six districts referred to would not have easy access to Kilinochchi. This matter was not disputed by Counsel for the Respondents. The safeguards contained in the decision making process set out in section 6(e) to be effective to any "minority group" the members of the Committee should have no fears with regard to the proper exercise of their choice. The Petitioners' contention of the lack of such an environment of freedom in the designated place cannot be disputed. In the circumstances the Petitioners have made out a strong *prima facie* case in respect of section 6(f). Accordingly interim relief is granted restraining the operation of this provision. The parties would be at liberty to decide on a suitable site to locate a Regional Committee on the basis of the criteria set out below :

(i) That the place be centrally located within the TDZ of the six districts referred to ;
(ii) That all persons from every part of the TDZ of these districts should have free and unhindered acces to such location

The criteria set out above would result in the illegality referred to above being converted to situation according to law.

The findings stated above are summarized as follows :

(i) an interim order is not granted in respect of the entirety of the MOU referred to and the Structure as provided in the MOU consisting of Committees may be established and become functional subject to the restrictions as are imposed by this judgment ;

(ii) the operation of Sections 6(b)(ii), 6(b)(iv), 6(b)(f), 6(l) and 7 of the MOU are stayed pending the final determination of this application ;

(iii) the funds both foreign and local intended to be deposited in the Regional Fund as provided in Section 7 may instead be dealth with according to the provisions of the Constitution and deposited in a separate account with a Custodian to be designated, if lawfuly authorized ;

(iv) the location of the Regional Committee may be decided on by the parties in compliance with the criteria that has been stated ;

(v) a Project Management Unit (PMU) may be set up in lieu of the Unit provided for in Section 6(l) by the relevant Ministry in accordance with the applicable procedure. Such Project Management Unit would be at liberty to coordinate and implementation the project with the District Committee, the Regional Committee and the High Level Committes as provided in the MOU.

The foregoing will be operative till the final determination of these applications.

FERNANDO, J - I agree,

AMARATUNGA, J- I agree,

Relief granted partly by limited stay orders.