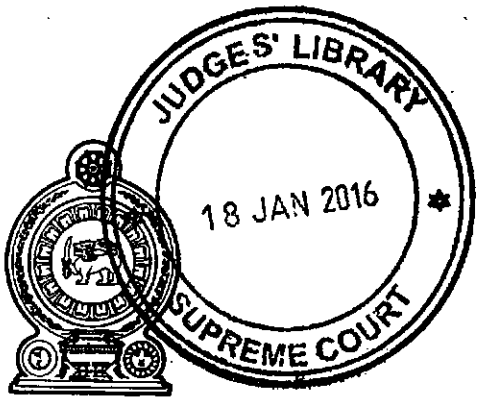


# THE
# Sri Lanka Law Reports

**Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka**

**[2006] 1 SRI L. R. - Part 8**

**PAGES 197 - 224**



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# DIGEST

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ulterior motive of justifying the political stance taken by you in violation of the Constitution of the party ....

and ends on an ominous note as follows :

"Finally I would like to remind that the Muslims of the north east will not pardon you for the treacherous act committed and the Party too will take appropriate action against you in due course."

To say the least, the Leader has thrown the principles of natural justice and fairness to the winds. The hostile comments made well before the commencement of any disciplinary action by itself establish the allegations of the Petitioners of mala fides and of bias. To make matters worse, the Leader has precipitously stated that the Party will take action against the Petitioners is due course. Thereby he has assumed the authority to decide on the matter for the entire Party. This is far removed from the democratic process, which should characterize the action of a political party and the degree of fairness, being a sine qua non of any disciplinary action that may be validly taken by a political party in respect of any of its members.

In this background the Court has to examine the impugned disciplinary process with a greater degree of caution to ascertain whether the initial stigma of bias and mala fides have been removed in the course of the disciplinary action allegedly taken.

The letters dated 19.11.2004, being the show cause letters have been sent by the Secretary General of the Party on the basis of the direction of the High Command. President's Counsel for the Petitioners contend that minutes are kept of meetings of the High Command. They have referred to documents "C" and "D" being minutes of the High Command meetings held on 10.05.2004 and 20.09.2004 produced by the Respondents. These documents establish that the minutes of previous meetings are read and adopted as accurate records, on being proposed and seconded to that effect by the members. The Respondents have failed to produce any of the minutes of any of the meetings of the High Command at which decisions are said to have been taken with regard to disciplinary action against the Petitioners.

The two letters dated 1.03.2005 sent by the Secretary General requiring the Petitioners to attend meetings of the High Command and the Politbureau on successive dates purported to be sent on the basis of a decision of the High Command and Politbureau. A question necessarily arises as to who changed these decisions within three days of the Petitioners pointing out the anomaly of attending two sets of disciplinary inquiries. We have to make this observation since the letter requiring the Petitioners to attend the disciplinary inquiry before the High Command has been sent on 14th March in reference to the letter of 11th March sent by the Petitioners. There could possibly have been no meetings held both of the High Command and Politbureau within such a short space of time.

The disciplinary inquiry itself is said to have been held at the meeting of the High Command at Kings Court of Trans Asia Hotel. Colombo on 23.03.2005, commencing at 7.00 p.m. Since the final decision to expel the Petitioners is said to have been made in this meeting it was essential for the Respondents to have produced the minutes of the meeting that indicate the persons who were present and the manner in which the serious issues raised by the Petitioners were considered before a final decision was made. The minutes would ordinarily have to be confirmed at the next meeting of the High Command. The letters of expulsion do not indicate the meetings at which the decisions as to the expulsions were confirmed by the High Command. These infirmities necessarily lead to the inference that the Secretary General has been sending a series of letters at the dictation of another and not on the basis of any decisions of the High Command or of the Politbureau, that would ordinarily have been recorded in the form of minutes of such meetings.

In the case of *Tilak Karunaratne vs Sirimavo Bandaranaike and others*[1] Dheeraratne J., examined the nature of the jurisdiction conferred on this Court in terms of provisions of Article 99(13) (a). He has made the following observations at page 101-

*"The nature of the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99 (13) (a) is indeed unique in character; it calls for a determination that expulsion of a Member of Parliament from a recognised political party on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member*

*of Parliament becomes vacant. It is this seriousness of the consequence of expulsion which has prompted the framers of the Constitution to invest that unique original jurisdiction in the highest court of the island, so that a Member of Parliament may be amply shielded from being expelled from his own party unlawfully and/or carpriciously. It is not disputed that this Court's jurisdiction includes, an investigation into the requisite competence of the expelling authority, an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature ; an investigation as to whether there was breach of principles of natural justice in the decision making process; and an investigation as to whether in the event of grounds of expulsion being specified by way of charges at a domestic inquiry the member was expelled on some other grounds which were not so specified"....*

It is clear from the observation cited above that this Court has to examine the requisite competence of the expelling authority and the nature of the decision making process including that of the "domestic inquiry" to be satisfied as to its bona fides and the compliance with the principles of natural justice.

The 1st to 3rd Respondents have failed to produce any evidence as to any of the foregoing matters which the Court has to examine to determine the validity of the expulsion.

In the case of *Gamini Dissanayake* Vs *M. C. M. Kaleel and others* [2] Kulatunga, J. in delivering the majority judgment of this Court observed as follows:

"The right of a MP to relief under Article 99 (13) (a) is a legal right and forms part of his constitutional rights as a MP. If his complaint is that he has been expelled from the membership of his party in breach of the rules of natural justice, he will ordinarily be entitled to relief and this Court may not determine such expulsion to be *valid* unless there are overwhelming reasons warranting such decision. Such decision would be competent only in the most exceptional circumstances permitted by law and in furtherance of the public good the need for which should be beyond doubt. As Megarry J said in *Fountaine* vs *Chesterton* (Supra)".....If there is any doubt, the applicability of the principles of natural justice will be given the benefit of that doubt" (cited by Megarry J in *John* vs *Rees)* and the expulsion will be struck down."

The observations that the Court may not determine an expulsion to be valid unless there are overwhelming reasons warranting such decision and that such a decision will be competent only in the most exceptional circumstances and in furtherance of the public good the need for which should be beyound doubt have been made considering the serious repercussions that follow upon an expulsion of a member. Ordinarily a Member of Parliament would vacate his seat only if his election is declared void or if he becomes subject to any of the disqualifications as are specified in the Constitution. Therefore, the expulsion from the party which visits the same consequence on a member should be made only for cogent reasons that warrant such extreme action. The reasons have to transcend personal and parochial considerations and should rest on a broader foundation of the public good.

The sequence of events outlined above based entirely on the documents that have been produced reveal that prior to disciplinary action being taken a serious dispute had arisen between the Petitioners and the Leader of the Party. As noted, the matters raised by the Petitioners relate to important questions of policy to be decided by the Party in the larger interests of the electorate being the Muslims of the North East. The reply of the Leader as contained in letter dated 05.11.2004 does not state any firm position with regard to these questions of policy but descends to a personal tirade against the Petitioners.

The burden of proof is on the Respondents to satisfy the Court as to the competence of the expelling authority, being in this instance the High Command of the Party. To get to this point it is the burden of the Respondents to establish that the validly constituted High Command convened and took the decision reflected in the several letters written by the General Secretary. At the least, the Respondents should have produced the book containing minutes of the meeting of the High Command that include the minutes of the relevant meetings. They have failed to produce even such *prima facie* evidence of the meetings. It is also the burden of the Respondents to satisfy this Court that the High Command considered the evidence and the relevant material in respect of the charges that have been made against the Petitioners in the light of the matters urged by the Petitioners (in their reply to the show cause notice) and came to findings adverse to the Petitioners from the perspective of the overall interests of the Party and its electorate. The Respondents have failed to adduce any

such evidence. Importantly, considering the personal animus displayed by the Leader prior to disciplinary action being taken, the Respondents, should have adduced evidence to establish that the decision making process was devoid of any taint of bias against the Petitioners. The Respondents have failed to adduce any such evidence as well. Thus we hold that the Respondents have failed in every respect to satisfy this Court as to the validity of the impugned expulsions.

We accordingly declare that the expulsions effected by letters dated 04.04.2005, of the three Petitioners are invalid. Accordingly their seats in Parliament shall not become vacant pursuant to the purported expulsions.

The applications are allowed with costs payable to the Petitioner by the 1st, 2nd and 3rd Respondents.

In relation to Application No. 4 of 2005, the letter dated 02.05.2005 addressed to the Secretary General of Parliament by the United National Party stating that the Petitioner in that application has ceased to be a member of the Party from 05.04.2005 has been admittedly sent on the basis of the expulsion of the Petitioner from 1st Respondent Party by letter of 04.04.2005.

Learned President's Counsel for the United National Party conceded that the Party had no direct interest in this matter and would abide by the decision of this Court on the basis of the challenge to the impugned expulsion as contained in the letter of 04.04.2005.

Accordingly, in Application No. 4 of 2005, we make a further declaration that the impugned expulsion as contained in letter dated 02.05.2005, to the Secretary General of by Parliment by the United National Party in also invalid.

**SARATH N. SILVA, C. J.**

**NIHAL JAYASINGHE, J.**

**N. K. UDALAGAMA, J.**

**N. E. DISSANAYAKE J.**

**RAJA FERNANDO, J.**

*Expulsion determined invalid*

# CHITRA MANOHARI PERERA
# VS
# SHANTHI PERERA

SUPREME COURT
S.N. SILVA, CJ
DISSANAYAKE, J. AND
FERNANDO, J.
SC APPEAL No. 83/2003
C.A. No. 792/2000 (F)
D. C. COLOMBO CASE No. 4307/T
9TH JUNE AND 9TH JULY, 2004

*Civil Procedure Code - Testamentary procedure-Citation under section 712 and order under section 716 of the Code— Whether order under section 716 is a final order giving a right of appeal under section 754(1) and 754(3) of the Code or an incidental order giving only a right of appeal under section 754(2) by way of an interlocutory appeal, with leave to appeal.*

This appeal relates to the estate of Emmanuel Perera who died on 13.07.1965 leaving a will. The appellant who is described in the judgement as the petitioner (Chitra Manohari Perera) was finally appointed in the room of the deceased executor. This appeal is in respect of an order made by the District Judge under section 716 of the Civil Procedure Code upon a citation made under section 712 of the Code against the respondent (to give up property of the estate which had been withheld by the respondent).

An appeal was lodged against the District Judge's order under sections 754(1) and 754(3) of the Code. The Court of Appeal set it down for argument.

**Held:**

The order made by the District Judge was an incidental order in respect of which an (interlocutory) appeal had to be made with leave of court under section 754(2) as such order did not finally dispose of the rights of parties, while the testamentary case was pending. It was not a final order from which an appeal under sections 754(1) and 754(3) could be made.

**Cases referred to :**

1. *Siriwardena* vs *Air Ceylon Limited* (1984) 1 Sri. L. R. p. 286
2. *Ranjith* vs. *Kusumawathi and Others* (1998) Sri L. R. 232
3. *Salaman* vs. *Warner and Others* (1891) 1 Q B 734

**APPEAL** from the judgement of the Court of Appeal.

*Romesh de Silva, P. C. with H. Amarasekera, H de Livera and Sugath Caldera* for appellant.

*M. B. Ratnayake* for respondent.

*Cur. adv. vult*

June 16, 2005

**NIMAL DISSANAYAKE, J.**

J. K. Emmanuel Perera died on 13th July, 1965, leaving a last will and testament naming his brother J. K. Eugene Perera as Executor. The said J. K. Eugene Perera instituted testamentary proceedings bearing No. 4307/T in the District Court of Negombo wherein the said last will was proved and probate obtained, in the name of the original petitioner J. K. Eugene Perera.

On an appeal made to the Supreme Court against the said grant of Probate, a re-trial was ordered.

Thereafter the said J. K. Eugene Perera had died and his widow K. Emalin Perera had been substituted in his place. Subsequently the said Emalin Perera had been granted Probate.

The said Emalin Perera by her application dated 1st February, 1999, applied for citation under Section 712 of the Civil Procedure Code on the 6th Respondent-Respondent-Appellant-Respondent.

Emalin Perera died and her daughter Chitra Perera the 4 (b) Respondent-petitioner-respondent applied to be substituted in the place of the deceased Emalin.

The learned District Judge by his two orders both dated 8th September, 2000, permitted the citation and permitted Chitra Perera (who shall hereinafter be referred to as the petitioner) to be substituted in the room of the deceased substituted Petitioner Emalin Perera.

The Respondent filed a notice of appeal followed by a petition of appeal purporting to act under Sections 754(1) and 754(3) of the Civil Procedure Code.

When the said appeal had come up for hearing before the Court of Appeal, the following two preliminary objections had been taken on behalf of the petitioner, namely-

(1) that the petition of appeal was out of time and warranted rejection,

(2) that there was no right of appeal from the order of the learned District Judge in terms of Section 754 of the Civil Procedure Code.

Both parties have consented before the Court of Appeal to conclude the matter by way of written submissions.

However, it appears that the petitioner had abandoned her 1st preliminary objection before the Court of Appeal and had referred only to the 2nd preliminary objection in her written submissions.

The learned Judge of the Court of Appeal by his order dated 18.06.2003 dismissed the preliminary objections and set down the appeal for argument.

Special leave has been granted by this Court on the following two questions of law :-

*(a)* whether the order dated 08.09.2000, is a final judgement or order not having the effect of a final order ?

*(b)* whether in the circumstances of the case should the 6th Respondent have filed a leave to appeal application ?

The contention of learned Counsel for the petitioner in brief was that there can only be one judgment in a summary case and as against the other orders the correct procedure to be followed, in the event of an appeal was by way of a leave to appeal application, under Section 754(2) of the C. P. C.

Therefore he has contended that the procedure for appeal against the impugned order of 8th September, 2000 is by way of an application for leave to appeal. Since no application for leave to appeal has been filed, the appeal had to be rejected and therefore dismissed.

On the other hand, learned counsel for the Respondent contended that the order dated 8th September 2000, permitting the application for citation has to be issued under Section 715 of the Civil Procedure Code only after an Inquiry, and has to be proceeded in like manner and with like effect as

upon a trial, and that after the conclusion of the trial like inquiry, judgement must be entered.

Therefore, in terms of Section 754(5) the impugned order of 08.09.2000 has the effect of a judgment and therefore a right of final appeal lay against the said order and he argued that hence the judgment of the Court of Appeal was correct. It is apparent that the learned District Judge has acted under Section 712 and had held an inquiry and had made an order of citation under Section 716 of the Civil Procedure Code, to bring into the credit of the case all rents admittedly received by the Respondent in respect of a number of premises bearing numbers 179 and portions of No. 181 which are morefully depicted in plan bearing No. 1662/1.

The question before this Court presently is whether the order dated 08.09.2000 has the effect of a final judgment in terms of Section 754(1) and (5) and therefore whether the Respondent had a right of final appeal in terms of Section 754(1) of the Civil Procedure Code.

In *Siriwardena* vs. *Air Ceylon, Limited* [1] Sharvananda J (as he then was) after an analysis of a number of English decisions, at page 297, laid down some tests to be applied to determine the question whether an order has the effect of a final judgment and has stated :

> "It would appear from the above authorities, for an order to have the effect of a final judgment and to qualify to be a judgment under Section 754(5) of the C.P.C.-
>
> (1) It must be an order finally disposing of the rights of the parties,
>
> (2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way.
>
> (3) The finality of the order must be determined in relation to the suit.
>
> (4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one."

In the case of *Ranjith vs. Kusumawathi and others* [2] Dheeraratne, J. who too had embarked on an analysis of a number of English and Sri Lankan judgments has stated at page 236 :

"There have been two virtually alternating tests adopted by different judges from time to time in the U. K. to determine what final orders and interlocutory orders were. In *White vs. Brunton* (1984) 2 All E. R. 606), Sir Donaldson MR, labeled the two tests as the order approach and the application approach. The order approach was adopted in *Shubrook vs. Tufnel* (1882) 9 QBD 621 ; 1881-8) All E. R. 180) where Jessel, MR. and Lindel, L. J. held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made."

At page 239 Dheeraratne, J. had quoted the words of Lord Esher in *Salamon Vs. Warner and Others*[3] and stated that -

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will if it stands finally dispose of the matter in dispute, I think for the purpose of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Dheeraratne, J. has applied the order approach in coming to his decision in the said case of *Ranjith Vs. Kusumawathi and Other (Supra).*

In the case at hand ,the impugned order dated 08.09.2000 is an order of citation, made under Sections 712 and 716 of the C. P. C.

This is an incidental order, as the testamentary proceedings was the main matter before Court, which has commenced under Section 516 of the C. P. C. and will be concluded only after filing of final accounts in terms of Section 551 of the C. P. C and with the closing of the estate.

The testamentary matter is still pending before the District Court. Therefore, an order of the learned District Judge under Sections 712 and 716 of the C. P. C. will not finally dispose of the matter, whichever way it is given.

Thus the impugned order dated 08.09.2000 of the learned District Judge is an interlocutory order and not a final order.

It is my view that therefore, the Respondent who was dissatisfied with the said order should have first filed an application for leave to appeal to the Court of Appeal in terms of Section 754(2) of the C. P. C. and not a petition of Appeal under Section 754(1) and 754(4) of the Civil Procedure Code. The learned Judge of the Court of Appeal has erred in dismissing the preliminary objection taken by the Petitioner.

I allow the appeal of the petitioner and set aside the judgment of the Court of Appeal and reject the petition of appeal tendered against the order of the District Court by the Respondent.

**S. N. SILVA, C. J.**—I agree.

**RAJA FERNANDO J.**—I agree.

*Appeal allowed.*

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## NANDASENA
## VS
## CHANDRADASA, O. I. C., POLICE STATION, HINIDUMA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
WEERASURIYA, J. AND
UDALAGAMA, J
SC (SPL) APPLICATION No. 12/2004
17TH JUNE AND 15TH SEPTEMBER, 2005

*Fundamental Rights-Articles 11, and 13(1) of the Constitution-Alleged unlawful arrest and torture-Insufficiency of evidence on torture-Arrest for a breach of the peace.*

The petitioner complained that the 1st respondent OIC came near his boutique in a jeep; and after summoning him assaulted him on his face. He was then taken to the police station by other police officers. He complained of infringement of Articles 11 and 13(1) of the Constitution. He alleged that a part of his boutique had been demolished.

It was proved that on information received by the 1st respondent over the telephone, from a Pradeshiya Sabha Member that the petitioner was making an unauthorized construction encroaching on the public road and that a crowd

had gathered creating unrest and a possible breach of the peace, the 1st respondent visited the scene. He found an atmosphere of unrest there. The evidence of the 1st respondent was supported by the Pradeshiya Sabha Member and another witness by their affidavits.

The petitioner's version which was supplement by his petition and a belated statement made to a Grama Niladhari was contradictory. He had no injuries to establish the alleged assault.

The 1st respondent's version was that he reached the scene on information received over the telephone and saw the unlawful construction which the petitioner refused to remove. There was unrest in the crowd that had gathered there. In the context, the 1st respondent arrested the petitioner to prevent a breach of the peace.

There was no medical evidence showing any injury to the petitioner.

Article 13(1) requires arrest according to procedure established by law ; and the person arrested should be informed of the reason for the arrest.

Article 11 provides that no person should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**HELD**:

1. The petitioner must discharge his burden regarding alleged infringement of Article 11 with a high degree of certainty. In the instant case, the evidence falls short of the required standard.
2. Under section 32 of the Code of Criminal Procedure Act, No. 15 of 1979, an arrest without a warrant is competent where, *inter-alia*, a person commits a breach of the peace, in the presence of the arresting officer. In the instant case, the evidence established the commission of a breach of the peace.
3. In the circumstances, there was no infringement of Articles 13(1) or 11 of the Constitution.

**Cases referred to :**

1. *Mc. Nabb* vs. U. S. (1943) 318 US 332
2. *Channa Peiris* vs. *Attorney-General and Others* (1994) 1 Sri LR 1

**APPLICATION** for relief for infringement of fundamental rights.

*Kapila Gamini Jayasinghe* for petitioner.

*D. Akurugoda* for 1st respondent.

*K. A. P. Ranasinghe*, State Counsel for 2nd and 3rd respondents

*Cur.adv.vult*

14th October, 2005

**SHIRANI BANDARANAYAKE, J.**

The petitioner, who was 54 years of age at the time of the incident, is a small scale trader, carrying on his business at Thawalama, a village situated in the Galle District. He alleged that on 02.09.2003 around 10.00 o'clock in the morning, the 1st respondent, who was the Officer-in Charge of the Police Station at Hiniduma, arrived near his boutique in his jeep and after summoning the petitioner near the jeep assaulted him on his face. Thereafter the 1st respondent, along with some other police officers had taken the petitioner to the Police Station. Prior to that, part of his boutique had been demolished by the aforementioned group of police officers. The petitioner further submitted that he was produced before the Magistrate's Court of Baddegama on 03.09.2003 and was released on bail.

The petitioner therefore complained that the 1st respondent had violated his fundamental rights guaranteed in terms of Articles 11, 12(1), 12(2), 13(1) and 14(1)(g) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Articles 11 and 13(1) of the Constitution.

The petitioner's allegations were against the 1st respondent that he was arrested on 02.09.2003 without any basis and that he was assaulted at the time he was so arrested on 02.09.2003. In support of his complaint against the 1st respondent, the petitioner had produced an affidavit from one Jinadasa Vithanage from Thawalama, Galle and a copy of the complaint made by the petitioner to the Grama Niladhari of Thawalama.

Of the allegations made against the 1st respondent, let me first consider the alleged violation of Article 13(1) of the Constitution. Article 13(1) of the Constitution, which relates to freedom from arbitrary arrest, reads as follows :-

> "No person shall be arrested except according to procedure established by law. Any person arrested, shall be informed of the reason for his arrest."

According to 1st respondent, around 9.00 a.m. on 02.09.2003, he had received a telephone message (1R7) informing him that a person was erecting a structure encroaching the road and thereby causing an obstruction to the public at Halvitigala-Aswalandeniya junction. On the information received he had decided to visit the place in question and on his arrival at the said junction he had seen that a person was erecting a shed encroaching several feet of the Aswalandeniya road. The 1st respondent had also observed that at that time a crowd had gathered and the two parties were about to clash. At that instance the 1st respondent had dispersed the said crowd and had warned the petitioner to remove the unauthorised construction, which was being erected by him encroaching the road. The petitioner, according to the 1st respondent, had refused to remove the said unauthorised construction and continued with his work irrespective of the warning given by the 1st respondent. Accordingly after explaining to the petitioner that he was causing a public nuisance which may lead to an imminent breach of the peace, the 1st respondent had taken the petitioner into custody. In support of his contention the 1st respondent had produced an affidavit from a Member of the Pradeshiya Sabha of Thawalama, namely, one Waidyaratne Attanayake Herath Mudiyanselage Sumathipala, who had been an eye witness to the aforesaid incident. According to him around 8.00 a.m. on 02.09.2003 a group of villagers had informed him that the petitioner had started to construct a temporary shed obstructing the junction near Aswalandeniya Road. According to his version if this construction was allowed to remain that would have obstructed the roadway and would have prevented any vehicle using the road. At the time the said Sumathipala had approached the Aswalandeniya junction (1R2), villagers had assembled near the junction and were becoming restless.

The 1st respondent had also filed a further affidavit from one Gardi Hewavasam Dodangodage Sujeewa Lakmal who was carrying on a business of collecting and transporting tea leaves from Dammala, in Hiniduma area. According to him around 7.00 a.m., when he was passing Aswalandeniya in his truck, he had seen the petitioner constructing a temporary shed obstructing the main road. Sometime later, a Member of the Pradeshiya Sabha, had arrived at the scene and had warned the petitioner not to carry out the construction, but to no avail. Later the 1st respondent had arrived and had warned the petitioner, but as the petitioner continued with his construction, the 1st respondent arrested him after dispersing the crowd that had gathered near the junction (1R6).

On a consideration of the afore mentioned affidavits it is apparent that the 1st respondent had arrived at the scene in question on the information he had received by way of a telephone message, that had been given as had been found out later, by the Member of the Pradeshiya Sabha. It is also clear that the 1st respondent had arrested the petitioner as it had clearly appeared to him that the petitioner was causing a public nuisance.

Section 32 of the Code of Criminal Procedure Act, No. 15 of 1979 describes the instances where peace officers could arrest persons without a warrant. According to Section 32 (1) (b)

> "Any peace officer may without an order from a Magistrate and without a warrant arrest any person -
>
> *(a)* who in his presence commits any breach of the peace ;
>
> *(b)* who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned".

It is common ground that the petitioner was arrested by the 1st respondent. The contention of the 1st respondent is that the petitioner was arrested as he was causing a public nuisance. In such circumstances could such an arrest be a violation of the petitioner's fundamental rights guaranteed in terms of Article 13(1) of the Constitution ? In terms of Article 13(1), as stated earlier, the arrest should be 'according to procedure established by law'. The importance of observing the 'correct and proper procedure' was correctly evaluated by Justice Frankfurter in *Mc. Nabb vs. U.S.*[1] where he had stated that 'the history of liberty has largely been the history of observance of procedural safeguards'. The purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fairplay.

Considering the circumstances of this matter, it is clear that the 1st respondent had arrested the petitioner as he was instrumental in causing a public nuisance leading to a breach of the peace. The police had taken necessary steps against the petitioner and criminal proceedings were

instituted against him. On an examination of the totality of the evidence, I am inclined to accept the version given by the 1st respondent.

In such a situation the arrest of the petitioner cannot be regarded as an illegal arrest and therefore the petitioner's claim with regard to Article 13(1) of the Constitution should fail.

The petitioner has complained that the 1st respondent had assaulted him on 02.09.2003 and thereby he has alleged that the 1st respondent had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution. Article 11 of the Constitution refers to freedom from torture and states as follows :-

> "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

According to the complaint made by the petitioner, the 1st respondent had assaulted him on his face at the time the latter had arrived near his boutique. Except for his petition and affidavit where he refers to the said assault, it is to be borne in mind that the petitioner has not produced any medical evidence to substantiate his allegations against the 1st respondent.

Learned Counsel for the petitioner submitted that the petitioner had not received any medical treatment with regard to the aforementioned assault and that it was the reason for the non-production of any medical certificates. Accordingly it is clear that there were no injuries due to the alleged assault. Learned Counsel for the petitioner drew our attention to the affidavit given by Jinadasa Vithanage (P3) and the complaint made by the petitioner to Grama Niladhari on 23.09.2003 (P3A) as supporting documents to substantiate his allegations against the 1st respondent. In the affidavit given by the said Jinadasa Vithanage (P3) it is averred that the 1st respondent had summoned the petitioner near the jeep and thereafter had assaulted the petitioner on his face. Paragraph 3 of the said affidavit refers to the said incident in the following terms :

"ඒ අනුව වෙදගේ නන්දසේන යන අය හිනිදුම පොලිස් ස්ථානාධිපතිතුමා අභියසට ගිය විට ඔහු වෙදගේ නන්දසේනගේ කමිසයෙන් අල්ලා "කම්මුලට" පහර කීපයක් ගසා..... (emphasis added)".

However, in the complaint made to the Grama Niladhari at Thawalama (P3A) what is stated is as follows :-

"එහි සිටි ස්ථානාධිපතිතුමා මගේ බෙල්ලෙන් අල්ලා කණට දෙක තුනක් ගසා ..... (emphasis added)".

On an examination of these two documents it appears that the petitioner's version given in his petition and affidavit is different to the version stated in the two documents filed by him to substantiate his position.

When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden. Discussing this position, Amerasinghe, J. in *Channa Peiris and other* vs *Attorney General and others* [2] had clearly stated that,

> "Having regard to the nature and gravity of the issue a high degree of certainty is required before the balance of probability might be said to tilt in favour of the petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment".

Considering the non-availability of any medical evidence with regard to the alleged assault, it would be necessary to examine carefully the supporting documents produced by the petitioner to substantiate his allegations against the 1st respondent.

The petitioner attempted to substantiate his allegations against the 1st respondent on the basis of the complaint made by him to the Grama Niladhari of Thawalama and relying on an affidavit he had filed along with his petition of one Jinadasa Vithanage. The first document, being the complaint made to the Grama Niladhari of Thawalama (P3A), indicates that the petitioner had made the said complaint on 23.09.2003. Accordingly the petitioner had decided to make a statement to the Grama Niladhari only after 3 weeks from the date of the said incident. The affidavit of Jinadasa Vithanage (P3) on the other hand is dated 22.03.2004, which is over 6 months from the date of the incident.

Learned Counsel for the 1st respondent contended that the said Jinadasa Vithanage, who is the author of the affidavit dated 22.03.2004, is a close relative of the petitioner and is the owner of the boutique adjoining the petitioner's grocery store at Thawalama. Therefore it is not possible to place any reliance on the aforesaid affidavit not only that being the single affidavit filed by the petitioner to substantiate his position, but also, as referred to earlier, the contents of this affidavit differ from what was stated by the petitioner in his petition and affidavit.

In the event where there has been no evidence of physical harm and the only document produced by the petitioner being a statement by him that the 1st respondent had assaulted him on his face which statement had not been supported by any independent evidence by way of affidavits or by medical evidence, I am of the view that the petitioner has not been able to satisfy this Court that his fundamental rights guaranteed in terms of Article 11 were infringed by the 1st respondent.

Considering all the circumstances referred to above it is apparent that the 1st respondent has not violated the fundamental rights of the petitioner guaranteed in terms of Articles 11 and 13(1) of the Constitution.

I accordingly hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution have been violated by the actions of the 1st respondent. This application is accordingly dismissed, but in all the circumstances of this case without costs.

**WEERASURIYA, J.**—I agree.

**UDALAGAMA, J.**—I agree.

*Application dismissed*

## A. E. M. G. FERNANDO
## VS
## PEOPLE'S BANK AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J
UDALAGAMA, J AND
DISSANAYAKE, J
SC APPLICATION (FR) 283/2004
28TH JANUARY AND 1ST AND 2 ND MARCH, 2005

*Fundamental Rights-Failure to grant extension of services-Abrupt termination of services-failure to give reason for premature termination of services beyond 28.06.2004-Legitimate expectation of extensions-Article 12(1) of the Constitution.*

The petitioner was the Chief Manager of the Internal Audit Department of the People's Bank. On reaching 55 years age, he was given three extensions in terms of Circular No. 323/2001. His last extension was from 28.06.2003 to 28.06.2004. On 16.06.2004, twelve days before his 58th birthday, the letter P 18 was received (from the Bank) informing that his services will not be extended beyond 28.06.2004. No reasons were given for that decision.

The justification for the termination of services is contained in R4 filed with the objections of the Deputy General Manager. This appears to be a report by an officer albeit unsigned.

**HELD:**

(1) The sudden termination of services by P 18 at short notice and without reasons was violative of Article 12(1) of the Constitution.
(2) The petitioner had a legitimate expectation of receiving extensions up to the 60th year, in normal circumstance which expectation had been denied without adducing any reasons.

**Case referred to :**

1. *Surangani Marapona* vs *Bank of Ceylon and Others* (1997) 3 Sri L. R. 156

**APPLICATION** for relief for infringement of fundamental rights.

*Saliya Peiris* with *C. Madanayake* for petitioner.

*Wijedasa Rajapaksa, P. C.*, with *Sasika Dissanayake* for respondents

*Cur.adv.vult*

8th July, 2005

**UDALAGAMA, J.**

Admittedly the petitioner as at the date of this petition was the Chief Manager of the Internal Audit Department of the People's Bank and on his reaching the age of 55 years was granted extensions of service for the past 3 years. The last extension of service for one year was granted from 28.06.2003 to 28.06.2004.

It is the contention of the petitioner that he had satisfied all the requirements regulating the granting of extensions as set out in circular No. 323/2001 and complains that on 16.06.2004, 12 days before his 58th birthday that he received the impugned letter marked and filed of record as P18 informing him that his services will not be extened beyond 28.06.2004.

Learned Counsel for the petitioner submitted that *vide* regulations as found in the aforesaid circular No. 323/2001 referred to above, which also admittedly regulates the granting of extensions, declares that the age of retirement of Bank employees shall be 55 years, but however that extensions of service of a Staff grade employee would be granted at the discretion of the management for a specific period beyond 55 years of age and up to 60 years. *Vide* the contents of the same circular the General Manager or the Chief Executive Officer of the Bank is tasked with the discretion to grant such extention taking into consideration factors enumerated in the said circular.

Paragraph 10 of the circular inter-alia deems it necessary in the event the applicant's application for an extension is unsuccessful, to be notified of such refusal of extension of service, affording him an opportunity to re-apply for a service extension for a further period in terms of the said circular. The failure of the unsuccessful candidate to have done so would be deemed to have shown that such applicant was not interested to further serve the aforesaid Bank.

Paragraph 12 of the circular specifies the requirement that in the event of an applicant's extension of service not been recommended that a

separate report stating the reasons of such non recommendation be sent directly to the Deputy General Manager of the respondent Bank.

Apparently there appears to be no evidence that such steps had in fact been taken.

The learned President's Counsel for the 1st to 9th respondents in his written submissions to this court has referred this court to items Nos. 1-4, and 6 and 7 of the aforesaid circular No. 323/2001 and has further submitted that the 1st respondent institution being a business entity engaged in a highly competitive field of banking activities is vested with full powers and discretion in recruitment, transfers, promotions and the granting of extensions of services to its employees.

However, the respondent Bank is an institution of the State. Hence I am of the view that this court in the circumstances need to examine the complaint of the petitioner that the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution have been violated consequent to the acts of the respondent Bank. Besides discretion in my view need to be exercised properly and reasonably.

That no adequate and specific reasons for the non recommendation of the petitioner's application for an extension of service are forthcoming in respect of the petitioner's application, is patent.

R4 filed with the objections of the Deputy General Manager appears to be a report made out by an officer, albeit unsigned, to be the basis of the non recommendation and contains no reasons for such non recommendation.

P8 the impugned order refusing the petitioner's application for extension of service is bereft of any reasons for such refusal. Besides P8 is dated 14.06.2004 and same being an adverse recommendation and undoubtedly delayed, I am of the view that the said impugned notification clearly contradicts the provisions of the said circular No. 323/2001.

The absence of a separate report giving reasons for the refusal of an extension which had to be submitted to the Deputy General Manager without delay, is also contrary to the provisions of the aforesaid circular.

As submitted by the learned Counsel for the petitioner the decision of this Court in *Surangani Marapona vs. Bank of Ceylon and others*[1] held that 4 months delay to decide an application for an extension of service "had been an inordinate delay".

In the instant case the delay to refuse the petitioner's application, *vide* the impugned P8, left the petitioner barely 14 days to retire from the Bank. Importantly no reasons for such delay were also forthcoming. The necessity to give reasons for its decision to refuse an application for an extension was also emphasised in *Surangani Marapona vs. Bank of Ceylon* (supra) when this court held that, "there should be sufficient reasons to support such decision beyond doubt".

I would also agree with the submissions of the learned Counsel for the petitioner that the latter had a legitimate expectation to serve the respondent Bank on annual extensions of service upto the age of 60 years and that the petitioner is entitled to be apprised of the reasons to justify the denial of the aforesaid legitimate expectation of the petitioner to serve the Bank until the petitioner reached the age of 60 years.

In the aforesaid circumstances and subsequent to careful scrutiny, I am of the view that inter alia the inordinate delay in determining and notifying the refusal of the petitioner's application and having failed to give reasons for the refusal of an extension the management of the respondent Bank has violated the fundamental rights guaranteed to the petitioner under Article 12(1) of the Constitution and this court would make order quashing P8 and further that the management of the respondent Bank grant to the petitioner an extension of service from 28.06.2004 to 28.06.2005. No costs.

**BANDARANAYAKE,J.** —I agree.

**DISSANAYAKA J.** —I agree.

*Relief granted.*

## PIYASENA DE SILVA AND OTHERS

## VS.

## VEN. WIMALAWANSA THERO AND ANOTHER

SUPREME COURT
BANDARANAYAKE, J.
FERNANDO, J AND
AMARATUNGA, J.
SC APPEAL No. 58/2005
SC SPLA.188/2005
CA No. 78/2004
9TH AND 19TH SEPTEMBER, 2005

*Writ of mandamus – Application to intervene – Refusal in chambers without hearing appellants – Contravention of Article 106(1) of the Constitution directing public sittings – Legitimate expectation of hearing – Fair procedure.*

Four appellants applied to the Court of Appeal to intervene and object to an application by the first respondent against the second respondent for a writ of mandamus to compel the issue of a driving licence to the first respondent monk.

When the application was submitted to a judge in chambers, the judge without hearing the applicant – appellants or counsel and without giving reasons summarily refused the application.

**HELD:**

(1) The failure of a single judge to hear parties infringed Article 106 (1) of the Constitution which requires "public sittings" save in exceptional cases. Further the President, Court of Appeal had fixed the matter to be heard by two judges as required by Article 146(2)(iii) of the Constitution. The order made by a single judge was invalid in the circumstances.

(2) The respondent's counsel conceded that it was appropriate to have heard parties before the impugned order was made, subject to the

respondent's right to object to the appellants' standing to intervene. For this reason and for the reason that the failure to hear the parties was contrary to natural justice constituted a failure of a fair hearing for which the appellant had a legitimate expectation, the order made in chambers was invalid.

(3) Although natural justice does not require the giving of reasons for an administrative decision, there is a strong case for giving reasons particularly to assist the aggrieved party to pursue the remedy of an appeal.

(4) It is unnecessary to decide on the question of standing of the appellants as that question would be a matter for the Court of Appeal to decide.

**Cases referred to :**

1. *Madan Mohan vs Carson Cumberbatch and Co.* (1988)2 Sri LR 75
2. *R vs University of Cambridge* (1723)1 STR 557
3. *Schmidt vs Secretary of State for Home Affairs* (1969)2 Ch 149
4. *Pure Spring Co. Ltd. vs Minister of National Resources* (1947)1 DLR 501

**APPEAL** against the order of the Court of Appeal.

*U. Egalahewa* for appellants.

*Saliya Peiris* with *Asthika Devendra* for petitioner – respondents.

*Cur.adv. vult*

14th October 2005

**SHIRANI BANDARANAYAKE, J.**

This is an appeal from the order of the Court of Appeal dated 04.08.2005. By that order the Court of Appeal refused an application made by the 1st to 4th intervenient-petitioners-petitioners-appellants (hereinafter referred to as the appellants) for listing for intervention in the Court of Appeal (Writ)

Application No. 1978/2004 without being heard and allowing the appellants to support their application. The appellants came before this Court where Special Leave to Appeal was granted on the following questions :

"1. Did the Court of Appeal err in law when the said Court decided to dismiss the application without hearing the petitioners ?

2. Did the Court of Appeal err in law for not listing an application for intervention for support?"

The facts of this appeal are as follows :

The appellants are Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya where the petitioner – respondent-respondent (hereinafter referred to as the 1st respondent) is the chief incumbent Thero. The appellants submitted that they had become aware through various means that the 1st respondent had filed an application against the respondent – respondent-respondent (hereinafter referred to as the 2nd respondent), being the Commissioner of Motor Traffic for not issuing a driving license to him in the Court of Appeal (C. A. (Writ) No. 1978/2004) and that a mandamus had been sought for the issuance of a valid driving license (A1). The aforementioned application was supported by the learned Counsel for the 1st respondent on 22.10.2004 and notice was issued on the 2nd respondent. The 2nd respondent had filed papers objecting to the grant of the writ of mandamus stating *inter-alia* that the Members of the Dayaka Sabha as well as the Commissioner General of Buddhist Affairs had objected to the granting of the said driving license (A2). The case was thereafter fixed for hearing for 14.09.2005.

Learned Counsel for the appellants submitted that the appellants, being devoted Buddhists as well as Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya, who have been actively involved in affairs of the temple where the 1st respondent is the chief incumbent thero, have a sufficient interest in the matter where the 1st respondent has sought a mandamus directing the 2nd respondent to issue a valid driving license. It was also contended that the grant of a valid license to a Buddhist monk is against the Dhamma and Vinaya as claimed, not only by the Members of the Dayaka Sabha and the villagers, but also by the public in general. Accordingly the appellants had moved to intervene in the case pending before the Court of Appeal and to allow them to file objections (A3). The

appellants had claimed that, being Members of the Dayaka Sabha that maintains the said temple of the village they have sufficient interest to intervene. The relevant documents had been filed in the Court of Appeal on 26.07.2005.

On 04.08.2005, without being heard and without allowing the appellants to support their application, the Court of Appeal had refused the appellants' application for intervention (A4). The said refusal had been made not in open Court, but in chambers by a single Judge.

Learned Counsel for the appellants contended that the said order of the Court of Appeal is contrary to law and is arbitrary and is in violation of the rules of natural justice as the appellants were not given a hearing before the decision to reject the application for intervention in the Court of Appeal (Writ) No. 1978/2004.

Learned Counsel for the 1st respondent conceded that it would have been more appropriate in the interests of natural justice for the Court of Appeal to have heard the appellants' Counsel in support of their application. He further submitted that the 1st respondent has no objection to the appellants being heard in open Court on their application. While conceding the appellants' right to support their application in open Court for intervention, learned Counsel for the 1st respondent submitted that the appellants do not possess any legitimate interest or legal ground whatsoever to intervene in the writ application in the Court of Appeal. He further submitted that whilst reiterating the fact that he is not objecting to the appellants being heard in support of their application to intervene, the 1st respondent has a right to object to that application, which right he wished to reserve for the proceedings in the Court of Appeal.

Having stated the factual position of this appeal, let me now turn to consider the submissions on the questions of law.

The appellants had filed their application for intervention on 26.07.2005 in the Registry of the Court of Appeal. The Journal Entry dated 04.08.2005 indicates that the Registrar of the Court of Appeal had submitted it to a

Judge in chambers for directions. The said Journal Entry dated 04.08.2005 was in the following terms :

"04.08.2005

**Hon . .....J.,**

AAL for the Intervenient petitioner files motion petition, affidavit and documents and moves that Court be pleased to call this case on 23rd, 26th, 29th August, 2005. Submitted for Your Lordsihp's direction please.

*Sgd.*

R/CA

04.08.2005"

On the same day this application was refused without hearing the appellants and without giving any reasons. The said action by the Court of Appeal, according to the learned counsel for the appellants, raises several fundamental issues, which could be broadly categorized into two segments. They are as follows:

(a) the impugned order given by the Court of Appeal on 04.08.2005 is in contravention of the provisions of the Constitution of the Republic;

(b) The manner in which the said impugned order was given is in breach of the rules of natural justice.

It is pertinent to note that the refusal to call the case in open Court for the appellants to support their motion, was decided in the Chambers by a single judge without giving the parties an opportunity for a hearing. Article 106 of the Constitution refers to the sittings of all Courts and the manner in which it should be carried out. The said Article is in the following terms :

> "106(1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

Article 106(2) refers to the exception to the rule referred to in Article 106(1), which included :

*(a)* proceedings relating to family relations,

*(b)* proceedings relating to sexual matters,

*(c)* in the interests of national security or public safety, or

*(d)* in the interests of order and security within the precincts of such court, tribunal or other institution.

Article 106(1) of the Constitution deals with 'Public sittings' and the meaning of the limb 'shall ..... be held in public' means that the sittings of the Court should be open Court sittings. In fact, in *Madan Mohan* vs *Carsons Cumberbatch and Co.*[1] Seneviratne, J. in his dissenting judgment, considering the effect and applicability of article 106(2) of the Constitution had stated that.

> "Article 106 of the Constitution deals with 'public sittings' . All authorities, both local and foreign show that the meaning of the limb 'shall ..... be held in public' means that the sittings of the court should be open court sittings, so that any member of the public can attend a court sitting. The next limb 'and all persons shall be entitled freely to attend such sittings', further emphasizes the requirements that the sitting of a court 'shall be held in public'. 'Shall be held in Public' further means that any person constituting the public whether he has a particular or special interest in the case or not, or not directly interested in the case, can attend court when the court is sitting. 'shall be entitled to freely attend such sittings' further means that there can be no restriction or impediments to any person attending a court sitting except factors such as the accommodation available in the court, or when due to factors set out in Article 106(2) of the Constitution the court excludes people not directly interested in the proceedings."

The exceptions to this position specified in Article 106 of the Constitution are the instances referred to in Article 106 of the Constitution.