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

[2007] 1 SRI L.R. – PARTS 3-4

PAGES 57-112

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at Sarvodaya Vishva Lekha, Ratmalana

Price : Rs. 40.00

DIGEST

Page

CONTEMPT OF COURT – Undertaking given by party – Issue of an interim injunction by Court of Appeal based on the undertaking – Violation – No charge framed – What is relevant is whether the contemnor breached the undertaking?

COURT OF APPEAL (Appellate Procedure) Rules 1990 Filing of objections – is an affidavit necessary? Objections in the form of an affidavit alone – Does it suffice? Does it deprive the respondent's right to appear in opposition ?

FUNDAMENTAL RIGHT (1) Constitution 13th Amendment – Art 4(c) Art 12(1) Art 35(1), Art 80(3), Art 105(1), Art 154 A(2) – Art 152(3) & Art 155(2) – Proclamation resulting in merger of two provinces flawed – Non-observance of mandatory conditions – Amendment of condition done by Emergency Regulations Ultra vires? – Provincial Councils Act 42 of 1987 S37(1) 37(2)a, 37(2)b – Amendment 27 of 1990 – S5A – Public Security Ordinance S5 – Time bar – continuing violation.

(Continued from Part 2)

(2) Art 126 (1), Presidents' Entitlement Act 4 of 1986 – S213 – Conferment of wrongful or unlawful benefits – Executive power exercised in trust for the people – Such wrongful act is an infringement of fundamental right? Locus Standi – Sed quis custodiet ipsos cutodies – Nemo debet sua judix..

(3) Constitution Art 12(1), Art 29, Art 126 (4) – 13th Amendment – Grade 1 admissions to National Schools – Circular arbitrary unequal and capricious – National Policy – Affirmed by Cabinet of Ministers?– Classification – 'Royster formulation' National Education Commission Act 19 of 1991 – S2-Education Ordinance.

(Continued in Part 5)

WRIT OF MANDAMUS – To evaluate and consider appointment to a permanent post – Duty bound to act fairly? Obligations arising out of a contract of employment – Private Right? Does writ lie?

I hold that both grounds urged by Mr. de Silva, as to the inconsistency with Article 154A(3) of the Constitution and being in any event outside the scope of section 5 of the Public Security Ordinance establish that Regulation P1 is *ultra vires* and made in excess of the power reposed in the President. Accordingly, the purported amendment of the provisions of section 37(1)(b) of the Provincial Councils Act by the President is invalid and of no effect or avail in law.

The next question to be decided is in relation to the validity of Order P2 effecting a merger of the Northern Provinces. Section 37(1)(b) contains two mandatory conditions that have to be satisfied before a Proclamation effecting a merger is issued. The address made by the President to Parliament and the statements made as to the security situation seeking an approval of the Proclamations of the State of Emergency in the year 1988 referred to in the preceding analysis clearly establish that the President could not have been possibly satisfied as to either of these mandatory conditions. The endeavour to amend the mandatory conditions by recourse to the Emergency Regulations demonstrates that the President in his own mind knew that the two mandatory conditions have not been satisfied. An axiomatic principle of Administrative Law is thus formulated by Wade and Forsyth early in the treatise as follows:

> *"Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, a fortiori, if it infringes the limits which Parliament itself has ordained." (9th Edition page 5)*

The Proclamation P2 made by the then President declaring that the Northern and Eastern Provinces shall form one administrative unit has been made when neither of the conditions specified in section 37(1)(b) of the Provincial Council Act No. 42 of 1987 as to the surrender of weapons and the cessation of hostilities, were satisfied. Therefore the order must necessarily be declared invalid since it infringes the limits which Parliament itself has ordained.

Finally, I have to address the objection of time bar raised by the Additional Solicitor General. The impugned orders P1 and P2 were made in September 1988 and the poll to be held in terms of section 37(2)(a) has been postponed over past 17 years by the documents 3R7A to 3R7Z, The last postponement was made on 23.11.2005 fixing the date of poll on 16.11.2006 and 5.12.2006 for the Eastern and Northern Provinces respectively. The petitioners have failed to invoke the jurisdiction of this Court within one month of any of the impugned orders as required by Article 126(2). It is therefore submitted that the petitioners are precluded from obtaining relief.

The counter submission of Mr. de Silva is that the rights of the petitioners and those similarly circumstanced in the Eastern Province to have a Provincial Council constituted in terms of Article 154A(2) by election of members is a continuing right and its denial by the *ultra vires* orders P1 and P2 is a continuing denial to the petitioner and those similarly circumstanced the equal protection of the law guaranteed by Article 12(1) of the Constitution. He further submitted that the purported postponement of the poll by 3R7A to 3R7Z are no force or effect in law since they seek to derive validity from P1 and P2.

As noted above the 13th Amendment which introduced a new Chapter XVIIA to the Constitution provides for extensive devolution of legislative and executive power to Provincial Councils. Although the Amendment was certified on 14.11.1987 and a Provincial Council was established for the Eastern Province and each of the other 8 Provinces by Order dated 3.2.1988 (3R1) made in terms of Article 154A(1) of the Constitution a Provincial Council has not been constituted for the Eastern Province by an election of members as required by Article 154A(2) due to the impugned order of merger P2. The right to have a Provincial constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the People and its denial is a continuing infringement of the right to the equal protection of law guaranteed by law Article 12(1) of the Constitution, as correctly submitted by Mr. de Silva. Therefore the objection of time bar raised by the Additional Solicitor General is rejected.

For the reasons stated above I allow the applications and grant to the petitioners the relief prayed for in prayers (c) and (e) of the respective petitions. No costs.

JAYASINGHE, J. – I agree.
UDALAGAMA, J. – I agree.
FERNANDO, J. – I agree.
AMARATUNGA, J. – I agree.

Relief granted.

SENARATH AND OTHERS
v
CHANDRIKA BANDARANAYAKE KUMARATUNGA AND OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
TILAKAWARDANE, J.
AMARATUNGA, J.
SC FR 503/2005
March 2, 2007

Fundamental Rights – Art 118, Art 126 (1), Presidents' Entitlement Act 4 of 1986 – S213 - Conferment of wrongful or unlawful benefits – Executive power exercised in trust for the people – Such wrongful act is an infringement of fundamental right? Locus Standi —Sed quis custodiet ipsos cutodies – Nemo debet sua judix.

The petitioners three Attorneys-at-law alleged infringement relating to unlawful unreasonable arbitrary and *mala fide* executive action of the 1st respondent who was at the material time the President of the country and the other respondents who were the then members of the Cabinet in securing for the 1st respondent –

(a) a free grant of developed land close to the Parliament
(b) Premises in Colombo 7 from which two public authorities have been ejected to be used as her residence after retirement,
(c) staff and other facilities purportedly under the President's Entitlement Act.

Held:

Per S. N. Silva, C.J.

"Good governance and transparency characterize democracy and the rule of law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be meted upon."

(1) Though it is correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption – the fact that the impugned action may or may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from the Supreme Court that the conferment of such benefit or advantage is contrary to the fundamental right to equality before the law.

(2) The respective organs of government reposed power as custodians for the time being to be exercised for the people. The petitioner allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the people - "*Sed quis ipsos custodies.*"

(3) The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law.

Per Sarath N. Silva, C.J.

"I am of the view that there is a positive component in the right to equality that where the executive being the custodian of the people's power abuse a provisions of law in the purported grant of entitlements under such laws and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court."

(4) The denial of *locus standi* in the circumstances as presented in this case where there has been a brazen abuse of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless.

Per Sarath N. Silva, C.J.

"In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a manner where he has a personal interest". '*Nemo debet sua judix*' is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown into the winds by the 1st respondent in initiating several Cabinet Memorandum

during her tenure of office and securing for herself purported entitlements that would if all ensure only after she lays down the reigns of office."

APPLICATION under Act 126 of the Constitution.

Cases referred to:

(1) In *Re the Nineteenth Amendment of the Constitution* - 2002 - 3 Sri LR 85.

(2) *Visvalingam* v *Liyanage* – 1983 – 1Sri LR 236.

(3) *Premachandra* v *Jayawickrema* 1994 – 2 Sri LR – 90.

(4) *S.P. Guptha* v *Union of India and others.* 1982 – AIR (SC) 149.

Peter Jayasekera with *Thiranagama* and *K. Senadheera* for petitioner.
Nigel Hatch PC with *Gaston Jayakody* and *Ms. K. Geekiyanage* for the 1st respondent.
P.A. Ratnayake PC DSG with *Ms. Demuni de Silva* SSC for respondents.

Cur.adv.vult.

May 3, 2007
SARATH N. SILVA, C.J.

The petitioners being three Attorneys-at-law of this Court have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. They plead that the applications have been filed in addition to their own interest, as a matter of public interest representing the rights of the citizens of this country, to enforce the fundamental right to equality before the law.

The alleged infringement relates to the unlawful unreasonable, arbitrary and *mala fide* executive action of the 1st respondent who was at the material time the President of the country and of 2nd to 35th respondents who were then members of the Cabinet of Ministers, in securing for the 1st respondent a free grant of a land vested in the Urban Development Authority in extent of 11/2 acres close to the Parliament which had been fully developed at a cost of Rs. 800 million; a premises at No. 27 Independence Avenue, Colombo 7, from which two public authorities viz: the Ranaviru Sevana Authority and the Disaster Management Centre were ejected to be used as her residence after retirement; staff and other facilities; purportedly under the President's Entitlement Act No. 4 of 1986.

The relevant provisions of the Presidents' Entitlement Act No. 4 of 1986 are as follows:

(2) *"There shall be provided to every former President and the widow of a former President, during his or her life time, the use of an appropriate residence free of rent;*

Provided that where for any reason, an appropriate residence is not provided for the use of such former President or the widow of such former President, there shall be paid to such former President or the widow of such former President, a monthly allowance equivalent to one third of the monthly pension payable to such former President or the widow of such former President, as the case may be.

3. (1) *There shall be paid to -*

(a) *every former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President; and*

(b) *to the widow of such former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the Minister of the Cabinet of Ministers.*

(2) *There shall be provided to every former President and the widow of such former President, official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."*

The petitioners have pleaded that they had no access to information as to the impugned grant of benefits and advantages to the 1st respondent and that their interest in the matter was aroused by a publication in a Sunday newspaper of 4.12.2005, which has been produced marked "P1" , under the heading "All the ex-president's perks". The publication referred to an allocation of , a land at madiwela to the 1st respondent and of 36 vehicles, security staff, private staff amounting to a total of 248. The other matters referred to in the publication in regard to certain

withdrawals from President Fund amounting to Rs. 600 million, do not form part of this application. The petitioners state that in view of the specific material contained in the publication they wrote letter dated 8.12.2005 to the Secretary to the Cabinet of Ministers requesting copies of related Cabinet Memoranda and decisions in order to verify their legality. The Secretary replied by letter dated 26.12.2005 (P2B) regretting his inability to comply with the request. Thereupon the petitioners wrote to individual Ministers and some documents that were made available enabled them file the present application. Considering the matters that had been pleaded the petitioners were permitted by Court to file amended papers setting out whatever additional material that was available with them in support of the alleged infringement.

The documents produced by the petitioners relate *inter alia*, to premises bearing No. 27, Independence Avenue, Colombo 7, which was being extensively repaired at that stage. Since the allocation of the premises as a residence to the 1st respondent had been directly drawn in issue, the Court made an order on the present Secretary to the President to disclose the basis on which the expenses for repairs were being incurred. Pursuant to that order the Secretary to the President produced the relevant documents marked 37R8 to 37R12 under confidential cover. It is pertinent here to note that Counsel for the 1st respondent and later the 1st respondent herself has filed an affidavit stating that the action of the Court in calling for information regarding the repairs is "*ultra vires*" and the 1st respondent strenuously objected to any inquiry being made into such expenditure. It appears that the 1st respondent has been ill-advised to use the phrase "*ultra vires*" in relation to an order made by this Court which is in terms of Article 118 of the Constitution "the highest and final Superior Court of Record in the Republic". On the other hand the Inquiry before this Court is whether the action of the 1st respondent and of the Cabinet of Ministers of which she was the head is *ultra vires* the provisions of the Presidential Entitlement Act No. 4 of 1986. Good governance and transparency characterise Democracy and the Rule of Law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be insisted upon. The petitioners have pleaded

and established that they were denied access to information.The extent to which information has been denied is borne out by the fact that the documents were sent even to Court under confidential cover. Hence, the objection of the 1st respondent was over-ruled and the documents were made available to the petitioners.

I would set out the relevant material in reference to the three matters drawn in issue by the petitioners as regards, the land; the residence; staff and other facilities.

The Madiwala Land

The first reference to this land in the documents produced by the parties is contained in the Cabinet Memorandum dated 28.03.05 submitted by the Minister of Urban Development and Water Supply. The Memorandum commences by stating that the 1st respondent as President "*has requested a block of land 11/2 acres in extent at Madiwela ... for the purpose of construction of a residence for herself after her retirement as President".*

It specifically states that *"she wishes this land to be allocated in lieu of the following allowances that a former President is entitled to under the Presidents' Entitlement Act No. 4 of 1986.*

* *Pension*
* *The official residence that she would be entitled to;*
* *Allowance for maintenance of the bungalow, plus allocation for payment of electricity and water bills;*

She will thus only take her entitlements of :

* *A few vehicles*
* *Security personnel and related equipments and vehicles for security purposes;*
* *Office staff."*

Paragraph 2 of the Memorandum seeks to justify the grant of the land by stating that in terms of the Act if the President does not avail herself of a residence, she would be entitled to the payment of 1/3 of the pension as rental allowance. This amounts to approximately Rs. 7,000/- per month. But, as Ministerial type of office residences are in short supply presently, if she avails herself of her entitlement of a residence, a Minister may probably have to

take a house on rent. The minimum rental of a Ministerial type of residence, at present, in the Colombo 7 area where they are presently situated would be around Rs. 300,000/- to Rs. 400,000/- per month or more. An additional allocation of approximately Rs. 1 million has to be made annually for repairs, maintenance as well as payment of electricity and water bills.

The justification proceeds further to state that the President has suffered by assassination of her husband and injuries suffered in an assassination attempt in 1999 and concludes by stating that "the value of land requested is insignificant" when compared with the entitlements she has given up and also proposes to forego in the future.

In paragraph 3 of the Memorandum Cabinet approval is sought to allocate the land to the 1st respondent on a "free-hold basis for the construction of her residence at her cost".

The petitioners contend that the Memorandum is contrary to the provisions of the Act which specifically envisages the payment of a allowance amounting to 1/3 of the pension if a Ministerial type of house is not available. Their main submission is that the Madiwela land was originally intended for the construction of the "Presidential Palace" and a sum of Rs. 800 million has already been spent by the State to develop the land for the purpose of such construction. The Minister, although leave to proceed was granted against him has not sought to contradict this specific averment in the petition. In the circumstances this Court has to act on the basis that the extent of 11/2 acres to be allocated, near the Parliament is a fully developed land in respect of which the State has already spent over Rs. 800 million and that the statement of the Minister that the value of land is "insignificant' is a misrepresentation of facts.

The Memorandum dated 24.8.2005 was considered on the very next day by the Cabinet of Ministers and approval was granted to it by the decision in 36RIB.

It is not clear as to what the Minister meant by a "free-hold" allocation. Such a concept is not known to the law of Sri Lanka. Whatever it may mean it is seen from document 37R2A that the Urban Development Authority in whom the land had been vested,

on the basis of that decision made a free grant of the land to the 1st respondent by Deed bearing No. 1135 dated 6.9.2005. It is significant that the date in the deed being a document with several schedules covering six pages is the very next day from date on which the decision of the Cabinet of Ministers was communicated. The land had been surveyed and the date of the Plan is 15.8.2005/ It is thus seen that within a matter of a brief period of this Court making a pronouncement as to the term of office of the President, the land had been surveyed, a Cabinet Memorandum submitted and approved and a deed containing a free grant issued.

The premises at 27 Independence Avenue, Colombo 7.

The first reference to the allocation of No. 27, Independence Avenue, Colombo 7, to the 1st resident is made in the Cabinet Memorandum dated 31.10.2005, submitted by the Minister of Public Security, Law and Order (36R2A).

This Memorandum makes no reference to the fact that a Memorandum had been submitted by the Minister of Urban Development and land at Madiwela was allocated to the 1st respondent in lieu of a pension, residence and so on. The Memorandum of the Minister of Public Security recommends that an entirely New Division be established for the 1st residence as "the Retired Presidential Security Division IV" headed by a Senior Superintendent of Police with 198 personnel, 18 vehicles and 18 motor cycles to be provided for the use of the officers.

Addressing the matter from the perspective of security paragraph 3 of the said Memorandum states:

> *"Allocate the house No. 27, Independence Avenue, Colombo 7, for this purpose since she needs to reside in a house where adequate security can be provided and to effect repairs thereto in order to ensure security measures."*

The 1st respondent herself has submitted a Note to the Cabinet dated 2.11.2005 titled "Staff of the office of the President on retirement. "(36R3A). It says *inter alia*, as follows:

> *"I will be entitled to certain facilities under the provisions of the Presidents' Entitlement Act No. 4 of 1986. Provision of official and personal staff would be one such entitlement."*

I have already selected premises No. 27, Independence Avenue,Colombo 7, for my office after retirement. Considering the meaningful role that I propose to play in the public affairs of this country on retirement the staff I require to maintain this office is given in the Annexure to this Note.

The annexure sets out a staff as follows:

PARTICULARS OF STAFF

Designation/Category	**No. of Positions**
President	01
Secretary to the Former President & Chief of Staff	01
Advisors - Political Affairs & International Affairs	02
Advisor - Social Affairs	01
Additional Secretary	01
Secretaries - Private & Confidential	02
Directors - Foreign Relations & Special Projects	01
Senior Assistant Secretary	02
Assistant Secretaries (SLAS)	03
Assistant Secretaries (Non-SLAS)	03
Co-ordinating Secretaries	03
Programme Officer	01
Manager	01
Stenographer - Sinhala/English/Tamil	05
Data Entry Operators	03
Clerks	04
Information Officer	01
Cameraman	01
Video Cameraman	01
Garden Specialist	01
Garden Labourers	02
Labourers	02
Messenger	01
Drivers	09
Butlers	05
Cook	01
KKSS	05
Total	**63**

The matter of the staff would be dealt with under the next heading. As regards the allocation of the premises at No. 27, Independence Avenue, it is seen in paragraph 3 of the Memorandum on security, the Minister has stated that these premises are needed for her to reside, suppressing the fact that the Cabinet has already by a decision taken 2 months before made a free grant of the land at Madiwala in lieu of the entitlement of a residence and a pension. The 1st respondent in her Note to the Cabinet which has been considered by the Cabinet on the same day as the Memorandum of the Minister viz: 3.11.2005, knowing fully well that she has already got a land free in lieu of a residence has stated that she has "already selected premises No. 27, Independence Avenue, Colombo 7, for the office after retirement, considering the meaningful role that she proposes to play in the public affairs of the country after retirement" and requests the personal staff of 63. There is plainly a contradiction, the Minister calls it a house to reside in and the 1st respondent calls it an office. It has to be noted that there is no entitlement to an office in the President's Entitlements Act, No. 4 of 1986. The reference to an office in the 1st respondent's Note is a patent mis-representation since in the staff of 63 included in the annex there are included 5 Butlers and a Cook. Such persons cannot possibly come within an office staff.

The more significant factor not contained in the Memorandum of the Minister and the Note of the 1st respondent is that No. 27, Independence Avenue, was not an "appropriate residence" in terms of Section 2 of the Act. As revealed in the affidavit of the 37th respondent these premises had been donated on 14.05.1980 (37R3) by the then President to the Sri Lanka Foundation. It was used for the Human Rights Centre and at the time material by the Rana Viru Seva Authority and the Disaster Management Centre. Steps had been taken well prior to the Cabinet decision of 3.11.2005 to retake possession of the premises and to shift the Authority and the Centre to rented premises. Letter dated 11.10.2005 (37R4) was sent by the then Chairman of the Sri Lanka Foundation to the then Secretary to the President. It states that in reference "to our telephone conversation last week where you requested that the Sri Lanka Foundation voluntarily surrender the above mentioned land to the State as Her Excellency the President

wishes to use the said premises as her office after relinquishing duties," the Board has unanimously resolved to surrender the land. The surrender was sent for registration but there was an error in the process which had to be rectified with another resolution being passed as recently as 31.10.2006 (vide 37R5, 37R13 and 37R14). Be that as it may, well before even the Cabinet decision with some reference to these premises was made on 3.11.2005 the 1st respondent on her own embarked on the process of effecting repairs. The estimate dated 30.09.2005 (37R12) for a sum of Rs. 43 million reduced to Rs. 35 million appears to have been obtained by her directly. She addressed a minute dated 30.09.2005 to the Secretary that he should obtain the necessary allocation from the Treasury and release it early. The Secretary sent letter dated 7.10.2005 (37R10) to the Treasury requesting a sum of Rs. 40.25 million to repair the building and a supplementary allocation was made by letter dated 11.11.2005 (37R11). The letter states that the allocation is under -

Head 801 -	Department of National Budget.
Programme 07 -	Public Resource Management.
Project 02-	Budgetary Support Services and Contingent Liabilities.

Whatever these words may mean the process is nothing but a fiscal ruse to incur unauthorized expenditure. It is significant that the Budget Estimates for 2006 for the former President which has also a column for 2005 does not reflect this figure (Vide: 43R3A). Infact the total expenditure for 2006 is Rs. 37 million and for 2005 Rs. 12 million.

Be that as it may, paragraph 3 of the letter (37R11) states as follows;

> *"The granting of this allocation should not be construed as adequate authority for incurring expenditure. All expenditure should be incurred in accordance with the provisions of the relevant Financial Regulations, Establishment Code and instructions issued from time to time by Government."*

By this time the 1st respondent without any recourse to a tender procedure and in flagrant violation of the guidelines which

she herself laid down as Minister of Finance, personally selected a contractor and agreed on the price payable. The Submission of President's Counsel for the 1st respondent that a deviation was warranted on grounds of urgency is wholly untenable in view of the paragraph 3 of 37R11. This probably is the reason for the strident objection to the order of the Court in calling for these documents. The documents and the facts set out above clearly establish that the entire sequence of events in regard to premises No. 27, Independence Avenue, is an abuse of authority on the part of the 1st respondent and marked by a serious deception i.e. the suppression in both papers to the Cabinet the previous free grant of the Madiwala land in lieu of the entitlement to a pension and a residence.

Allocation of Staff

The allocation of staff reveals a two track approach as seen from the papers referred to above. The Minister in charge of the subject of Public Security, Law and Order has submitted the Cabinet Memorandum (36R2A) referred to above recommending the establishment for the 1st respondent an entirely new Presidential Security Division IV with 198 personnel, 18 vehicles and 18 motor cycles. The 1st respondent has submitted a Note to the Cabinet (36R3A) stating her entitlement to an official and personal staff of 63 personnel. Both have been considered on the same day, that is on 3.11.2005 and allowed by the Cabinet of Ministers.

The submission of the petitioners is that in terms of the Presidents' Entitlements Act No. 4 of 1986, a former President does not have an entitlement to an office or to office staff. There is only an entitlement in terms of Section 3(1) to the payment of a monthly allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President.

The specific reference to an allowance and the manner in which it is to be computed, in my view, excludes any other staff being allowed to a former President in terms of Act No. 4 of 1986. The tenor of the Memorandum and the Note submitted by the 1st respondent appears to be that the staff requested is a "facility' to

which a former President is entitled to in terms of Section 3(2) of the Act. This provision entitles a former President to "official transport and on such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers."

In my view the phrase 'such other facilities' have to be read *ejusdem generis,* to mean similar in nature to the provision of official transport. As regards staff the specific provision in section 2 referred above makes reference only to an entitlement of a "monthly secretarial allowance". Therefore the memorandum of the Minister and the Note of the 1st respondent cannot derive any authority from the provisions of Act No. 4 of 1986.

The petitioners made a further submission that in any event the entitlements in Act No. 4 of 1986 are to "every former President and widow of a former President". This is clearly seen in sections 2 and 3. Therefore it was submitted that the entitlement becomes effective only after a President ceases to hold office an acquires the status of former President. The entitlement cannot be granted whilst the person is holding the office of President.

In my view the provisions have been advisedly worded in this manner to avoid a situation as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office.

In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest. "*Nemo debet sus judex*" is a principle of natural justice which has now permeated the area of corporate governance as well. This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office and acquire the eligible status of a former President. To add insult to injury the 1st respondent herself has submitted a Note to the Cabinet stating that she intends "to play a meaningful role in the public affairs of the country on retirement" and requires a staff to maintain her office. Whilst there may be of no objection to any

person playing a meaningful role in public affairs the wrongful act submitted by the petitioners is the procurements of land, premises for residence, staff (security and personnel) and vehicles contrary to the provisions of Act No. 4 of 1986, both from the perspective of time and content. The submission of the petitioners is in my view well founded.

I am in agreement with the basic submission that the entitlements in the Act apply only to a former President and that the provisions have been worded in this manner to ensure that the incumbent President would not have occasion to decide on his entitlements.

The submission of Counsel for the 1st respondent is that even if the grant of the land, premises and staff do not come within the purview of Act No. 4 of 1986, the petitioners nevertheless have no *locus standi* to file this application and that the Court has no jurisdiction to decide on the matter.

The implication of the submission of Counsel appears to be that if there is any conferment of a wrongful or unlawful benefit or advantage, that has to be addressed in appropriate proceedings but it cannot amount to an infringement of a fundamental right guaranteed by Article 12(1) of the Constitution.

It is indeed correct that a conferment of a wrongful or unlawful benefit or advantage may attract other offences such as the offence of corruption in terms of section 70 of the Bribery Act, as amended by Act No. 20 of 1994. However, the fact that the impugned action may or may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from this Court that the conferment of such a benefit or advantage is contrary to the fundamental right to equality before the law. Ordinarily, an infringement of a fundamental right is alleged when the impugned wrongful act on the part of the executive or administration affects the right of the aggrieved person. The petitioners' case is presented on a different basis where they seek to act in the public interest. The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the people and where in the purported exercise of

such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equally before the law.

In the context of this submission it is relevant to cite from the Determination of a Divisional Bench of seven Judges of this Court in regard to the 19th Amendment to the Constitution[1]. The Court there laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective organs of government are reposed power as custodians for the time being to be exercised for the People. At 96 the Court has made the following determination in regard to sovereignty of the People and the exercise of power.

> *"Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People to include –*
>
> (1) *the powers of Government.*
>
> (2) *the fundamental rights; and*
>
> (3) *the franchise.*
>
> *Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.*
>
> *The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament, the executive power "of the People'" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the*

Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People ..... (at page 98). Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People."

The petitioners allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the People. The basic question therefore arises as posed by Juvenal in the 1st century A.D. who wrote the famous latin phase in a slightly different context which has been frequently cited thereafter. "*Sed quis custodiet ipsos Custodes*?" meaning, "but who is to guard the guards themselves?". The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people. Therefore, in my view the law itself is the instrumentality through which custodians are guarded. This is the basic postulate of the Rule of Law. It has been affirmatively stated in several judgments of this Court that the Rule of Law is the basis of our Constitution (*Vide: Visvalingam* v *Liyanage*(2) and *Premachandra* v *Jayawickrema*(3). The phrase "Rule of Law" itself gained recognition as a premise of English Constitutional Law.

A.V. Dicey in his Famous work "The Law of the Constitution" at page 202 states as follows:

"That 'rule of law' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a

breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience of law which governs other citizens or from the jurisdiction of the ordinary tribunals; .....The 'rule of law', lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts..."

The rule of law thus gains its efficacy by being enforced by the Courts.

In *S.P. Guptha* v *Union of India and others*(4) at 149, nine Judges of the Supreme Court of India ruled in favour of a public interest suit filed by certain lawyers as a writ petition. In his judgment Bhagawathi, J., who was later the Chief Justice of India made the following observations with regard to the impact of the principle of rule of the law at 197.

"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers".

In considering the provisions of our Constitution as analysed in the Determination in the 19th Amendment *(supra)* and the observations cited above of Dicey and the Supreme Court of India, I am of the view that there is a positive component in the right to

equality. That, where the executive being the custodian of the People's power abuse a provision of law in the purported grant of entitlements under such law and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court. The denial of a *locus standi* in the circumstances as presented in this case where there has been a brazen abuse of power of power to wrongfully gain benefits from public resources, would render the constitutional guarantee of equality before the law meaningless. The facts that have been clearly established in this case prove that the 1st respondent and the Cabinet of Ministers of which she was the head, secured for the 1st respondent benefits and advantages in the purported exercise of executive power in breach of the provisions of the President's Entitlement Act No. 4 of 1986. Since executive power is exercised in trust for the People, such wrongful action is an infringement of the fundamental right to equality before the law guaranteed by Article 12(1) of the Constitution.

For these reasons I allow the application and grant to the petitioners the declaration prayed for that their fundamental right guaranteed by Article 12(1) of the Constitution has been infringed by executive action in the purported grant of benefits and advantages to the 1st respondent contrary to the provisions of the Presidents' Entitlements Act No. 4 of 1986.

As regards consequential relief it is seen that the 1st respondent has after this application was filed returned the land in question by a notarial instrument. Nevertheless a formal declaration is made that the decision to grant the land referred to in the Petition to the 1st respondent is contrary to law and of no force or avail in law.

Similarly declarations are made that the decisions which by implication give a right to the 1st respondent to the use and occupation of premises No. 27, Independence Avenue, Colombo 7, are of no force or avail in law.

I grant further declaration that the decisions that have been made from time to time by the Cabinet of Ministers and produced in Court with regard to the staff, both security and personal of no force or effect in law.

The 1st respondent would now be entitled to the benefits as stated in sections 2 and 3 of the Presidents' Entitlements Act No. 4 of 1986. The entitlement would be to an appropriate residence free of rent and where an appropriate residence it is not available the 1st respondent would be entitled to a monthly allowance of 1/3rd of the monthly pension that payable. Premises No. 27 Independence Avenue, Colombo 7, which has not been used as a residence cannot be considered as an appropriate residence for the purpose of section 2 of the Act.

The 1st respondent would also be entitled to a monthly secretarial allowance to be computed in the manner stated in section 3(1)(a) of the said Act and for official transport and facilities relating to such transport as permitted in terms of section 3(2)a of the said Act.

It has to be noted that the President's Entitlement Act No. 4 of 1986 is a unique piece of legislation which grants entitlements only to former Presidents and their widows. Intrinsically it is an exception to the concept of equality before the law, since no other holder of public office is granted such benefits. It appears that there is no similar legal provision in any other country.

The provisions of this Act being an exception in itself to equality before the law, have to be strictly interpreted and applied. In the circumstances the submission of Counsel for the 1st respondent the allocation made in the Appropriation Act for 2006 for salaries of the staff for the 1st respondent creates an entitlement to a staff is misconceived. An allocation in the Appropriation Act predicates that the money allocated should be expended according to law.

The application is allowed. The 1st respondent will pay a sum of Rs. 100,000/- as costs to the petitioners and the State will pay a further sum of Rs. 100,000/- as costs.

THILAKAWARDENA, J. – I agree.

AMARATUNGA, J. – I agree.

Relief granted.

MOSES
v
WELARATNE

COURT OF APPEAL
ROHINI PERERA, J.
CA 312/99 (CONTEMPT)
DC COLOMBO 18335/L
JANUARY, 12, 2007

Contempt of Court – Undertaking given by party – Issue of an interim injunction by Court of Appeal based on the undertaking – Violation – No charge framed – What is relevant is whether the contemnor breached the undertaking?

Action was instituted to define and demarcate the boundaries of the corpus. It was alleged that the respondent had sought to destroy the Northern boundary and put up a building. The petitioner obtained an enjoining order but the application for an interim injunction was refused. The petitioner sought to revise the said order, and in the Court of Appeal an undertaking was given that, the respondent would not effect further constructions and would maintain the *status quo* (order Y). The petitioner complained of contempt committed by the respondent breaching / violating the interim injunction (Order Y).
The respondent raised a preliminary objection as to the sustainability of the application on the basis that there is no charge to which the respondent could plead.

Held:

(1) The order Y does not specify the location, it is obvious that the order applies only to the Northern side, as that in fact was the disputed area.

(2) The party had been expressly enjoined from doing a particular thing in a particular location, and if he violates those particular acts, then he would be guilty of civil contempt.

(3) If the respondent did any act on the Northern boundary which would amount to a construction – he may then be guilty of contempt of Court. When there is no order with regard to the other boundaries,

there cannot be any compliance of such an order, hence no contempt is committed. The pleadings do not indicate with any specificity which part of the boundary,has been destroyed.

(4) The object of the order Y was to preserve the *status quo ante* only of the Northern boundary. There is no undertaking with regard to the 'other boundaries' other than the Northern boundary.

(5) Any undertaking given *ex facie curiae* is equivalent to a judgment or order from a Court.

(6) It is a well recognized principle of law that no person ought to be punished for contempt of Court, unless the specific charge against him be distinctly stated and opportunity of answering it had been given to him.

In the matter of Contempt of Court.

Cases referred to:

1. *Ranjith Senanayake and others* v *Paul Peiris* – 1992 – 2 Sri LR 169, 175.
2. *P. A. Thomas and Company* v *Mould* – 1966 1All ER 963, 967.

2a. *Redwing Ltd.* v *Redwin Forest Products Ltd.* – 1947 – 177 LT 387

3. *Harris* v *Haris* – 2001–2 FLR 895 at 328
4. *Coward* v *Stapleton* - 1953-90 CLR 579-80
5. *Nigam v Kedarnath Gupta* – 1992 AIR 2153 (SC)
6. *Kangol Industries Ltd.* v *Bray (Alfred) & Sons Ltd.*– 1953 – 1 All ER 44
7. *Comet Products (Pvt.) Ltd.* v *Hawkex Plastics Ltd.* – 1971 2 QB 67.

Ransiri Fernando with *Sarath Walgamage* for petitioner.

Manohara R. de Silva PC for respondent.

Cur.adv.vult

January 12, 2007

ROHINI PERERA, J.

The facts that led to the present proceedings commenced with 01
the institution in the District Court of Colombo Case No. 18335 L. The plaint was dated 18th August 1998. According to the facts stated in the plaint, the plaintiff (hereinafter referred to as the petitioner) resides in lot 2 B depicted in plan No. 2451 dated 4.11.1996 drawn by Licensed Surveyor A.E. Wijesuriya. The defendant (hereinafter referred to as the respondent) resided in lot 2A also depicted on the said plan. This action was instituted for a decree to define and demarcate the boundaries of the land described in the schedule to the plaint. 10

It was alleged that on a particular date in July 1998 the respondents had destroyed the boundary in the Northern side of the premises of the petitioner and started constructing the boundary line of the Northern side as alleged by the petitioner. When the respondent began demolishing the wall and the roof of the petitioner's building and thereby caused its destruction, to the Northern side of the boundary as a prelude to commencing the respondent's own building operation, the petitioner made a statement to the police on 3.8.1998. According to the said complaint which is marked R1, it is alleged that by the time the complaint was made and recorded, the construction of the building had been completed, except that the roof of that building was in the process of being completed. Thereafter the petitioner filed action in District Court of Colombo seeking the assistance of that Court for a decree for demarcation of the said Northern boundary and further for a restraining order to restrain the respondents from destroying the wall and the roof of the petitioner's building on the Northern side. The reliefs prayed for in that plaint are as follows:

(අ) පැමිණිල්ලේ 2 වන උප ලේඛනයේ ඉතා යම්පූර්ණ ලෙස විස්ර කර ඇති බලයලත් මිනින්දෝරු ඒ. ර්. විජේසූරිය විසින් මැන සාදන ලද 1986.11.14 දින දරන අංක 2451 දරණ පිඹුරේ පෙන්වා ඇති ලොට් බී දරන කට්ටිය වන කෝට්ටේ ඇතුල්කෝට්ටේ ජයවීර මාවතේ වරිපනම් අංක 54/14ඒ දරන පැමිනිලිකරුට අයත් ස්ථානයේ උතුරු දිසාවේ මායිම නිශ්චය කර සළකුණු කරන මෙන්,

(ආ) විත්තිකරු ඔහුගේ සේවකයින් හා නියෝජිතයන් විසින් මෙම පැමිණිල්ලේ 2 වන උපලේඛනයේ විස්තර කර ඇති බලයලත් මිනින්දෝරු ඒ. ර්. විජේසූරිය විසින් මැන සාදන ලද 1986.11.04 දින දරන පිඹුර ප්‍රකාර අංක 2451 පිඹුරේ පෙන්වා ඇති ලොට් 2 බී දරන ඉඩම් කට්ටිය වන කෝට්ටේ ඇතුල් කෝට්ටේ ජයවීර මාවතේ වරිපනම් අංක 56/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති එකි ස්ථානයේ බිත්තිය සහ වහලය විනාශ කිරීම, කඩා දැමීම සහ එකි ස්ථානයේ උතුරු දෙසින් එකි ස්ථානය ඇතුළත වෘහුයක් ඉදිකිරීම වලක්වාලන ස්ථිර තහනම් නියෝගයක් විත්තිකරුට විරුද්ධව නිකුත් කරමින් පැමිනිලකරුගේ වාසියට නඩු තීන්දුවක් ඇතුළත් කරන මෙන්,

(ඇ) මෙම නඩුව අසා නිම කරන තුරු විත්තිකරු ඔහුගේ නියෝජිතයන් හා සේවකයින් විසින් මෙම පැමිනිල්ලේ 2 වන උපලේඛනයේ විස්තර කර ඇති බලයලත් මිනින්දෝරු ඒ. ර්. විජේසූරිය විසින් මෑත සාදන ලද 1986.11.4

දින දරන අ·ක 2451 පිඹුරේ පෙන්වා ඇති එකී ලොට් 2 බී දරන ඉඩම් කට්ටිය වන කෝට්ටේ ඇතුල්කෝට්ටේ ජයවීර මාවතේ 57/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති ස්ථානයේ බිත්තිය සහ වහල විනාශ කිරීම සහ කඩා දැමීමට හා එකී ස්ථානයේ උතුරු දෙසින් එකී ස්ථානයට ඇතුළු ව්‍යුහයන් ඉදි කිරීම වලක්වාලන අතුරු නියෝගයන් විත්තිකරුට විරුද්ධව නිකුත් කරන මෙන් ද,

(ඈ) අතුරු තහනම් නියෝගය පිළිබඳ ඉල්ලීම විමසා අවසන් වනතුරු විත්තිකරු යහ .....

.....

වරිපනම් අ·ක 57/14 ඒ දරන ස්ථානයේ උතුරු දෙසින් ඇති එකී ස්ථානයේ බිත්තිය සහ වහල විනාශ කිරීම හා කඩා දැමීම හා එකී ස්ථානයේ උතුරු දෙසින් ඇති එකී ස්ථානය ඇතුළත ව්‍යුහයන් ඉදිකිරීම වළකවාලන වාරණ නියෝගයන් විත්තිකරුට විරුද්ධව නිකුත් කරන මෙන් ද,

(ඉ) එකී ස්ථානය ඇතුළත උතුරින් විත්තිකරු විසින් ඉදි කරන ලද ව්‍යුහයන් විත්තිකරු විසින් කඩා ඉවත් කිරීමට නියෝගයක් ද

.....

විත්තිකරුට විරුද්ධව පැමිනිලිකරුගේ වාසියට නඩු තීන්දුවක් ඇතුළත් කරන මෙන්,

On 19.8.1998 the District Court issued the enjoining order. On 2.9.98 the respondent filed his objections to the said application for an interim injunction. Further the respondent filed his answer for the main case. On the 23.2.1999 the District Court delivered the order dismissing the said application for an interim injunction.

On 8.4.1999 the petitioner filed an application for revision in the Court of Appeal against the order of the District Court. The reliefs sought in the said revision application were as follows:

(a) Act in Revision and set aside the said Order 23.2.99 of the learned Additional District Judge of Colombo.

(b) Grant issue an interim injunction until the hearing and determination of this action restraining the respondents, his agents and servants from destroying and breaking the roof and the wall on the Northern side of the premises depicted as Lot 2B in plan No. 2451 dated 4.11.1986 made by A.E. Wijesuriya licensed Surveyor bearing assessment No. 54/14A, Jayaweera Mawatha, Etul Kotte, and construct-

ing structures on the Northern side in the said premises.

(c) Grant and issue an interim injunction until the hearing and determination of this action restraining the respondent and his agents and servants from destroying and breaking the roof and the wall on the northern side premises depicted as Lot 2B on Plan No. 2451 dated 4-11-1986 made by A.E. Wijesuriya, Licensed Surveyor, bearing assessment No. 57/14A, Jayaweera Mawatha, Etul Kotte, Kotte and constructing structures on the northern side in the said premises.

The respondents filed objections to the revision application on 10.6.1999, and annexed R1 which is the police complaint dated 8.3.98.

In the statement of objections the respondents stated that the construction of the building was now been completed with the roof as well and the Certificate of conformity was marked as R2. This revision application was taken up for argument on the 30.6.99 and the Court of Appeal made the following order.

"same appearance as before – at this juncture the respondent (as the defendant stood then) undertakes not to effect further constructions and to maintain *status quo*. The interim injunction is accordingly issued restraining the defendant-respondent from continuing to build thereafter".

I shall refer to this order dated 30.6.99 as Y.

Any undertaking given in *ex facie curiae* is equivalent to a judgement or Order from a Court. Whenever, such an undertaking is breached it would amount to a contempt of Court. On the 30th of June 1999, the parties would have provided the court an undertaking to refrain from constructing any additional buildings and thereby to maintain the *status quo ante* of the *Northern side* of the boundary of lot 2B as depicted in the plan 2451.

'It may sometimes happen that a party gives a more wide ranging undertaking than he intended. In such a situation, the Court in it's discretion may decline to enforce that part of the undertaking which had been given by mistake'. (see: *Aldridge, Eady and Smith*,

on Contempt, Sweet & Maxwell, London, 2005, at paragraph 12-189)

The parties could not have undertaken to maintain the *status quo ante* and thus refrain from building on 'all the boundaries' for that is not the dispute. In *Ranjith Senanayake and Others* v *Paul Peiris*(1) at 169, 175, this Court had laid down the following principles to which I will now refer. The facts of that case are not relevant to these proceedings. However, the principles laid down in that decision is relevant to the present Appeal. It was held by this Court.

(1) That the petitioner's apprehension that they would be liable for Contempt of Court is not well founded and therefore there was no exceptional circumstances to act in revision.

(2) **That in view of the criminal nature of the Contempt of Court proceedings,**
(a) there must be clear evidence of violation of any Court order or injunction
(b) such an order should be strictly construed
(c) in determining whether or not breach has been committed, regard should be paid to circumstances and **the object for which such injunction was granted or order was made".**

The object of the order referred to as Y was to preserve the *status quo ante* only of the **Northern boundary**.

At 175 in *Ranjith Senanayake's (supra)* decision to which we have referred above, the Court of Appeal had written:

> "in the case of *P.A. Thomas and Company* v *Mould*(2) it was held that, ... where parties seek to invoke the power of the Courts to commit people to Prison and deprive them of their liberty, there have got to be quite clear and certainty about it."

It has been stated in *Arlidge, Eady & Smith* at 908:

> "An order of undertaking will not be enforced by committal if it's terms are ambiguous, the rule being analogous to that which govern the interpretation of Penal Statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed."

Therefore it is fundamentally important that one reads the petition and the reliefs that were prayed for on which the alleged breached undertaking was based.

In this case the relevant application is the application dated 08.04.1999 which is also connected to the original Plaint filed in the District Court dated 08-081998 which was marked XI. That undertaking which was imposed on 30.06.1999 had been properly entered and the writing is sufficiently clear to ensure that the defendant should not disturb the boundary and maintain the *status quo ante* of the premises concerned. It should be noted not withstanding the fact that the word "Northern Boundary" is not incorporated in the said order, the disputed area is the "Northern Boundary" as stated both in the Plaint and the Petition and Affidavit dated 08.04.1999.

> "A defendant cannot be committed for contempt on the ground that upon one of two possible constructions of undertaking being given he has broken that undertaking. For the purpose of relief of this character, I think the *undertaking must be clear and the breach must be clear beyond all question."*

Words of *Jenkins J. in Redwing Ltd* v *Redwing Forest Products Ltd.*[2a] Cited in *Harris v Harris*[3] at 328. **Quoted at page 909 of Arlidge, Eady and Smith on Contempt**.

The petition now before this Court for decisions is dated 24.3.2003. The relevant paragraph is paragraph 17 which states the following.

> "In the aftermath of the aforesaid conviction, while being placed on bail by your Ladyship's Court, the respondent once again in violation and/or disobedience of the interim injunction issued by your Lordship's Court on 30-06-1999 acting by or through his agents carried out the construction of
>
> a) Steel posts along the boundaries of the premises concerned,
> b) A steel mesh along the boundaries of the premises concerned,
> c) A new covering of the roof of the premises concerned, overlooking the Plaintiff-Petitioner-Petitioner's roof.

The petitioner produces herewith marked "C5", a copy of the complaint made by the petitioner to Welikada Police on 07-06-2003 and marked "C6", "C7", and "C8" photographs depicting the unlawful construction work carried out by the respondent on 07-06-2003 and plead them part and parcel hereof.

And the plaintiff-petitioner prays that this Court take cognizance of the Contempt Committed by the respondent breaching/disobeying/violating the order Y and punish the respondent."

On 28.2.2006 Counsel for the respondent took up a preliminary objections as to the sustainability in Law of the application of the petitioner dated 24 Nov. 2003 on the basis that there is no charge to which the respondent could plead. The Counsel agreed to file written submissions on this preliminary objection.

> "It is a well recognized principle of Law that no person ought to be punished for Contempt of Court unless the specific charge against him be distinctly stated and opportunity of answering it had been given to him". *Coward* v *Stapleton*(4) at 579-80.
>
> "This principle must be rigorously insisted upon", (ibid., *Arlidge, Eady and Smith* page 68 para 2-18).

However, before this Court makes a determination with regard to that aspect of the objection, the Court should determine whether the order made by the Court, had been violated, and whether there is a basis for commencing proceedings for contempt.

However, I do not agree with the written submissions submitted by the respondents to this Court in its entirety. The order Y does not refer to the demolishing of the wall or the roof and if the respondent had not demolished the wall or the roof of the Northern side he cannot be held to have acted in defiance of the order Y. It must be noted that at the time the respondent filed his statement of objections it had been alleged by the petitioner that the walls had already been demolished and the roof had already been damaged. The building on the alleged disputed area was already completed. And it was undertaken by the parties on the 30.6.99 'not to effect

further constructions and to maintain *status quo ante*. By order Y the parties are prohibited from effecting additional constructions and the parties must maintain the current situation that existed on the Northern boundary as at 30th June 1990 as depicted in the plan 2451. Though the order Y does not specify the location it is obvious that the Order applies only to the Northern side, as that in fact was the disputed area. It may also be relevant to mention that the earlier application for revision was filed by the petitioner, at a time when, the respondent had been punished for contempt. This matter is now on appeal to the Supreme Court. In that petition dated 08.04.99 the petitioner alleged that "the respondent is continuing to construct structures on the Northern side in the said premises destroying the boundaries of the premises on the Northern side and thereby irreparable loss and damage is caused to the petitioner". (paragraph 13)

However, in the present petition dated 24-03-2003 the petitioner states the following namely,

"That the respondent is carrying out the construction of

a) Steel posts along the boundaries of the premises concerned,

b) A steel mesh along the boundaries of the premises concerned,

c) A new covering of the roof of the premises concerned, overlooking the plaintiff-petitioner-petitioner's roof."

The party had been expressly enjoined by injunction from doing a particular thing in a particular location and if he violates those particular acts, then he shall be guilty of Civil Contempt. The petitioner should have demonstrated that the alleged Contemnor intentionally (not accidentally) knowing the facts which rendered it a breach of the relevant order or undertaking had committed the act. Here there is no undertaking with regard to the "other boundaries" other than Northern boundary.

The Authorities have clearly stated, that:

"**Probabilities not sufficient**". Mere probabilities may not be sufficient to exercise jurisdiction and there must be proof of willful conduct. *Nigam* v *Kedarnath Gupta*[5]. (See Narayan, Law of Contempt 4th Edition, at paragraph 85).

What is relevant is whether the Contemnor had breached the undertaking and not whether it was done accidentally, mistakenly, intentionally, or willfully. These matters are matters that are relevant at the inquiry. Here in this Court it is only a determination of a preliminary issue.

If the respondent did any act on the Northern boundary which would amount to a construction or which would change the condition in which the boundary was, as it had existed on the 30th June 1999, he may then be guilty of Contempt of Court.

When there is no order with regard to the other boundaries there cannot be any compliance of such an order, hence no Contempt is Committed. The pleadings merely refer to "Boundaries of the premises concerned" and refer further to "a new covering of the roof of the premises concerned overlooking the plaintiff-petitioner-petitioner's roof".

These do not indicate with any specificity which part of the boundary has been violated and which part of the roof has been given a new covering. There is a most cogent view of the law which is relevant to these proceedings on this point, expressed by the authors of the book *On Contempt* to which reference has been made earlier (*ibid.*, *Arlidge, Eady & Smith* at paragraph 12-190). It reads as follows:

"Just as with a breach of an Order, where the Court will not commit and alleged contemnor unless the breach is strictly proved, so with an undertaking if there is doubt it may be appropriate, instead of invoking the process of contempt, to apply for an order requiring the alleged contemnor to state whether he has complied with his undertaking, although this does not seem to be an option that is often invoked", (see *Kangol Industries Ltd.* v *Bray (Alfred) & Sons Ltd.*[6]

Additionally, Lord Denning M.R., in his judgment in the English Court of Appeal, in *Comet Products (UK) Ltd.* v. *Hawkex Plastics Ltd.*[7] expressed the view:

"I am prepared to accept that such a rule [compulsory interrogation] did exist in the days of Sir William Blackstone but I do not think it exists any longer today. The genius of the

Common Law has prevailed. I hold that a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him prove his guilt. I reject the submission that the defendant is a compellable witness in the contempt proceedings" (*ibid.*, at pages 74-75). We are firmly of the view that the petitioner had failed to establish to our satisfaction that the respondent had violated the Order Y, to which we have previously referred and therefore on the facts submitted to this court, the circumstances do not warrant a commencement of contempt proceedings.

To commence Contempt proceedings in cases of Civil Contempt summons should be issued on the Contemnor with a copy of the order of the alleged violation.

"It is also necessary to establish service of any order which is alleged to have been disobeyed by leaving a copy with the person to be served. The importance of personal service of the order, where committal is sought, is to enable the person bound by that order, and who is alleged to be in contempt, to know what conduct would amount to a breach; (at page 904 of Arlidge, Eady & Smith on Contempt)

It appears that the documents served on the respondents are C1 and C8. And along with the Summons the charge sheet is also attached. But the alleged violated order dated 30.6.99 is not attached. C1 is the judgment dated 8.10.2002, C2 sentencing order dated 8.10.2002, C3 petition of the S.C. Spl. L.A. Application No. 271/ 2002, C4 the order with regard to bail C5 which is the statement of the petitioner to the Welikada Police on 07-06-2003. 3 photographs marked as C6, C7, C8 and the negatives of the photographs and the police investigation notes.

However, there is no disclosure of a violation of the Court order Y in the Petition and Affidavit produced on behalf of the petitioner on 24-11-2003. Therefore, not withstanding the fact that summons had been issued this Court has a discretion to terminate these Contempt Proceedings. The Contempt Proceedings are thus terminated and the respondent is discharged from these Contempt Proceedings.

Contempt proceedings terminated.

ASSEMBLES OF GOD OF CEYLON
v
URBAN COUNCIL, ANURADAPURA AND ANOTHER

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 325/2000
OCTOBER 31, 2006
NOVEMBER 17, 2006

Court of Appeal (Appellate Procedure) Rules 1990 Filing of objections – is an affidavit necessary? Objections in the form of an a affidavit alone – Does it suffice? Does it deprive the respondent's right to appear in opposition ?

The petitioner raised a preliminary objection to the respondent being heard on the basis that there is no statement of objections but only an affidavit.

Held:

(1) Respondent when filing objections to an application has to file a statement of objections distinct from an affidavit of the respondent. An affidavit is necessary to support any averment of facts that are averred in the statement of objections.

(2) An affidavit alone cannot be construed as a statement of objections even if he has objected to the application in his affidavit.

(3) There is no mandatory requirement in the Rules to file a statement of objections. Therefore a respondent who fails to file a statement of objections or files an objection not in compliance with the Rules cannot be deprived from appearing and objecting to the application on grounds of law or to submit to Court on the infirmities of the petitioner's application.

Per Sriskandarajah, J.

"The intention of the framers of the Rule is not to deprive a party to a fair hearing but to maintain the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law".

APPLICATION for a *Writ of Certiorari / Mandamus.*

Cases referred to :-

1. *Gita Shirene Fonseka* v *Monetary Board of the Central Bank of Sri Lanka* – 2004 – 1 Sri LR –149.

1(a). *Kiriwanthe and another* v *Navaratne and others* – 1990 – 2 Sri LR 393.

2. *K. Shanmugavadiva* v *J. M. Kulatilake* – SCM 50/2002 – SC Spl LA 44/2002.

3. *Ranaweera* v *Mahaweli Authority of Sri Lanka* – 2004 -2 Sri LR 346 (Distinguished).

4. *Union Apparels (Pvt) Ltd* v *Director General of Customs and others* – 2000 – 1 Sri LR 38.

5. *Piyadasa* v *Law Reform Commission.* SC (AP) 30/97 - SCM 8.7.1998.

M. A. Sumanthiran for petitioner

Ms. B. Tilakaratne DSG for 2nd respondent

S. A. D. S. Suraweera for intervenient respondent.

Cur.adv.vult.

January 29, 2007

SRISKANDARAJAH, J.

The petitioner raised a preliminary objection objecting to the 2nd respondent being heard on the basis that there is no statement of objection filed by the 2nd respondent in this application.

It is an admitted fact that the 2nd respondent filed its objections by way of an affidavit on the 10th of September 2000. The questions that have to be determined by this court are whether an objection in the form of an affidavit alone could be considered as a statement of objections in terms of Court of Appeal Rules? If it cannot be considered as a statement of objection whether the 2nd respondent can be offered an opportunity to be heard?

The 2nd respondent submitted that nowhere in the Court of Appeal (Appellate Procedure) Rules a format of a statement of objections which the respondent is required to adopt is given, whereas the Rules do specify various other forms that parties are required to adopt e.g. the Notice of Hearing, Form of Proxy, Notice of Appeal, etc. The 2nd respondent filed its objections by way of an affidavit on the 10th of September 2000 with a motion.

The motion states as follows:

" I file herewith the objections by way of an affidavit together with the documents ...." 20

A similar objection was raised in *Gita Shirene Fonseka* v *The Monetary Board of the Central Bank of Sri Lanka.*(1)

Wijayaratne, J. with Ms. Shiranee Tilakawardana, J. (P/C.A) agreeing referring to the relevant Rules of the Court of Appeal held:

"Rule 3 (4) (b) (i) of the Court of Appeal Rules 1990 states,

'A statement of objection shall be filed by each respondent within four weeks . . .'

Rule 3 (7) states,

'. . . . A statement of objection containing any averment of facts shall be supported by an affidavit in support of such averments' 30

Gravity of the burden of court is no reason to dispense with or ignore rules of Court. The discretion of court considered in *Kiriwanthe's*(1a) *case* does not exist any longer after the promulgation of the Court of Appeal (Appellate Rules) 1990. This aspect of the discretion is adequately dealt with by the Supreme Court in the Case of *K.Shanmugavadivu* v *J.M. Kulatillake*(2) considering the ambit of rule 3 of the Court of Appeal (Appellate Rule) 1990, observed that,

'In such circumstances, the only kind of discretion that could be exercised by court is to see whether and how much time could be permitted for the filing of papers in due course' 40

.....

.....

Rule 3(4) (b)(i) read with rule 3(7) however leaves no discretion to the court in the case in filing of statement of objections to dispense with either the statement of objection or the affidavit in support of averments of fact."

The learned D.S.G. submitted that in *Ranaweera* v *Mahaweli Authority of Sri Lanka*(3) Marsoof, J. (P/C.A) with Sripavan, J. agreeing had taken a different view; 50

Marsoof, J. (P/C.A) in his Judgment observed;

"The 1st and 2nd respondent did not file a statement of objections but instead filed only the affidavit of the 2nd

respondent, who is the Director General of the 1st respondent Mahàweli Authority of Sri Lanka by way of objections. It is necessary to mention at the outset that the petitioner has in Paragraph 3 of his counter affidavit pointed out that the respondents have failed to comply with Rule 3 (4)(b)(i) Court of Appeal (Appellate Procedure) Rules 1990 and therefore the affidavit filed by the 2nd respondent by way of objection should be rejected. I am inclined to the view that the petitioner should have in the 1st instance invited the attention of the Court to the alleged non compliance with the rules and got the matter listed for an order of Court as contemplated by rule 3(14) of the aforesaid Rules. The said rule is quoted below:

> *"Where the parties fail to comply with the requirements set out in the preceding rules the Registrar shall without any delay, list such application for an order of court".*

The object of this Rule appears to be to give an opportunity to a party in default to take steps to comply with the rules of court. In my view the petitioner should have objected to the alleged "Objections" filed by the respondents by way of a motion and had the matter referred for an order of court. Instead, the petitioner has chosen to file counter affidavit wherein he has taken up the question of non compliance with Rules in the counter affidavit. In terms of Rules 3(4)(b)(i) counter affidavit have to be filed by the petitioner within 4 weeks of the date of receipt of the Statement of objection, unless a different date is fixed by court which was what happened in this case. By filing counter affidavits the petitioner has waived the right to take objection to the non compliance of the rules by the respondent.

Having observed the above the court in the above case decided not to rely on the objections filed in the said application. The court when arriving at the final decision in the above application held:

> "Having carefully considered the application made by the petitioner to this court without taking into consideration any of the averments contained in the so called 'objection' of the respondents I have come to the conclusion ...."

In the above case even though the court had made several observations with regard to the objections filed in the form of affidavit finally in its judgment preferred not to consider the objections filed and it named the objections as the "so called objection". Therefore the above case cannot be considered as accepting affidavits on the form of an objection.

Rule 3 (5) specifically provides that:

> "Every respondent who lodges a statement of objections, and every petitioner who lodges a counter affidavit, shall forthwith serve a copy thereof, together with any supporting affidavit and exhibits on every party.
>
> Rule 3(7) ..... A statement of objections containing any averments of fact shall be supported an affidavit in support of such averments.

From the above rules and from the line of judgments it is clear that the respondent when filing objections to an application has to file a statement of objection distinct from an affidavit of the respondent. An affidavit is necessary to support any averments of facts that are averred in the statement of objections.

Therefore an affidavit of the respondent alone cannot be construed as a statement of objection even if he has objected to the application in his affidavit. Therefore this Court upholds the preliminary objection that the affidavits filed by the 2nd respondent cannot be considered as a statement of objection.

This court now proceeds to consider the consequence of the failure to file a statement of objection. The learned counsel for the petitioner submitted that the failure to comply with the mandatory applicable rules 3(4)(b)(i) read with rule 3(7) deprives the respondents right to appear in these proceedings in opposition to the petition.

Rules 3 (4)(b) provides:

> "the court **shall fix dates** for the filing of statements of objections by the respondents, for the filing of counter affidavits by the petitioner and for the hearing of the application; if any of such dates is not fixed by the court, the following provisions shall apply:

(1) A statement of objection **shall be filed** by the respondent **within four weeks of the date of service of notice**;

(Emphasis added)

(ii) . . .

The above rules only provide the mandatory time frame within which the statement of objection has to be filed.

Rule 3(7) ..... A statement of objections containing any averments of fact **shall be supported by an affidavit** in support of such averments. (Emphasis added)

The above rule only provides that if a statement of objection is filed and if that statement of objection contains any averments of facts it shall be supported by an affidavit.

There is no mandatory requirement in the above rules to file a statement of objections. Therefore a respondent who fails to file a statement objection or files an objection not in compliance with the rules cannot be deprived from appearing and objecting to the application on grounds of law or to submit to court on the infirmities of the petitioners application.

Even in situations where the rules have specifically stated that a party is not entitled to be heard has exemptions and the court has interpreted that a party should not be deprived from affording an opportunity of being heard.

The Court of Appeal (Appellate Procedure) Rules 4(2) which deals with Appeal provides:

"No party to an appeal shall be entitled to be heard unless he has previously lodged three copies of his written submissions (herein after referred to as "submissions") Complying with the provisions of this rule."

But Rule 4(6) provides

"Where a party fails to lodge submissions, or lodges submissions which are not in substantial compliance with the foregoing provisions, the Court may restrict the duration of the oral submissions of such party at the hearing of the appeal or application to 45 minutes."

It could be seen from the above rules that the intention of the framers of theses rules is not to deprive a party to a fair hearing but to maintain the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law.

Unlike in The Court of Appeal (Appellate Procedure) Rules Supreme Court Rules have not provided any exemptions to Rule 30: Supreme Court Rules, Rule 30 provides:

> "No party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submission (hereinafter referred to as "submissions", complying with the provisions of this Rule."

In *Union Apparels (Pvt) Limited* v *Director-General of Customs and Others*(4) at 38 Shirani Bandaranayake, J., quoted with approval the observation of Amerasinghe J., in *Piyadasa and others* v *Land Reform Commission*(5):

> "In my view Rule 30 is meant to assist the court in its work and not to obstruct the discovery of the truth. There were numerous documents that had to be considered; and, in order, we needed the assistance of the learned counsel for the petitioner as well as the respondents, including their written submissions to properly evaluate the information that we had before us. It was therefore, decided that the preliminary objection should be over ruled."

Even though I uphold the preliminary objection of the petitioner that the 2nd respondent's affidavit could not be entertained as a statement of objection, the 2nd respondent is entitled to appear and on its behalf the counsel could make any submission to court on questions of law or in relation to the material available before court for the purpose of this court to arrive at a decision.

Preliminary objection upheld. The respondent/Counsel could make submissions on questions of law or in relation to material before Court.

SIVA KUMAR
v
DIRECTOR-GENERAL, SAMURDHI AUTHORITY OF SRI LANKA AND ANOTHER

COURT OF APPEAL
EKANAYAKE, J..
SRISKANDARAJAH, J.
CA 2119/2003

Writ of Mandamus – To evaluate and consider appointment to a permanent post – Duty bound to act fairly? Obligations arising out of a contract of employment – Private Right? Does writ lie?

The petitioner sought a *Writ of Mandamus* directing the respondent to take action to have an evaluation and consider the petitioner to be appointed for a permanent post.

The respondent contended that, the petitioner does not have the right to the performance of duty of a public nature.

Held :

(1) The object of the application is to compel the performance by the respondents of certain obligations out of a contract of employment which existed between the petitioner and the respondents. His claim is merely a dispute about a private right and as such a *Writ of Mandamus* does not lie. Such matters arising out as to contracts of employment are solely matters within the purview of private law and not a matter for judicial review.

APPLICATION for a *Writ of Mandamus.*

Cases referred to:-

(1) *Perera* v *Municipal Council of Colombo* – 48 NLR 66
(2) *Rodrigo* v *Municipal Council of Galle* – 49 NLR 89
(3) *Mendis* v *Sima Sahitha Panadura Janatha Santhaka Pravahana Sevaya and others* – 1995 – 2 Sri LR 184.

Srinath Perera PC for petitioner.
Ms. M. Fernando SSC for respondents.

Cur.adv.vult

January 25, 2007

CHANDRA EKANAYAKE, J.

The petitioner by his amended petition dated 20.10.2004 has sought *inter alia* a mandate in the nature of *writ of mandamus* directing the respondents to take action under clause 04 of the letter of appointment by which he was appointed as "Samurdhi Sanwardhana (Trainee) – [marked as P2] to have an evaluation and consider the petitioner for appointing to a permanent post with effect from March 2001.

It was the contention of the petitioner that in terms of the letter dated 16.8.2000 (P1) he was appointed a 'Samurdhi Niyamaka' and he assumed duties in the said post on 01. 09. 2000 in divisions of 1 and 2 of Rhywatta, Olugantota. Thereafter as averred in paragraph (3) of the petitioner a formal letter of appointment (P2) was issued as a 'Samurdhi Sanwardhana Niladhari' (trainee) by the 1st respondent and by paragraph (4) of the same though it was stated that he would be considered for confirmation as 'Samurdhi Sanwardhana Niladari' (Grade II)' after training period of 6 months after evaluation of service. However no action was taken by the respondents is terms of the said paragraph of P2 although he had completed the 6 months training period by March 2001 and as he was not appointed to the said permanent post even after a period of one year, he was compelled to request that he be appointed to the above permanent post and he did so by letters marked P3, P4 and P5. It was the position of the petitioner that although the respondents were duty bound to act fairly, they have failed and/ or neglected to fulfill that duty, and in the aforesaid premises he has sought the relief prayed in the present petition.

The respondents by their statement of objections whilst denying the position taken up by the petitioner moved for a dismissal of the petitioner's application more particularly on the grounds urged by paragraphs 6 and 7 of the same and further on the ground that petitioner's application was misconceived in law and there was no basis to issue a *writ of mandamus* against the respondents.

It is seen from the document marked 1R1 (Scheme of recruitment for the post of Samurdhi Sanwardhana Niladhari –

(Grade II) annexed to the statement of objections of the respondents, that the basic qualification of an applicant should be 5 passes at the G.C.E. (Ordinary Level) Examination, and at the time of evaluation for the permanent post of Samurdhi Sanwardena Niladari (Grade II) it was revealed that the petitioner only possessed passes in 4 subjects (2 simples passes and 2 credit passes) at the G. C. E. (Ordinary Level) Examination and the same was far below the required basic qualification as per 1R1 and therefore the petitioner was not confirmed in the said post. The above position is well established by the petitioner's application form for the said post (1R2 which being a Sinhala translation of the application form 1R1).

Further according to the minute appearing in the document marked 1R4 instructions had been sought in respect of the petitioner who was a Samurdhi Sanwardhana Niladhari (Trainee) as he did not possess the minimum educational qualifications in terms of 1R1. As per minute dated 23rd February appearing in1R4 it has been suggested that it would be appropriate to take steps to terminate his services as he did not possess the required minimum educational qualifications for the post "Samurdhi Sanwardana Niladhari (Grade II)". Thereafter by the minute dated 25th February his services had been terminated and letter dated 08. 03. 2004 (1R5) had been sent to the petitioner communicating his termination. However, it is apparent from the petitioner's letter dated 22. 03. 2004 (1R6) that he had refused to accept 1R5. Now what the petitioner has sought is to compel the respondents by way of *writ of mandamus* to take action to appoint the petitioner to a post as per paragraph (4) of P2.

The position taken up by the petitioner had been that the respondents statutory bodies are duty bound to act fairly, but in the present instance they have failed and neglected to fulfill the said duties. Consideration of the material before Court reveals that the petitioner does not have the right to the performance of some duty of a public nature. In this context it would be pertinent to consider the decision of the Supreme Court in *Perera* v *Municipal Council of Colombo*[1] wherein it was held that; "*in an application for writ of mandamus the applicant must have the right to the performance of some duty of a public and not merely of a private character*". In the

said case the petitioner who was employed as a dispensary medical officer under the 1st respondent (The Colombo Municipal Council), sought a writ of mandamus on the Council and on the Local Government Service Commission (the 2nd respondent), to compel them to reinstate the petitioner in the post held by him from which he had been interdicted and to pay him arrears of salary from the date of his interdiction till reinstatement. In the course of the said judgment per Nagalingam. J. at 67 and 68;

> "On these facts it would be manifest that the object of the application is to compel the performance by the respondents of certain obligations arising between the petitioner and the respondents out of the contract of service entered into by the petitioner with 1st respondent. That the petitioner is merely an employee or a servant of the 1st respondent there can be no doubt that there can be equally little doubt that the neglect or refusal on the part of the respondent Council to pay the petitioner his salary in full or to reinstate him in his office is a breach of a duty not of a public but of a private character."

The petitioner in the present case undoubtedly has attempted to invoke the writ jurisdiction of this Court to secure a private remedy. Further the decision to terminate the petitioner's service had been solely due to the fact that the he did not possess the minimum educational qualification required on terms of scheme of recruitment marked as 1R1. In those circumstances in my view no failure of justice too has been occasioned.

The decision in the case of *Rodrigo* v *Municipal Council of Galle*(2) too would be of assistance here. It was a case where writ of mandamus was sought by the petitioner who was a Senior Revenue Inspector to give him work and to pay his salary when the respondent (Galle Municipal Council) refused to give him work and to pay his salary after 31. 10. 1947. It was held by the Supreme Court.

> "***that a writ mandamus*** did not lie because the petitioner's office was not one which conferred on him a statutory right to the performance of his duties and functions and his claim to reinstatement was merely a dispute about a private right."

I am unable to distinguish the above case from the case at hand for the reason that the object of the present application is also to compel the performance by the respondents of certain obligations arising out of employment (P2) which existed between the petitioner and the respondents and his claim to performance of clause 4 of P2 is merely a dispute about a private right, and as such not the subject for a writ of mandamus. Further disputes arising as to contract s of employment are solely a matter within the purview of private law and not matter for judicial review. In the case of *Mendis* v *Sima Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others* (3) *per* S. N. Silva, J. (P/CA) [as he was then] at 294;

> " The Writ of Mandamus prayed for in prayer (b) (reproduced at the beginning of this judgment) is entirely misconceived. It seeks an order from this Court restoring the Petitioner to the post of Managing Director with full pay. As noted above the Writ of mandamus lies only to compel the discharge of a statutory duty by a public authority. What is here sought to be done is the enforcement of a contract of employment."

For the foregoing reason I am of the view that the present application of the petitioner has to fail and same is hereby dismissed without cost.

SRISKANDARAJAH - I agree.

Application dismissed.

HAPUTHANTIRIGE AND OTHERS
v
ATTORNEY GENERAL

SUPREME COURT
SARATH N. SILVA, C.J
DISSANAYAKE,.J.
SOMAWANSA,.J.
SC FR 10,11,12, 13/07
MARCH 14, 15, 2007

Fundamental rights-Constitution Art 12(1), Art 29, Art 126 (4) – 13th Amendment – Grade 1 admissions to National Schools – Circular arbitrary unequal and capricious – National Policy – Affirmed by Cabinet of Ministers?– Classification – 'Royster formulation '– National Education Commission Act 19 of 1991 – S2 – Education Ordinance.

The petitioners in all the applications allege infringement in respect of the refusal to admit the several children named in the petition to Grade 1 of the respective National Schools. The allegations are related to unequal, arbitrary and capricious application of the Circular. The scheme of the Circular is to state the National Policy for admission of student to schools. The circular also states that the National Policy has been affirmed by the Cabinet of Ministers.

Held:

Quarere

"It is stated in paragraph 1.0 that the National Policy has been approved by the Cabinet of Ministers and reference is made to a letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers, however it is noted that the Circular itself is dated two days prior – this by itself renders it doubtful whether in fact the Cabinet of Ministers considered a National Policy on school admission as claimed in the Circular.

1) The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Art 12(1) sets out the positive element of the right that all persons are equal before the law, and guarantees "the equal protection of the law" and the bar

against discrimination on grounds of race, religion, language, caste, sex political opinion or place of birth – the safeguards that assume equality before the law.

2) Taken in the context of the Republican principle of equality and the fundamental guarantee thereof the phrase the law in Art 12 has to be interpreted in a wider connotation than the term law and within law in Article 170 to encompass any binding process of legislation.
3) The guarantee of the right of equality in Art 12 should extend to any binding process of legislation laid down by the executive or the administrative which affects in its application.
4) The law in its primary sense is contained in the Education Ordinance, but the Ordinance has not been amended and the elaborate system of regulations has fallen into disuse, and there is no law that is operative as regards National Schools or for that matter in regard to any School. Education, being the foremost responsibility of the Government has been operating for a long time in a legal vaccum.
5) The impugned Circular does not have of the general characteristics that, pertain to policy, it has a classification of 7 categories, from a functional perspective it is the binding process of legislation laid down by the executive as regards the matter of admission to government schools.

Per S.N. Silva, C.J.

"Both from the perspective of the application of the equal protection of the law guaranteed by Art 12 (1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admissions of students to schools should be that it assures to all students equal access to education".

6) The classification in the impugned Circular is not based on the suitability and the need of particular child to resume education in a National School or any other State School. It is based on wholly extraneous considerations and the suitability and the need of the particular student to receive education in the school is not ascertained in the process nor is there any method and criteria specified to ascertain such matters. The system of weighted marking contained in the Circular consequently defeats the objective of providing equal access to education.

7) The impugned Circular is inconsistent with the fundamental right to equality before the law and equal protection of the law guaranteed by Art 12(1), in so far it relates to the admission of students to Grade 1 of national/other school to which the Circular has been made applicable.

8) Section 2 of the National Education Commission Act 19 of 1991 empowers the President to declare from time to time the National Educational Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy has to be formulated on the recommendation and advice of the Commission.

APPLICATION under Art 126 of the Constitution.

Cases referred to :-

1. *Gulf Colarado and Santa Railway Co.* v *Ethis* – (1897) 165 US 150 165
2. *Royster Guano C* v *Commonwealth of Virginia* – 1920 – 253 US 412 at 415
3. *Brown* v *Board of Education Topika* – 347 US 483

Wijedasa Rajapakse PC with *Rasika Dissanayake and Gamini Hettiarachchi* for peririoners

Nuwan Peiris for 19th and 30th respondents

Sanjay Rajaratnam DSG for 2 - 8th and 10th - 12 respondents

Cur.adv.vult.

March 29, 2007

SARATH N SILVA, C.J.

The petitioners in all the application have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. The infringements they allege are in respect of the refusal to admit the several children named in the petitions to Grade 1 of the respective National School.

Admission to Grade I in Government school have resulted in a large number of applications being filed each year in this Court alleging infringement of the fundamental rights guaranteed by Article 12(1) and also in the Court of Appeal for *writs of certiorari* and *mandamus*. These matters have been generally dealt with as being urgent since the children on whose behalf the jurisdiction of the Court have been invoked are denied schooling and require relief without delay. With the intervention of Court administrative relief has been granted in many of the cases by admitting the children to the particular school concerned or to an alternative school.

The allegations have related to unequal, arbitrary and capricious application of the relevant circulars resulting in less

suited children securing admission to the detriment of the children who have been thereby compelled to invoke the jurisdiction of Courts. Quite apart from the thrust and parry of allegations and counter allegations, the underlying cause of this pervasive malady is the ever increasing demand for admission to leading schools in Colombo and other principal cities, administratively designated as National Schools within the purview of the Central Government as distinct from other schools within the purview of Provincial Councils and, the limited and number of places in such schools. Plainly, it is a situation of demand out stripping by far the availability of places. The response of the authorities to this classic situation of a gross mismatch in supply and demand has been to narrow down, through an intricate system of criteria contained in circulars (that would be examined hereafter), the area that would feed a particular school described in the Sinhala Circular as "පාසලේ පෝෂිත ප්‍රදේශය" "The feeder area" of the leading school have become preposterously narrow to be as low as 600 meters for D,S Senanayake Vidyalaya located between Bullers Road and Gregory's Road in Colombo 7 and 1000 meters for Ananda College abutting Maradana Road, in Colombo 10. It is probable that none of the children admitted live within this narrow official "feeder area". If the Officials and particularly the principals of the schools stay outside the gates at commencement and close of school hours, they would see that the "feeder" buses and vans, that transport school children are from as far out as Gampaha, Nittambuwa, Negombo and Kalutara. The upshot is the nightmare of school time traffic which disrupts all other activity in the city. The reality of the faulty process that we have to address from a legal perspective was pithily captured in an editorial comment of a leading newspaper early this month as follows:

> "That, the education sector is in a total mess becomes manifestly clear, year in year out from the brouhaha over the Grade One admissions. If the objective of education is to produce good citizens, the opposite of that happens in this country. Children are trained to be liars from the very beginning of their schooling. Parents forge bundles of documents to "prove" that they live within the stipulated distance from the schools of their choice and children are trained to memorize and utter blatant lies to cover up that

crime at the interviews, where they are debriefed by teachers and principals to check whether their parents are lying! In a country where children are trained to lie at a very tender age, it is not surprising that more and more people want to enter politics! How can the Ministry of Education, which cannot deal with at least a child's school admission properly, handle his or her education efficiently thereafter?"

Notwithstanding virulent criticism, the authorities have continued in the same way allowing matters to be resolved in Court. Recourse to Court has increased over the years to reach a remarkably high figure this year. Often, when leave to proceed is granted the authorities agree to the admission of the children concerned rendering it unnecessary to proceed with the matter further. In view of the persistent allegations of infringements it was decided that number of cases be grouped together and heard on two dates by this Bench.

With the assistance of counsel, including counsel of the Attorney General's Department, we have been able to comprehensively examine the relevant provisions of the impugned Circular and the ramifications of applying them....

The lead cases in which pleadings are complete relate to Sujatha Vidyalaya, Matara (S.C.F.R 10 – 13 of 2007) Mr. Wijyadasa Rajapakse, President's Counsel who appeared for the petitioners presented submissions on a two fold basis, viz:

(i) That the application of the provisions of the Circular to the relevant facts by the Respondents has been arbitrary and capricious, resulting in infringements of the fundamental rights guaranteed to the Petitioners by Article 12(1) of the Constitution.

(ii) That the classifications and criteria in the Circular applicable to the admission to Grade I are *per se* unreasonable and cannot be rationally related to the object of providing equal access to education.

President's Counsel strenuously submitted that the object of free education provided by the State is not to favour particular groups by reserving the best facilities to pre-

identified categories such as children of past pupils, and brothers and sisters of those already in a particular school. Such reservations do not pertain to the suitability of the child for admission and are in any event inconsistent with the character and purpose of a National School.

The facts relevant to the four applications in first group typify the complaints of alleged violation that are based on a combination of unreasonable and vague criteria and the arbitrary application thereof. The petitioners in the four cases made applications for the admission of their respective children to the Sujatha Vidyalaya, Matara, on the basis of Circular No. 20 of 2006 dated 23.05.2006 issued by the 10th respondent, being the Secretary of Ministry of Education, titled "Admission of Children, to Schools" (P1). The Circular is available only in Sinhala.

The petitioners admittedly reside within close proximity of the Sujatha Vidyalaya and their common complaint is that on the elaborate system of assigning marks which would be considered later, they infact received sufficient marks to secure admission of their children. However, 30 other children, residing further away secured admission depriving the petitioners' children of their due places in view of a decision of the respondents (stemming from a decision of the Acting Director of Education, as contained in document 6R4) to assign 15 marks to each child who was born at the Matara Hospital. As a result the petitioners children fell below the cut off point giving an undue advantage to children who were born in the Matara Hospital.

The case of arbitrary exercise of power in applying the Circular was unanswerable and the respondents agreed as an interim measure to admit the children to school. However, this would be in addition to the 30 children who secured admission due to the fortuitous circumstance that they were born in the Matara Hospital and not in any other Hospital. That would have ordinarily concluded the case but for the decision to deal with the alleged infringements vis-à-vis, the Circular in a comprehensive manner.

In this background I would examine the impugned Circular (P1) issued by the Secretary Ministry of education, referred to above. The Circular has several parts including that relevant to

these applications dealing with the admissions to Grade I. The scheme of the Circular is to state in Part I, the national policy for admission of students to schools. It is stated in paragraph 1.0 that this national policy has been affirmed by the Cabinet of Ministers and reference is made to letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers. However, it is noted that the Circular itself is dated two days prior, that is on 23.05.2006. This by itself renders it doubtful whether infact the Cabinet of Ministers considered a national policy on school admission as claimed in the Circular. Be that as it may, similar Circulars appear to have been issued even in the previous years and the Circular is examined on the premise that it is an act of the executive.

The national policy in respect of the different levels of admission to schools as contained in the Part I, is elaborated in the other parts of Circular and the schemes of marking are contained in the schedules at the end.

Admissions to Government schools are effected mainly at two levels

They are;

i) Admission to grade I being the subject matter of this application; and

ii) Admission to Grade VI based entirely on an island-wide scholarship examination;

The second level of admission at Grade VI rarely result in complaints, since it is based on the marks assigned at an examination conducted by the Department of Examinations. Thus, a merit based scheme is less prone to allegations of abuse provided it is properly structured to ensure transparency. The main submission of the President's Counsel is that the scheme for Grade I as contained in the Circular is totally devoid of a merit criteria in the sense of the suitability of a child for admission to particular school and is based on extraneous criteria such as ownership/occupation of property: the record of the parent as a past pupil (when both parent have been past pupils marks being attributed in respect of the parent having the better record); and the record of any brother or sister of the applicant child, already in that school. The extent to which the suitability of the child is excluded from the process is seen from the fact that no marks whatsoever are attributable on that account.

Counsel submitted that the resources of the State being public funds are spent largely on National School and that it is essential that the facilities in such schools being limited, the suitability of the child should be the principal criteria with a "feeder area" being realistically fixed with reference to Divisional Secretaries areas. That, the assignment of quotas to past pupils and brothers and sisters is an unreasonable classification which negates equal access to education being be the objective of the law.

In the light of these submissions being far reaching in their ambit, I would at first examine the specific classification that are made in Circular P1 in respect of admission to Grade I. The circular classifies seven categories specifying a percentage of admission for each as follows:

1)	Householders children	40%
2)	Children of the past-pupils of the school	25%
3)	Brothers and sisters of the children receiving education in the school	15%
4)	Children of the public officers who have received transfers and taken residence in the area in which the school is located and the children of MP's and Provincial Councilors who have to live outside their area of residence	06%
5)	Children of persons who are not householders	07%
6)	Children of persons who are directly involved in institutions connected with school education	05%
7)	Children of persons who have returned from abroad	02%

In addition to the foregoing, clause 1:1 (d) provides that the initial selection should be of 34 student per class and 5 places be reserved for children of members of the Armed Forces and the Police who are engaged in service in operational areas. One place is reserved for the children of persons who get transferred after the initial admissions on the basis of exigencies of state service. Thus a total of 40 student is specified for each class.

Clause 5:1 specifies the qualifications for admission from the householders category for 40% of the vacancies. It is stated that children permanently resident close to the school would qualify on the basis of residence of their parents or their grand parents where the parents are living in the same house.

5:1 (b) provides that residence should be for six years or more and to gain priority following criteria is set out. They are

i) ownership of the place of residence;

ii) evidence of permanent residence and the period;

iii) distance to the school from the place of residence;

5:1(c) states that evidence of ownership would be:

i) Title deed;

ii) Householders list;

iii) Permit granted by the National Housing Authority;

iv) Title deed of the grand parents if the residence is the grand parents house

v) A certificate issued by the head of the Institution as regards residence in official quarters;

vi) Any other applicable document

Schedule II contains a scheme of marking in reference to particular documents.

A maximum of 50 marks will be assigned as follows:

i) a document confirming the ownership	25
ii) birth certificate of the child(the relevant address to be included)	15
iii) certificate of the Grama Sevaka confirmed by the Divisional Secretary	05
iv) electricity, water, telephone and the like	03
v) any other documents	02

Clause 2 of the schedule assigns further total of 150 marks for the period of residence in the particular place. If the residence is over 6 years 150 marks, if it is 5-6 years 90 marks and 4-5 years 30 marks.

Clause 3 gives the marks on the basis of distance from the school. The distance is calculated from the office of the primary section of the school. If it is calculated from the office of the primary section of the school. If it is within 500 meters – 60 marks, and the number of marks get reduced proportionately as it goes further and where the distance is more than 3000 meters only 5 marks will be given.

President's Counsel made serious criticism of this entire scheme. He submitted that the document as to residence being the most important on which the marks as to distance and so on are also calculated, is specified as a title deed. He submitted that the persons before whom the documents are produced are not qualified, in any way to decide on the validity or otherwise of a title deed. The validity of a deed and the title conveyed thereby is a vexed question in civil litigation. It appears that the only matter looked into is the fact of registration. Under our law, registration does not attribute title to land is at best a claim to priority, which has to be considered in the light of the other registered documents. We have to yet move into a system of title registration.

Counsel accordingly submitted that this has left open an avenue for fabrication of deeds, especially in urban areas. He further contended that in any event one could have ownership of property that is not reflected in a title deed. In a situation where property is inherited from a parent who has died and the testamentary proceedings are not concluded there would be no registered document. Similarly, an instance of co-ownership or of prescriptive possession cannot be proved by a title deed as required in Clause I (i) of the schedule. Such a person would fall outside the entire scheme of marking. Thus the scheme favours the person who secures a title deed by hook or crook and may well exclude the genuine owner. The editorial comment of "bundles" of forged documents stems from these requirements in the scheme of marking.

It was revealed that several criminal prosecutions have been instituted against applicant parents; a sad ending to an endeavour to secure the admission of a child to a school of choice.

The extent of the prevarication of documents that take place is reflected in Supreme Court case No. 101/2005 which relates to an application for admission to Ananda College. The parent had obtained a lease for premises bearing No. 142 Temple Road, Colombo 10. These premises are said to be located 50 meters away from Ananda College. The document P8 produced in that case is the electoral list in respect of the said premises. The name of the applicant parent who is a member of the Armed Forces appears as chief householder. The second name is that of the mother. The third is an entirely different name of a medical officer. The fourth is a lecturer of a University who appears to be the wife of the third person. The fifth and sixth are persons bearing different names who have no occupation. The sixth is described as a Coordinating officer. The eighth is described as being self employed. There is yet another, making a total of nine. The *modus operandi* appears to be that each year the particular applicant shifts to the top position and present chief occupant who has made use of that position drops down. Ironically, the owner who has purported to give the lease is also included as one of the occupants. Hence, there is no change in the actual possession of the premises.

Being located 50 meters away from Ananda College the place is of high demand. Quite apart from fraudulent school admissions this situation presents a serious danger to the exercise of the franchise and the electoral process.

The next basis of assigning marks to a householder is on the birth certificate of the child concerned. This requirement is misconceived since the child is not given an address in the birth certificate. The particulars given of the mother and father in the birth certificate are places of their birth. It appears that the authorities have had in mind, the address of the informant specified in the reverse of the birth certificate who could be any person furnishing the information to the Registrar of Birth. In respect of birth at the Matara Hospital, in place of name of the informant the rubber stamp of the DMO had been placed. In these circumstances the authorities

decided to assign the full 15 marks to children born in the Matara Hospital. It is inexplicable that the acting Director herself who is supposed to be in charge of subject has given instructions on such a nonsensical basis. No person with an iota of common sense would give such an instruction. In view of this atrocious mistake 30 children secured admission.

President's Counsel then took on category of past pupils. He submitted that in terms of schedule 03 of the Circular marks are given on the basis of the period spent by the parents in the school; the examinations passed, performance including participation in musical band and so on. The significant point raised by Counsel in that where a parent had gained admission to the school pursuant to the year 5 scholarship examination only 2 marks are assigned. A clear instance of discrimination in respect of parents, long stayers preferred as against scholars. Whereas when parent had entered at grade I and continued 13 marks are assigned. Counsel submitted that it is irrational to assign marks on the basis of the period the parent has spent in school and his achievements both as a student and in extra curricular activities.

There is indeed merit in the submission of Counsel and when one peruses the scheme it appears as if though the scheme is designed to ascertain the suitability of the parent for re-admission to the school and not that of the child whose suitability is totally ignored.

Similarly, in the other category of brothers and sisters marks are assigned in respect of achievements of the brother and sister already in school. In respect of both categories residence is also a criteria which has to be decided as in relation to householders. That scheme as revealed in the preceding analysis is totally flawed.

As regards the category of "transfers" Counsel submitted that Members of Parliament and Provincial Councillors are given maximum of 20 marks although they are not in a transferable service. It has to be noted that upon election they should remain to serve their electorates and not move to urban centers and be removed from the area where their attention is most needed. If the elected members remain in their particular areas those schools will develop and the demand for leading school would gradually diminish. The scheme is totally misguided in respect of elected representatives.