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[2007] 2 SRI L.R. – PARTS 11-12

PAGES 281-336

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DIGEST

EXPULSION OF A MEMBER OF A RECOGNISED POLITICAL PARTY WHO IS A MEMBER OF PARLIAMENT – Articles 3.3.(c), 3.3(d), 3.4.(d) and 9.7 of the Constitution; Validity of the expulsion in terms of proviso to Article 99 (13)(a) of the Constitution; Procedural impropriety – Right to representation by an Attorney-at-Law – Section 41(2) of the Judicature Act No. 2 of 1978.

Rambukwella v United National Party and others 329
(Continued in Parts 13 to 15)

FUNDAMENTAL RIGHTS – Article 11, 13 (1) – Assault – No reason or justification? – Assaulted by crowd – Arrested by Police to prevent major skermish – Petitioners under influence of liquor – Fundamental rights guarantee owed to any person? – Does torture per se amount to cruel and degrading treatment – Burden of proving – Torture? – Use of excessive force – Penal Code – Sections 183, 314, and 410.

Sri Thaminda, Dharshane and Mahalekam v Inspector of Police and others 294

FUNDAMENTAL RIGHTS – Article 12 of the Constitution – Necessary parties – Non inclusion – Fatal? – Pursuing any exercise in futility – Equality – Discrimination.

Don Shelton Hettiarachchi v Sri Lanka Port Authority and others.. 307

FUNDAMENTAL RIGHTS – Article 12, Constitution – Executive or administrative action? – Tests? – Conversion of Public Corporations and Government Owned Business undertakings into Public Companies Act – No. 23 of 1987.

Organization of Protection of Human Rights and Rights of Insurance Employees and others v Public Enterprises Reform Commission and others 316

WRIT OF CERTIORARI – Administration of Sri Lanka Law College – Council of Legal Education – Public body? – Legal right to the performance of a legal duty by party against whom mandamus is sought – Material – Legitimate expectation – Could a prerogative writ be refused on the ground of administrative inconvenience?

Wannigama v Incorporated Council of Legal Education and others 281

WANNIGAMA
v
INCORPORATED COUNCIL OF LEGAL EDUCATION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE
AMARATUNGA, J.
BALAPATABENDI, J.
SC 20/2007
SC SPL LA 9/2007
CA WRIT 588/2006
MAY 4, 2007
JUNE 12, 2007

Writ of Certiorari – Administration of Sri Lanka Law College – Council of Legal Education – Public body? – Legal right to the performance of a legal duty by party against whom mandamus is sought – Material – Legitimate expectation – Could a prerogative writ be refused on the ground of administrative inconvenience?

The appellant who sat the entrance examination in the Sinhala medium was informed that he had obtained only 66 marks, and that he had not been successful at the entrance examination as 69 was the cut off mark and 239 candidates were selected on that basis. The appellant contended that 21 students who had sat the examination in the Tamil medium were called for an interview and 11 candidates had been admitted to the Sri Lanka Law College, and alleged that they had been admitted, not according to the marks obtained at the entrance examination but according to their performance at the interview. Alleging that the process employed for the selection of the 7th - 17th respondent was *ultra vires* the rules of the Council of Legal Education, the appellant and 8 others challenged the decision of the 1st respondent. The appellant's application was dismissed by the Court of Appeal.

In the Supreme Court, it was contended by the appellant that, the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instructions in the Sri Lanka Law College – Sinhala and Tamil, and the Court of Appeal was wrong in denying relief to the appellant, on the

basis that his credit pass in the G C.E. O' Level examination is in the Sinhala language and that he sat for the entrance examination in the Sinhala language.

The respondents contended that the appellant had failed to establish a specific right as a prerequisite for the Writ of *Mandamus* to be issued and that there was no basis for legitimate expectation and that the relevant authority would have to encounter administrative inconvenience, if relief was to be granted.

Held:

(1) It is a pre-entry requirement that the candidates should possess a credit pass in the English language and Sinhala or Tamil language. Considering the pre-entry requirements, the students, who have a credit pass in the relevant language are only entitled to admission to the relevant mediums, when admission is considered for the relevant medium of instructions.

In the circumstances, there were two mediums of instructions at the Sri Lanka Law College.

The appellant could not have been considered along with the students, who had sat for the entrance examination in the Tamil medium and called for the interview for a special selection process.

Held further:

(2) For the appellant to insist that, *Mandamus* be issued to direct Sri Lanka Law College to admit him to follow its programme, he should have fulfilled the basic requirement for the said writ by indicating that he has a legal right as he had obtained over and above 69 marks. The appellant has obtained only 66 marks, thus has no legal right for admission, on the basis of the results. When the appellant has no such legal right there cannot be any legal duty for the 1st respondent to admit the appellant to the Sri Lanka Law College.

The appellant could not have any legitimate expectation on the basis of his marks obtained at the entrance examination. The intervening circumstances, was the selection of a group of students who had sat for the entrance examination in the Tamil medium. The appellant did not belong and could not have belonged to that group. It is not possible to rely upon a legitimate expectation, unless such expectation is founded upon either a promise or an established practice.

(5) A writ may be refused not only upon the merits, but also by reason of the special circumstances of the case. The Court will take a liberal view indicating whether or not the writ will issue. It is apparent that to admit the appellant – would lead to several

administrative difficulties. Writ of mandamus will not be issued when it appears that it is impossible of performance, by reason of the circumstances.

APPEAL from the judgment of the Court of Appeal reported in 2006 - 3 Sri LR 287.

Cases referred to:

1. *Vasana* v *Incorporated Council of Legal Education and others.* 2004 1 Sri LR 163.
2. *Maha Nayake Thero, Malwatte Vihare* v *Registrar General* 1937 3 Sri LR 186.

M.A. Sumanthiran with *Viran Corea, Sharmaine Gunaratne, H. Vamadeva, Suresh Fernando* and *Erimza Tegal* for the petitioner-appellant.

Shavindra Fernando DSG with *Nerin Pulle* SSC and *S. Barrie* SC for respondents.

Cur.adv.vult.

September 11, 2007

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 13.12.2006. By that judgment, the Court of Appeal refused to issue a writ of *mandamus* and dismissed the petitioner-appellant's (hereinafter referred to as the appellant) application. The appellant filed an application before this Court on which Special Leave to Appeal was granted on the following questions:

1. Has the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instruction in the Sri Lanka Law College, namely Sinhala and Tamil?
2. Was the Court of Appeal wrong in denying relief to the petitioner on the basis that his credit pass in the G.C.E. Ordinary Level Examination is in the Sinhala language and that he sat for the entrance examination in the Sinhala language?
3. Whether in any event the relief sought in this application is futile?

The facts of this appeal, *albeit* brief, are as follows:

The entrance examination for admission to the Sri Lanka Law College to follow the course for admission as Attorneys-at-Law of the Supreme Court was held on 01.10.2005 and the appellant was a candidate for the said examination who sat in the Sinhala medium. The entrance examination was conducted by the 6th respondent at the request of the Incorporated Council of Legal Education in terms of its Rules.

In December 2005, the appellant had received the result sheet indicating that he had obtained 66 marks and that he had not been successful at the entrance examination (P4 in X2) as it had been decided by the Incorporated Council of Legal Education to select students, who had obtained over and above 69 marks at the said examination and 239 candidates were selected on that basis.

The appellant thereafter had become aware that four (4) students, who had sat for the said entrance examination in the Tamil medium had filed fundamental rights applications alleging that only one candidate has been selected from the Tamil medium for the year 2006 from the said entrance examination for admission to Sri Lanka Law College. Those petitioners had sought to re-scrutinize their papers.

According to the appellant this Court had directed the Senior State Counsel to ascertain whether the Commissioner General of Examinations was agreeable to constitute a committee consisting of a Chief Examiner to re-scrutinize the answer scripts without releasing the answer scripts from the Commissioner General of Examinations and if he was agreeable to such a course of action steps were to be taken accordingly and proceedings in those applications were terminated on that basis (P6 in X2). However the 6th respondent had declined to re-correct the answer scripts as the results sheet had specifically stated that no re-scrutinizing would be carried out.

Following the said order, the 3rd respondent, by his letter dated 01.03.2006 had called certain students to be present at the Chambers of the Hon. The Attorney-General on 08.03.2006 for an interview in relation to admission to Sri Lanka Law College

(P7 in X2). Thereafter the appellant had become aware that out of the 21 students, who were called for the interview, eleven (11) candidates, namely 7th to 17th respondents, had been admitted to Sri Lanka Law College. They had been admitted, not according to the marks obtained at the entrance examination to the Law College, but according to their performance at the interview.

The appellant submitted that several students, who were admitted after the said interview had obtained lower marks than the appellant who had obtained 66 marks, whereas others, who were so selected had got only 60, 62 or 65 marks. Further the appellant stated that he was aware that there were students in the Tamil medium who had received more marks than the 7th to 17th respondents at the entrance examination to the Sri Lanka Law College, but were not admitted.

In the circumstances, the appellant stated that the entire process of admission of 7th to 17th respondents had lacked transparency and that they were selected outside the criteria of the Rules of the Incorporated Council of Legal Education. According to the appellant, the scheme for the admission to Sri Lanka Law College is only based on the applicant's performance at the entrance examination and there is no provision to grant marks at interviews. The said interviews were made only for the selected few and there was no public notification of such an interview and therefore the 2nd, 3rd and 4th respondents had acted *ultra vires* the Rules of the Incorporated Council of legal Education in conducting the said interview.

Accordingly eight (8) candidates, who sat for the entrance examination and the appellant had filed writ applications seeking *inter alia* mandates in the nature of *writs of mandamus* and *certiorari* challenging the admission of the 7th to 17th respondents and the non-admission of those 8 candidates and the appellant and stating that the process employed for the selection of the 7th to 17th respondents to Sri Lanka Law College was *ultra vires* the Rules of the Council of Legal Education, was unreasonable, arbitrary, lacking transparency and was flawed by procedural and substantive irregularity

All nine (9) applications were taken up together for hearing before the Court of Appeal. Out of these, seven (7) applications were allowed and the two (2) applications filed by the appellant and another student, both of whom had sat for the entrance examination in the Sinhala medium, were dismissed. Being aggrieved by the said decision, the appellant filed a Special Leave to Appeal application.

Having stated the facts of this appeal let me now turn to consider the appeal based on the questions on which Special Leave to Appeal was granted by this Court.

1. Has the Court of Appeal misdirected itself in fact and law in holding that there are two mediums of instruction in the Sri Lanka Law College, namely Sinhala and Tamil?

Learned Counsel for the appellant in his application to this Court for Special Leave to Appeal, had specifically stated that the learned Judge of the Court of Appeal had dismissed the application filed by the appellant in the Court of Appeal *inter alia* for the reason that there were only two mediums of instructions at the Sri Lanka Law College, namely Sinhala and Tamil media and therefore he sought for Special Leave to Appeal *inter alia* on the question whether it was a misdirection to hold that there are only those two mediums of instruction.

Learned Judge of the Court of Appeal had stated in his judgment that there are two mediums of instructions at the Sri Lanka Law College. However, it is interesting to note that this fact had been common ground and the Judge has clearly stated so in the judgment, which reads thus:

> "It is common ground that there are two mediums of instructions at the Sri Lanka Law College, namely: 'Sinhala medium' and the 'Tamil medium'."

It is therefore apparent that this has been the view taken not only by the learned Counsel for the respondents, but also by the learned Counsel for the appellant. Otherwise it cannot be considered to be a fact by the Court of Appeal to be common ground at that stage. Moreover, as contended by the learned

Deputy Solicitor General for the 1st and 3rd respondents it is clear that the learned Judge of the Court of Appeal had formed such an opinion purely on the basis of the submissions made by the learned Counsel for the appellant.

This position is strengthened, when one reads the following paragraphs of the judgment, where the learned Judge of the Court of Appeal had stated that,

> **"The counsel for the petitioner contended that even though there were two mediums of instructions** the candidates are free to sit the Entrance Examination, in any language and to follow lectures in any language (emphasis added)."

Be that as it may, it is not disputed that the admission to the Sri Lanka Law College and the conduct of academic activities are governed by the Rules of the Incorporated Council of Legal Education. Accordingly it is a pre-entry requirement that the candidates should possess a credit pass in the English language and Sinhala language or Tamil language.

Learned Deputy Solicitor-General for the respondents contended that 'it is the practical reality that at the Sri Lanka Law College there are the Sinhala and Tamil mediums of instruction'. Considering the pre-entry requirements and the medium of instruction at the Sri Lanka Law College it cannot be found to be in correct that the learned Judge of the Court of Appeal had come to the conclusion that 'the students, who have a credit pass in the relevant language are only entitled to admission to the relevant mediums, when admission is considered for the relevant medium or instruction'.

In the circumstances, since it had been quite clearly common ground that there were two mediums of instructions at the Sri Lanka Law College it is imperative that this question has to be answered in the negative.

2. Was the Court of Appeal wrong in denying relief to the petitioner on the basis that his credit pass in the G.C.E. Ordinary Level Examination is in the Sinhala language

and that he sat for the entrance examination in the Sinhala language?

Admittedly the appellant sat for the entrance Examination for the admission to Sri Lanka Law College in the Sinhala medium. It is also not disputed that the appellant had obtained a credit pass in the Sinhala language and that he had not offered Tamil language as a subject for the Ordinary Level Examination. It is thus apparent that whilst all the candidates, who were later selected on the basis of an interview had been from the Tamil medium, the petitioner was the only such candidate, who had sat for the entrance examination in the Sinhala medium.

The appellant had not contended that he had the ability and that he was deprived from sitting for the said entrance examination in the Tamil medium. In the circumstances it is apparent that the appellant had selected Sinhala medium as his choice of medium for the purpose of sitting for the entrance examination.

Learned Deputy Solicitor General for the 1st and 3rd respondents contended that the said respondents had made a clear distinction between those who sat for the entrance examination for admission to Sri Lanka Law College in the Sinhala medium and Tamil medium in order to redress a grievance relating to a mistake in the question paper and certain problems that were found by the teaching and practice of law in the Tamil language.

Learned Deputy Solicitor General submitted that the Incorporated Council of Legal Education had also adopted a policy decision to increase the intake to the Tamil medium of the Sri Lanka law College in order to redress the problems of inadequacy of qualified Attorneys-at-Law, who could practice in the Tamil language in the Northern and Eastern Provinces of the country. Since there was no established procedure to follow in such a situation, the Incorporated Council of Legal Education had selected students from amongst the candidates, who had obtained high marks in the Tamil medium by following an interview process.

The contention of the learned Counsel for the appellant was not on the correctness of the process that was adopted by the Incorporated Council of Legal Education, but to elaborate the reasons for the non-consideration of the appellant along with that group of students, who had sat for the entrance examination in the Tamil medium, for admission to Sri Lanka Law College. However, it is to be noted that the learned Counsel for the appellant had not contended that the appellant could either pursue his studies at the Sri Lanka Law College in the Tamil medium or that he was capable of engaging in the profession as an Attorney-at-Law in the Tamil language. In such circumstances, the appellant could not have been considered along with the other students, who had sat for the entrance examination in the Tamil medium and called for the interview for a special selection process.

Accordingly this question also has to be answered in the negative.

3. Whether in any event the relief sought in this application is futile?

The contention of the learned Counsel for the appellant was that the appellant had prayed for a writ of mandamus to grant him admission to the Sri Lanka law College. Learned Counsel for the appellant strenuously contended that the technical objections raised by the learned Deputy Solicitor General to the grant of the writ of mandamus will not apply in this case. Learned Deputy Solicitor General for the respondents however contended that it was necessary for the appellant to establish a specific legal right as a pre-requisite for the writ of *mandamus* to be issued and also that it is incumbent on the appellant to demonstrate, that the respondents are 'beholden by a public duty' to admit the appellant to the Sri Lanka Law College. Learned Deputy Solicitor General referred additionally that there was no basis for legitimate expectation and that the relevant authority would have to encounter administrative inconvenience, if relief was to be granted in this appeal.

I would accordingly consider these contentions separately.

(a) The question of legal right and public duty.

Learned Counsel for the appellant relying on the decision in *Vasana* v *Incorporated Council of Legal Education and others*[1] stated that it was clearly stated by Amaratunga, J. that the Incorporated Council of Legal Education is indeed a public and statutory body and there is a legal duty to perform in enrolling the students to the Sri Lanka Law College. Learned Deputy Solicitor General for the respondents also relied on the decision in *Vasana (supra)* and stated that the Court of Appeal in that case had unequivocally laid down that,

> "In order to succeed in an application for a writ of mandamus the petitioner has to show that he or she has a legal right ...."

The writ of mandamus has been described as an order, which is of a most extensive remedial nature and is a command directed to any person, Corporation or inferior tribunal requiring him or them to do some particular thing, which is in the nature of a public duty (Halsbury's Laws of England, 4th Edition, Vol.I, para 89, pg. 111). Referring to the conditions precedent to issue of mandamus, it is stated in Halsbury's Laws of England *(supra*, para 120, pg 131) that,

> "The applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought, or alternatively that he has a substantial personal interest in its performance."

It is therefore apparent that, as has been clearly and correctly pointed out in the decision in *Vasana* by Amaratunga, J. *(supra)*, the appellant must show that he has a 'legal right to the performance of a legal duty' by the party against whom the mandamus is sought; viz. the Incorporated Council of Legal Education.

It is common ground that the appellant had obtained only 66 marks at the entrance examination and did not qualify for admission to the Sri Lanka Law College. As stated earlier 239

candidates were selected for admission to the Sri Lanka Law College who had obtained over and above 69 marks. A writ of mandamus would be issued only if a person can clearly show that he has a legal right to insist on such performance. Accordingly, for the appellant to insist that mandamus be issued to direct the Sri Lanka Law College to admit him to follow its programme, he should have fulfilled the basic requirement for the said writ by indicating that he has a legal right as he had obtained over and above 69 marks at the entrance examination. The appellant who had admittedly obtained only 66 marks, at the entrance examination to the Sri Lanka Law College thus has no legal right for the admission to the Sri Lanka Law College on the basis of the result of that examination. When the appellant has no such legal right, there cannot be any legal duty for the Incorporated Council of Legal Education to admit the appellant to the Sri Lanka Law College.

The next ground, which was strenuously contended by the learned Counsel for the appellant was that the appellant had a legitimate expectation that he would be admitted to the Sri Lanka Law College along with the 7th to 17th respondents as he too had obtained marks over and above 60.

Legitimate expectation, in general terms, was based on the principles of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. As has been pointed out by D.J. Galigan (Due Process and Fair Procedures. A Study of Administrative Procedure, 1996, Pg. 320),

> "In one sense legitimate expectation is an extension of the idea of an interest. The duty of procedural fairness is owed, it has been said, when a person's rights, interests, or legitimate expectations are in issue."

Discussing the concept of legitimate expectation, David Foulkes (Administrative Law, 8th Edition, Butterworths, 1995, pg. 290) has expressed the view that a promise or an undertaking could give rise to a legitimate expectation. In his words,

> "The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the

authority itself. This action may take one or two, or both forms, a promise (or a statement or undertaking) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that an expectation of the kind which the courts will enforce."

The procedure followed by the Sri Lanka Law College was to select the students for admission in the order of merit based on their performance at the entrance examination and the number of vacancies available as determined by the Incorporated Council of Legal Education.

Accordingly as stated earlier, the students, who had obtained over and above 69 marks were selected for admission. The appellant, when he became aware that he had obtained only 66 marks, knew quite well that, in terms of the practice and the procedure followed by the Incorporated Council of Legal Education in admitting students to the Sri Lanka Law College, that he was not qualified for admission.

In such circumstances it is evident that the appellant could not have had any legitimate expectation to have been selected to the Sri Lanka Law College on the basis of his marks obtained at the entrance examination. The intervening circumstances, as referred to earlier, was the selection of a group of students, who had sat for the entrance examination in the Tamil medium. As examined earlier, the appellant did not belong to and could not have belonged to that group. It is not possible to rely upon a legitimate expectation unless such expectation is founded upon either a promise or an established practice. It is abundantly clear that the appellant has no such grounds to rely on and in such circumstances it becomes futile for him to have any claim on the basis of legitimate expectation.

The final ground on which submissions were made was based on administrative inconvenience.

Learned Deputy Solicitor General for the 1st and 3rd respondents contended that any order, which directs the Sri Lanka Law College to admit the appellant would lead to several administrative difficulties as there are a large number of other applicants, who

have obtained higher marks than the appellant. Learned Deputy Solicitor General submitted that if an order is given to admit the appellant considering fair procedure, all those applicants, who would exceed one thousand in number, will have to be admitted. He further contended that, the Sri Lanka Law College is not equipped to accommodate over one thousand students in a given batch. Accordingly, relying on the decision of Soertsz, J. in *Maha Nayake Thero, Malwatte Vihare* v *Registrar General*[2], it was contended that the harm to the appellant, **who did not qualify for admission to the Sri Lanka Law College** is not sufficiently significant to outweigh the administrative inconvenience that would undoubtedly follow in the event a decision is taken to admit the appellant to the Sri Lanka Law College. In *Maha Nayake Thero, Malwatte Vihare (supra)*, Soertsz, J. had stated that,

> "... the writ may be refused not only upon the merits, but also by reason of the special circumstances of the case. The court will take a liberal view in determining whether or not the writ will issue."

This position has been considered by many other authorities. For instance, in Halsbury's Laws of England (4th Edition, Vol.I, page 125, page 134), it is clearly stated that the writ of mandamus will not be issued when it appears that it is impossible of performance, by reason of the circumstances and the writ will normally be refused **'if the party against whom it is prayed does not, for some other reason, possess the power to obey'**.

Considering all the aspects examined hereinbefore, it is thus apparent that the relief sought by the appellant in this appeal is futile and I answer the 3rd question in the affirmative.

In the circumstances, questions No. 1 and No. 2 are answered in the negative and question No. 3 is answered in the affirmative.

For the reasons aforesaid, this appeal is dismissed and the judgment of the Court of Appeal dated 13.12.2006 is affirmed.

I make no order as to costs.

AMARATUNGA, J. – I agree.
BALAPATABENDI, J. – I agree.

Appeal dismissed.

SRI THAMINDA, DHARSHANE AND MAHALEKAM
v
INSPECTOR OF POLICE AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
THILAKAWARDANE, J.
MARSOOF, J.
SC FR 463/464/465/03
JUNE 27, 2005
SEPTEMBER 2, 5, 2005

Fundamental Rights – Article 11, 13 (1) – Assault – No reason or justification? – Assaulted by crowd – Arrested by Police to prevent major skermish – Petitioners under influence of liquor – Fundamental rights guarantee owed to any person? – Does torture per se amount to cruel and degrading treatment – Burden of proving – Torture? – Use of excessive force. – Penal Code – Sections 183, 314, and 410.

The petitioners allege violations of Articles, 11 and 13(1) by certain officers. They complain that they were arrested without justification and were brutally assaulted, and further contend that, they were subjected to torture or to cruel inhuman or degrading treatment or punishment in violation of Article 11.

The respondents contended that the petitioners were under the influence of liquor and when the 3rd petitioner was requested to move his three wheeler away, the petitioners had attacked the respondents and the Police Constable who had sustained injuries had to be hospitalised, and that the petitioners had sustained injuries at the hands of the crowd, that had gathered there to intervene and save the Police Constable from being assaulted.

Held:

(1) The mere fact that there was an assault which carried some injury is not indicative of a violation of Article 11. The use of force does not *per se* amount to cruel, inhuman or degrading treatment and in particular a

minimum level of severity should be established to sustain a charge of torture.

The onus is on the petitioner to adduce sufficient evidence to satisfy Court that any act in violation of Article 11 did take place.

Per Saleem Marsoof, J.

"I am of the opinion that the fundamental rights guaranteed by Article 11 are owed to 'any person' which includes even persons in a high state of intoxication".

(2) Despite the failure on the part of the petitioners to identify those who violated their fundamental rights, they are entitled to a declaration that their fundamental rights have been violated by executive and administrative action.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Lucas Appuhamy* v *Mathurata* 1994 1 Sri LR 400.
2. *Saman* v *Leeladasa* 1989 1 Sri LR 10.
3. *Gunasekera* v *Kumara and others* SC 191/88 SCM 3.11.89.
4. *Wijayasiriwardane* v *Kumara, Inspector of Police, Kandy and others* 1989 2 Sri LR 312.
5. *Sisira Kumara* v *Sergeant Perera and others* 1998 1 Sri LR 162.
6. *Malinda Channa Peiris and others* v *Attorney-General* 1994 1 Sri LR 1.
7. *Ratnasiri and another* v *Devasurendra, Inspector of Police, Slave Island and others* 1994 3 Sri LR 127.

K. Thiranagama with *S.H.K.K. Kumari* for petitioners.
Mohan Peiris PC for 1st – 11th respondents.
Mahen Gopallawa SC for Attorney-General.

Cur.adv.vult.

August 2, 2007

SALEEM MARSOOF, J.

These three applications have been filed alleging violations of Articles 11 and 13(1) of the Constitution by certain Police Officers who were on duty on the last day of the Kandy Esala Perahera which fell on 11th August 2003. Since they arose from the same transaction, the three applications were heard together, and it is convenient to deal with them in one judgment.

The petitioner in SC Application No. 463/03, Mahadura Pandula Sri Thaminda, and the petitioner in SC Application No. 464/03 Ruwan Darshana Fernando, were persons who were earning their living by running fruit stalls opposite the Central Market, Kandy. The petitioner in SC Application No. 465/03, Aruna Shantha Mahalekam was the driver of the three=wheeler belonging to the said Ruwan Dharshana Fernando.

The petitioners' version of the incident that gave rise to these applications, as narrated in the petitions filed in this Court, is that at about 9.30 p.m. on 11th August, 2003, the petitioners came to the fruit stalls owned by Taminda and Fernando after dinner in the three-wheeler driven by Mahalekam. When the three-wheeler was stopped at the three-wheeler park opposite the Central Market for them to get down, there were a number of Police Officers there. One Police officer asked the driver to take the three-wheeler away immediately. The driver Mahalekam told the Police Officer that he would take it way after the persons inside got down. Then the Police Officer asked him, "What did you say?" and slapped him. It is the position of the petitioners that Ruwan Dharshana Fernando had an injury on his leg and was using crutches to walk, and consequently, there was a slight delay in alighting from the three-wheeler. When Mahalekam was being assaulted. Fernando asked the Police Officer not to assault him because it was his delay. The petitioners state that at that point Police Constable 31461 Abeyratne of Galhewa Police Station, gave Fernando a blow. Then, Thaminda got down from the three-wheeler and appealed to the Police Officer not to assault Fernando because he is a disabled person on his crutches. Thaminda said to the Police Officer. "Do not assault him. There is a law in the country. Act according to law". At that time the Police bus bearing Registration No. 63-376 came there, and a Police Officer who was inside the bus inquired from PC Abeyratne, "What was the problem?". He said: "These men talk law". Thereafter, about 12 Policemen alighted from the bus. The Policemen, who got down from the bus, saying: "Who are you? We are the chandiyas," kicked the petitioners and assaulted them with hands, batons and leather belts.

According to the petitioners, they were arrested by the 1st and 2nd respondents without any justification and were dragged into the bus, and thereafter put under the seats and further assaulted. As Fernando could not walk, the Police Officers dragged him along the tarred road and put him into the bus. The petitioners asked them too, not to assault them and to act according to law. They allege that they were attacked with batons and butts of guns at the Police Station as well, and the petitioners sustained severe injuries. Thaminda claims that at the Police Station one Police Officer attacked him on his chest with the muzzle of a gun, causing a bleeding injury. The petitioners allege that Mahalekam was dealt with most brutality, and that due to the attack with batons he sustained a bleeding head injury. When he asked for some water, one Police Officer had hit him on his bleeding wound with a baton, saying "I will give you some water". With that blow he became unconscious, and they put all three petitioners into the bus which took them to the General Hospital, Kandy, where Mahalekam was admitted to ward 11. Thereafter, the other two petitioners, namely Thaminda and Fernando, were taken to the residence of the Additional Magistrate, Kandy. These two petitioners claim that while they were being taken from the Hospital to the Magistrate's Bungalow, the Police Officers put them under the seats of the bus and kept kicking them. When they were produced before the Additional Magistrate, they informed him that they have sustained injuries due to assaults by the Police, and the Magistrate ordered the Police to admit them to the Hospital for treatment. It is claimed that even when they were being taken from the Magistrate's Bungalow to the Hospital, the Police Officers continued to assault them saying "You told the Magistrate and did this to us". Even inside the Police Post at the Hospital they were assaulted saying "These are the men who put part to us". They were taken to the General Hospital, Kandy at about midnight on 11th August 2003, and although Fernando was discharged from hospital after treatment at ward 10 the next morning. Thaminda had to be treated at ward 11 for a few days.

All three petitioners were in remand custody till 19th August 2003, on which date they were bailed out. The very next day they

visited the Police Headquarters in Colombo and made the statement produced marked 'P2' with the three petitions filed in this court. Their statements are substantively in the same lines as the averments in their petitions, except that in these statements they have sought to identify the Police Officers who allegedly assaulted them. The question of identity is very crucial to applications of this nature, and will be looked into in greater detail later on in this judgment.

The petitioners have pleaded that they were arrested by the 1st and 2nd respondents without any reason or jurisdiction, in violation of their fundamental right to freedom from arbitrary arrest guaranteed by Article 13(1) of the Constitution, and that they were brutally assaulted by the 1st to 10th respondents causing serious injuries requiring hospitalization, thereby infringing their fundamental rights to freedom from torture and cruel, inhuman or degrading treatment or punishment guaranteed by Article 11 of the Constitution.

It appears from the affidavit filed in these cases and the statements recorded by the Police that the incident arose from the delay in taking away the three-wheeler from which the petitioners had alighted within a prohibited zone within 400 meters from the route of the Perahera within which parking of vehicles inclusive of three-wheelers) was not permitted for security reasons. It is not disputed by the petitioners that the incident occurred while the three-wheeler was being parked in a prohibited area. It is common ground that the incident in question took place on the last day of the Kandy Esala Perahera (the "Randoli Perahera"), at a time when tens of thousands of persons, inclusive of foreigners, had gathered by the road side to view the Perahera. Special traffic arrangements had been made in order to facilitate the conducting of the Perahera by closing certain areas for traffic and by diverting the traffic into by-roads.

The respondents' version of this incident is set out in the affidavit dated 3rd November 2003 filed by the 1st respondent and the joint affidavit dated 3rd November 2003 filed by the 2nd to 10th respondents along with their objections. As attachments to the affidavit of the 1st respondent has been produced two more affidavits marked respectively '1R4a' and '1R4b' and

affirmed to by Ekanayake Mudiyanselage Goonethilake Banda, the senior Superintendent of Police for the Kandy Division, and Senanayake Mudiyanselage Abeyratne, who was a constable on duty near the Kandy Market at the time of the incident. It transpires from these affidavits and the documents annexed thereto that PC Abeyratne, who was deployed near the Market, had required the driver – Mahalekam to move the three-wheeler away, but the petitioners, who were under the influence of liquor, had been incensed at this request and had turned abusive and violent. They had assaulted PC Abeyratne during the course of which the latter sustained injuries, and his uniform was torn. According to the respondents, the crowd that had gathered there had to intervene to prevent PC Abeyratne from being assaulted further, and in view of the injuries sustained by him, he had to be admitted to Hospital along with the petitioners. The respondents' position is that all three petitioners were drunk, disorderly and violent, and the crowd had set on the petitioners when they saw PC Abeyratne being assaulted by the petitioners.

At that time, the 1st to 10th respondents, who were officers of the Rapid Deployment Force (RDF) Unit of the Kandy Police were in a police vehicle parked nearby ready to meet any emergency. According to the respondents, it was a by-stander who had informed the said Police vehicle about the incident, and this Unit proceeded to take action to avoid a further breach of the peace. The Rapid Deployment Force (RDF) is a Unit of the Sri Lanka Police specially trained to deal with unusually difficult situations inclusive of the controlling of riots and other similar circumstances, and is required to play a lead role in situations which Police Units indulging in normal Police duties are unable to effectively deal with. RDF Units are stationed in principal towns in Sri Lanka and are also called upon to be present on special occasions at which large crowds gather in order to support and supplement the local Police in the area. The 1st to 10th respondents were all members of this Unit, and were led by the 1st respondent who was in rank an Inspector of Police.

Learned President's Counsel appearing for the 1st to 11th respondents submits that the 1st to 10th respondents had to act quickly in order to avert a major skirmish between the petitioners

and the crowd which had already assaulted the petitioners. The immediate concern of these respondents was to obtain medical attention to the petitioners who had sustained injuries at the hands of the crowd and the said respondents had difficulty in even getting the petitioners to board the Police bus. It is the position of the respondents that the petitioners were informed at the time of their arrest that they were being arrested for obstruction of the performance of duties by a Police Officer, for drunken and disorderly behaviour and for breach of the peace. Learned President's Counsel has referred us to Section 23 (2) of the Code of Criminal Procedure Act No. 15 of 1979, as subsequently amended, which provides that if any person forcibly resists the endeavour to arrest him or attempts to evade arrest, "the person making the arrest may use such means as are reasonably necessary to effect the arrest." He also submits that in Lucas *Appuhamy* v *Mathurata*(1), it was observed by this Court that where an arrest without warrant is effected on sufficient grounds, such arrest was not in violation of Article 13(1) of the Constitution. The petitioners have since been charged for offences punishable in terms of Sections 183, 314 and 410 of the Penal Code, and proceedings are said to be pending. It is clear from the evidence that the 1st to 10th respondents did not act at any time in excess of the powers granted to them by law in effecting the arrest of the petitioners, and that their intervention prevented the occurrence of a major breach of the peace. In these circumstances, at the hearing of this case, the learned Counsel for the petitioners indicated to Court that he was not pursuing his case under Article 13(1).

The petitioners also allege that they were subjected to torture or to cruel, inhuman or degrading treatment or punishment in violation of their fundamental rights guaranteed by Article 11 of the Constitution. In this connection, it must be stated at the outset that the medical reports made available to Court unequivocally support the allegation made by the respondents that the petitioners were drunk. However these reports need to be scrutinized closely to ascertain whether their fundamental rights under Article 11 have been infringed.

As far as the petitioner in SC Application No. 464/03 Ruwan Darshana Fernando is concerned, the Medico – Legal Report issued by Dr. T.H.L. Wijesinghe has been produced in Court. This report shows that he was examined on the morning of 12th August 2003 in ward No. 10 of the General Hospital, Kandy prior to his discharge, and it shows that he had minor abrasions and contusions of a non-grievous nature, which clearly indicates that this petitioner has been subjected to assault. Learned President's Counsel for the 1st to 11th respondents has cited the decisions of this Court in *Saman* v *Leeladasa*(2) and *Gunasekera* v *Kumara* and others,(3) for the proposition that the mere fact that there was an assault which carried some injury is not indicative of a violation of Article 11. In fact in *Wijayasiriwardena v Kumara, Inspector of Police, Kandy and two others* (4) and *Sisira Kumara* v *Sergeant Perera and others*(5) this Court has taken the view that the use of force does not *per se* amount to cruel, inhuman or degrading treatment and in particular, a 'minimum level of severity' should be established to sustain a charge of torture. As Justice (Dr.) A.R.B. Amerasinghe observes in his work '*Our Fundamental Rights of Personal Security and Physical Liberty*' at page 29 –

> " 'Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must (be) the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment."

In *Wijayasiriwardena* v. *Kumara, Inspector of Police, Kandy* and *Two others (supra)*, the petitioners had a split lip and an injury on the cheek which he alleged amounted to a violation of Article 11, Mark Fernando, J. (with Dheeraratne, J. and Ramanathan, J. concurring) observed that -

> "The use of excessive force may well found an action for damages in delict, but does not *per se* amount to cruel, inhuman or degrading treatment that would depend on the

persons and the circumstances. A degree of force which would be cruel in relation to a frail old lady would not necessarily be cruel in relation to a tough young man; force which would be degrading if used on a student inside a quiet orderly classroom, would not be so regarded if used in an atmosphere charged with tension and violence .... To decide whether the force used in this instance was in violation of Article 11, "is something like having to draw a line between night and day' there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."

The injuries suffered by Ruwan Darshana Fernando are as much consistent with the story of this petitioner that he was assaulted by the Police, as they are with the story of the respondents that he along with the other petitioners were set upon by a crowd from whom they were rescued by the Police. In my opinion, this petitioner has not been able to establish a violation of Article 11 of the Constitution. The burden of proof required in applications of this nature was explained in the case of *Malinda Channa Peiris and others* v *Attorney-General*(6), wherein it was stressed that having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of any petitioner seeking to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment. Accordingly, the *onus* is on this petitioner to adduce sufficient evidence to satisfy Court that any act in violation of Article 11 did take place, and this in my opinion, he has failed to do. In the circumstances, I am of the view that the application filed by this petitioner should be dismissed, but in all the circumstances of this case, without costs.

However, as far as the other two applications are concerned, the position is much more serious. The petitioner in SC Application No. 465/03, Aruna Shantha Mahalekam, was examining by Dr. D.P.P. Senasinghe on the morning of 13th August 2003 in Ward No. 11 and in the Medico – Legal Report issued by him it is expressly stated that even at that time his

breath was smelling of alcohol. However, the following injuries have been noted by the Doctor in the body of Mahalekam:-

"1. Laceration, 6x4 cm, cruciate in shape, placed on the upper middle aspect of the head.
2. Contusion, 3x2 cm, oral shaped, placed on the back aspect of the left shoulder, at the root of the neck.
3. Contusion, 2x3 cm. band shaped, placed on the mid-back aspect of the right shoulder.
4. Contusion, 4x3 cm, oral shaped, placed 4 cm away to the left from the midline and 10 cm below the lower angle of the left scapula on the back of the left side of the chest.
5. Contusion, 5x3 cm, band shaped, placed obliquely towards right, 5 cm below and 6 cm to the left from the lower angle of right scapula on the back of the right side of the chest.
6. Contusion, 6x3 cm, band shaped, placed obliquely towards the left, on the back of the right side of the abdomen 10 cm below the injury No. 5.
7. abrasion, 2 cm, linear, placed transversely on the right outer aspect of the abdomen.
8. Contusion, 4x3 cm, oral shaped, placed on the right outer aspect of the abdomen surrounding the injury No. 7.
9. Contusion, 5x4 cm, oral shaped, placed on mid inner aspect of right arm.
10. Abrasion, 1x1 cm, irregular, placed on inner aspect of right elbow."

The very first item of injury noted above supports the story of this petitioner Mahalekam that even when he was brought to the Police Station he was bleeding with a head injury caused by a Police assault, and that when he asked for some water one Police Officer, who is not named by the petitioner in his petition or elsewhere, had hit him on his bleeding wound with a baton, and that he thereupon lost consciousness. Of course, Dr. Senasinghe has observed in his report that "there was no loss of

consciousness, vomiting or bleeding from the ears, nose or mouth," but the injuries suffered by this petitioner are in my opinion clearly on the other side of the line, and of sufficient seriousness to justify a finding of a violation of Article 11 of the Constitution.

The petitioner in SC Application No. 463/03, Mahadura Pandula Sri Thaminda was also examined on the morning of 13th August 2003 by Dr. Senasinghe who has noted in the Medico – Legal Report issued by him that his breadth too was smelling of alcohol. He has also noted the following injuries on the body of this petitioner.

"1. Sutured laceration, 1 cm placed obliquely, 1 cm above the inner 1/3 of the right eye brow.

2. Sutured laceration, 1 cm placed vertically, 1.5 cm away to the right, from the outer angle of right eye.

3. Sutured laceration, 5 cm, placed obliquely, on the middle of the back aspect of the head.

4. Contusion, 8x2 c,, placed obliquely on the back aspect of right side of the chest over right scapula.

5. Abrasion, 1x0.5 cm, irregular in shape, placed 10 cm below and 3 cm to the right from lower angle of left scapula on the back aspect of the left side of the chest.

6. Abrasion, 4x0.3 cm, linear, placed transversely on the left lower chest, 6 cm below the left nipple.

7. Abrasion, 1 cm, linear, placed transversely on the left lower chest, 2 cm below the injury No. 6."

In my opinion the injuries found on the petitioner Thaminda are also of a fairly grievous nature, and are of sufficient seriousness to justify a finding of a violation of Article 11 of the Constitution.

In my view, it is extremely unlikely that the injuries suffered by the petitioners in SC Applications 463/03 and 465/03 were sustained in the course of a confrontation with a crowd as alleged by the respondents. In fact, if such serious injuries were

inflicted on these two petitioners by a crowd of people, it was the duty of the police to trace the persons who inflicted such injuries and take action to prosecute them. In the absence of any information regarding action taken by the police to apprehend such persons, the only reasonable conclusion one can arrive at is that they were inflicted by the police after the arrest of these petitioners and while they were in Police custody.

There is, however, one difficulty in granting these petitioners relief, and that is the uncertainty which permeates their entire case in regard to the identity of those who subjected them to torture or to cruel, inhuman or degrading treatment or punishment. It is important to note that the only person whom they have expressly identified in the petitions filed by them as a person who dealt any one of them even a blow is PC Abeyratne, whom they have not chosen to cite as respondent to these applications. All the other acts they have complained of are not attributed to any particular police officer or officers.

In the statement made by the petitioner in SC Application No. 463/03 Thaminda at the Police Headquarters on 19th August 2003 marked 'P2' and produced with his petition, the name of the 1st respondent is expressly mentioned, along with the numbers of the 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents as those who assaulted him in the Police Station, but in addition to these persons Thaminda has mentioned PC 37434 and PC 34111 who are not respondents to these applications, and no explanation has been offered as to why these persons have not been cited as respondents. In the statement of Thaminda no reference is made to the 5th and 6th respondents, and the reliability of the statement is put into great uncertainty by the disclosure that the numbers of the Police Officers who are alleged to have assaulted Thaminda were obtained from a sincere friend whose name or identity is not mentioned in the statement. In the statement made by the petitioner in SC application No. 465/03 Mahalekam on the same day, the 2nd, 3rd, 5th, 7th, 8th, 9th and 10th respondent are identified as those who assaulted him, but he too makes reference to PC 37034 who is not a respondent to his petition. He has, however, not disclosed his source of information regarding the numbers mentioned by him, but it is most likely that

this is some information that Thaminda shared with him. The fact is, that there is no averment in the petition filed by this petitioner regarding the identity of those who allegedly assaulted him.

It is obvious that the petitioners have not been able to identify any of the Police Officers who assaulted them as they themselves were in a highly intoxicated state. However, I am of the opinion that the fundamental rights guaranteed by Article 11 are owed to "any person" which includes even persons in a high state of intoxication. On the available material I am satisfied that during the night of 11th August 2003, certain police officers attached to the Kandy Police Station and the Rapid Deployment Force (RDF) of that police station, acting under the colour of office, did assault the petitioners in SC Application No. 463/03 and SC Application 465/03 and subjected them to inhuman treatment. The situation in these applications is similar to that in *Ratnasiri and another* v *Devasurendran, Inspector of Police, Slave Island and others*(7) in which the Supreme Court held that despite the failure on the part of the petitioners to identify those who violated their fundamental rights, they were entitled to a declaration that their fundamental rights have been violated by executive or administrative action for compensation.

However, in all the circumstances of the present applications, where the petitioners have themselves conducted themselves in a disgraceful manner on a noble occasion, and must share parts of the blame for their predicament, I am not inclined to award any compensation, and only grant a declaration that the fundamental rights guaranteed to the petitioners in SC Application No. 463/03 and SC Application 465/03 by Article 11 of the Constitution have been infringed due to executive or administrative action. In the particular circumstances of these two applications. I do not make any order for costs.

SILVA, CJ. – I agree.

TILAKAWARDANE, J. – I agree.

Only declaratory relief granted.

DON SHELTON HETTIARACHCHI
v
SRI LANKA PORTS AUTHORITY AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SOMAWANSA, J.
BALAPATABENDI, J.
SC FR APPLICATION NO/ 89/2003
FEBRUARY 21, 2007

Fundamental Rights – Article 12 of the Constitution – Necessary parties – Non inclusion – Fatal? – Pursuing any exercise in futility – Equality – Discrimination.

The petitioner, a civil engineer, was the Chief Engineer (Planning and Development) of the Sri Lanka Ports Authority (the 1st respondent). The 1st respondent appointed the 5th respondent as the Director (Technical) and the 4th respondent as Special Advisor (Technical, Planning and Development). The petitioner contended that the Director (Technical) was the highest post in the engineering hierarchy to be held by a civil engineer, and the appointment of the 5th respondent who was an electrical engineer as Director (Technical) and the appointment of the 4th respondent as Special Advisor were therefore an infringement of Article 12.

Held:

(1) There was no evidence to substantiate his claim that the highest post in the engineering hierarchy of the port was always held by a civil engineer.

Equality requires that all should be treated equally without any discrimination. There cannot be any special privileges in favour of any individual and that persons who are similarly placed under similar circumstances should be treated equally.

(2) As the petitioner and the 5th respondent had retired from services after the filing of the application pursuing any exercise in futility could only serve as an academic purpose.

(3) The non-inclusion of all the parties who would be affected by an order made in the application was fatal to the validity of the application.

Cases referred to:

(1) *S.S. Royappa* v *State of Tamil Nadu* AIR 1974 SC 555.
(2) *Velupillai* v *The Chairman, Urban District Council Secretary* 39 NLR 464.
(3) *Farook* v *Siriwardene, Election Officer and others* (1997) 2 Sri LR 145.

Dr. Sunil Cooray with *M. Premachandra* for petitioner.

Shibly Aziz PC with *Senany Dayaratne* for 1st, 2nd, 3rd and 5th respondents.

Cur. adv.vult.

December 12, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a Chartered Civil Engineer by profession and a member of the Institute of Civil Engineers, was serving as a Head of a Division under the designation, Chief Engineer (Planning and Development) with effect from 02.10.2001 subject to a probationary period of one year of the 1st respondent Authority. The petitioner alleged that his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated by the 1st and 2nd respondents by the appointment of the 4th respondent as a Special Advisor (Technical, Planning and Development) and by the appointment of 5th respondent to the post of Director (Technical).

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

The facts of this case, as stated by the petitioner, *albeit* brief, are as follows:

The petitioner was appointed as an Engineer by letter dated 02.02.1968 (P2) at the Colombo Port Commission and subsequently by letter dated 22.08.1970 (P3), he was appointed as a Civil Engineer at the Colombo Port Commission. Since 1968, the petitioner had been serving in the Port Infrastructure Management for over a period of 35 years.

According to the petitioner, the chief tasks of the 1st respondent Authority belong to the discipline of Civil Engineering and it had been the practice since 1912 that the position giving the leadership to all port civil engineers was held by a Port Civil Engineer. Presently the highest such designation is the post of Director (Technical). The 5th respondent, according to the petitioner, is not a Civil Engineer, but a qualified Chartered Electrical Engineer and therefore he does not hold the requisite qualifications in terms of section 58(iii) of the Manual of Administrative Procedure of the Sri Lanka Ports Authority (P11) to be appointed as the Director (Technical). The 4th respondent is not an employee of the 1st respondent Authority and is an employee of Port

Management Consultancy Services Limited, which is a subsidiary Company of the 1st respondent Authority headed by the 2nd respondent. The 4th respondent, who is over 60 years of age was appointed as Special Advisor, as the 5th respondent is not a Civil Engineer and the 5th respondent is carrying out the duties, which the petitioner is entitled to carry out and also there is no recognized post in the Ports Authority known as 'Special Advisor'.

Accordingly, the petitioner's grievance is that the appointments given to 4th and 5th respondents should be cancelled and the petitioner should be appointed to the post of Director (Technical) in the 1st respondent Authority on the basis that the said post has been reserved for Civil Engineers.

The contention of the learned Counsel for the petitioner was that the position of Director (Technical) should be held by a Port Civil Engineer as has been the practice since 1912. In support of this contention learned Counsel for the petitioner referred to the previous positions held in respect of the highest position in the Civil Engineers' cadre, which is illustrated in the following chart:

Period	Designation	Organization/ Department	Profession	Relevant Statute
1912 – 1950	Harbour Engineer	Harbour Engineer's Department/PWD	Chartered Civil Engineer	Thoroughfare Ordinance
1951 – 1967	Harbour Engineer/Chief Engineer (Ports)	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Act of 1951
1968 – 1978	Port Commissioner	Colombo Port Commission	Chartered Civil Engineer	Port of Colombo Administration Act of 1951
1979 – 2001	Managing Director	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No. 51 of 1979
2002 – 2003	Director (Technical)	Sri Lanka Ports Authority	Chartered Civil Engineer	Sri Lanka Ports Authority Act, No. 51 of 1979

Learned Counsel for the petitioner further submitted that the Port Engineers are divided into two categories, which include the Port Infrastructure Management and Port Superstructure Management. According to his submission Port Civil Engineers are all involved in the Port Infrastructure Management whereas the electrical, mechanical and marine engineers belong to the Port Superstructure Management. The contention therefore was that since the highest position of the post of Port Civil Engineers' is presently identified a Director (Technical), such position should be held only by a Civil Engineer.

Learned President's Counsel for the 1st, 2nd, 3rd and 5th respondents (hereinafter referred to as the learned President's Counsel for the respondents) strenuously contended that the post of Director (Technical) is not limited to the discipline of Civil Engineers, but open to all the other disciplines such as mechanical, electrical, electronics and marine engineering for the reason that it would be patently unfair and discriminatory to reserve the said post for members of one branch of port engineering.

The petitioner, as stated earlier is challenging the appointments made to the 4th and 5th respondents and specifically the appointment made to the 5th respondent. The 5th respondent was admittedly appointed as the Director (Technical) of the 1st respondent Authority.

The nature and scope of the work of the said position was described in detail in the affidavit of the 1st to 3rd and 5th respondents, where it was averred that the said post is largely an administrative position, which is concerned with co-ordinating and overseeing activities of all the disciplines of port engineering. Such a position should be open to members of various disciplines of port engineering since the specialisation in engineering has not been a deciding factor when appointments were made to this post.

Learned President's Counsel for the respondents submitted that the 5th respondent was appointed to the post of Director (Technical) in terms of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority. Section 58 of the said manual, deals with the covering up duties and section 58(iii) reads as follows:

"58. *The general terms and conditions relating to appointments to cover up duties of other posts are indicated below:*

....

(iii) *where the covering up period is expected to be over one month, the most senior employee in the grade immediately below should be appointed to cover up duties provided he is considered suitable.*"

Learned President's Counsel for the respondents contended that on the basis of section 58(iii) of the manual of Administrative Procedure of the 1st respondent Authority, the 5th respondent, who was the senior most employee in the Head of Director grade, which was the grade immediately below that of the Director, who had over nine (9) years of experience in that grade as opposed to the petitioner, who had only one (1) year and nine (9) months experience in that grade was appointed to cover-up on duties of Director (Technical). It was further submitted that the 5th respondent was also deemed to be suitable for the said position on the basis of *inter alia* seniority, ability, managerial capabilities and contribution towards the achievement of organizational targets and goals.

Subsequently to the said appointment, the Board of Directors of the 1st respondent Authority had obtained approval from the Ministry of Port Development and Shipping to confirm the 5th respondent in the post of Director (Technical) (1R2).

It is to be borne in mind that the post of Chief Engineer (Ports) as the post of Director (Technical) was then known, was held from 1984 to 1989 by one R.B. Wickramage, who was a Mechanical Engineer by profession (1R1).

Thus it is evident that the position in question has not been confined to Civil Engineers and I am therefore in agreement with the submissions made by the learned President's Counsel for the respondents that the post of Director (Technical), being an administrative position, should not be restricted to one area of specialization, so that the most suitable officer could be selected on the basis of his seniority, ability, managerial capabilities and his contribution towards the achievement of targets and goals of the 1st respondent Authority.

In the circumstances it is apparent that the contention of the learned Counsel for the petitioner that the post of Director (Technical) is limited only for civil engineers cannot be accepted.

The petitioner had also complained of the appointment of the 4th respondent stating that the said appointment was made as the 5th respondent, who was not a Civil Engineer was unable to effectively and efficiently carry out the duties as the Director (Technical).

Learned President's Counsel for the respondent contended that the 4th respondent was appointed as a Special Advisor for the purpose of utilizing his expertise and experience for special projects such as donor-funded projects. Further it was submitted that as the 1st respondent was engaged in effecting an expansion of the ports system of the country, it had required the advice and Counsel of port engineers of the 4th respondent's level of experience and expertise to better strategize the utilization of foreign funding in an expedient and efficient manner.

On a consideration of the submissions of the learned President's Counsel for the respondents, it is apparent that the purpose of employing the 4th respondent was for the purpose of strategical utilization of foreign funds on special projects.

Considering the types of duties that had been allocated to the 4th respondent, it appears that his services had been obtained for the sole purpose of functioning as a Special Advisor on donor – funded projects and not for the purpose of assisting the 5th respondent, who was functioning in the capacity of Director (Technical).

The petitioner's complaint was that his fundamental right guaranteed in terms of Article 12(1) was violated due to the appointments of the 4th and 5th respondents.

Article 12(1) of the Constitution, which deals with the right to equality reads as follows:

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

Equality requires that all should be treated equally without any discrimination and as Sir Ivor Jennings (The Law of the

Constitution, P 49) had described, among equals the law should be equal and should be equally administered. It illustrates the concept that there cannot be any special privileges in favour of any individual and that persons, who are similarly placed under similar circumstances should be treated equally.

However, this does not mean that all laws should apply equally to all persons. What it postulates is that classification is permitted provided it is found on intelligible differentia and should be reasonable. There cannot be any arbitrariness in such classifications. Equality as pointed out by Bhagawati, J., (as he then was) in *S.S. Royappa* v *State of Tamil Nadu*(1) is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. Nevertheless there cannot be any discrimination between two persons, who are similarly circumstanced, which emphasizes the concept that equals cannot be treated unequally and unequals cannot be treated equally.

This concept equally applies to employment opportunities as well. Accordingly in regard to appointments and promotions equals should not be placed unequally and unequals also should not be treated equally.

The question therefore at this point would be whether the petitioner and the 4th and 5th respondents were equals who should have been treated equally.

Admittedly, the 4th respondent was appointed to the post of Special Advisor and the 5th respondent was appointed as the Director (Technical) of the 1st respondent Authority. The petitioner has neither submitted any supporting evidence to indicate that he was suitable and qualified to have been considered for either of these positions nor has he substantiated the position as to why the 4th and 5th respondents were not suitable to have been appointed to their respective posts. Although he has alleged that the 5th respondent should not have been appointed as he is not a Civil Engineer, there is no material that has been submitted by the petitioner to substantiate this position. Moreover, the petitioner had submitted that the purpose of appointing the 4th respondent as a Special Advisor was due to the fact that the 5th respondent was not a Civil Engineer, but only a qualified Electrical Engineer. This

submission is again without any supporting evidence. Would it be possible for a petitioner to make submissions without any supporting and substantiating material? My answer to that question is clearly in the negative. If a petitioner is leveling allegations against another party; it is necessary that supporting evidence, should be submitted to this Court. To uphold one's fundamental rights, it is necessary that a petitioner places sufficient material to show that such rights have been infringed by executive or administrative action. In this matter as referred to earlier, the petitioner has not submitted any material in support of his grievance.

Further, it is to be noted that the petitioner relied on section 58(iii) of the Manual of Administrative Procedure of the 1st respondent Authority, where it was stated that the senior most employees in the grade immediately below would be considered to cover-up duties. The respondents had also relied on that provision and had appointed the 5th respondent as by that time the 5th respondent had over 9 years of experience in that grade as opposed to the petitioner's one year and 9 months. The appointment given to the 4th respondent was admittedly to a special position for the purpose of using his expertise and experience for special projects. In such circumstances it cannot be said that the petitioner and the 4th and 5th respondents were similarly circumstanced to be treated as equals for the purpose of considering the alleged infringement of petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution.

There are two other matters I wish to refer to before I part with this judgment.

Learned President's Counsel for the respondents brought to our notice at the time of the hearing, which was admitted by the petitioner, that both the petitioner and the 5th respondent had retired from the 1st respondent Authority during the pendency of this application and there it was futile for the petitioner to proceed with this application.

Pursuing an exercise in futility, could only serve an academic purpose and as quite correctly pronounced by Abrahams, C.J. **this is a Court of Justice and not an Academy of Law.** (*Velupillai* v *The Chairman, Urban District Council Secretary*)[2].

Secondly learned President's Counsel for the respondents submitted that the necessary parties to this application have not been brought before Court, as the petitioner had contended that only Civil Engineers are entitled to be appointed to the post of Director (Technical) of the 1st respondent Authority.

As submitted by the learned President's Counsel for the respondents, the persons most likely to be affected by such an order were the port engineers of the 1st respondent Authority attached to different branches and who were not civil engineers. Since they were not made parties they were unable to resist such a contention, if not *en masse*, at least by representation.

Learned President's Counsel for the respondents also submitted that the present incumbent of the post of Director (Technical) is also a non Civil Engineer and if a decision was to be taken by this Court that the post of Director (Technical) should only be held by a Civil Engineer, he would have had to vacate his position.

The need for having necessary parties before Court was considered by this Court in *Farook* v *Siriwardena, Election Officer and others*[3], where it was clearly stated that the failure to make a party to an application of person/s, whose rights could be affected in the proceedings, is fatal to the validity of the application.

It was therefore an essential requirement that the parties, who were necessary to this application, should have been brought before this Court and the petitioner had not adhered to this requirement.

Considering all the circumstances of this application and for the reasons aforesaid I hold that the petitioner has not been successful in establishing that his fundamental right guaranteed in terms of Article 12(1) of the Constitution had been violated. This application is accordingly dismissed.

I make no order as to costs.

SOMAWANSA, J. - I agree.

BALAPATABENDI, J. - I agree.

Application dismissed.

ORGANIZATION OF PROTECTION OF HUMAN RIGHTS AND RIGHTS OF INSURANCE EMPLOYEES AND OTHERS

v

PUBLIC ENTERPRISES REFORM COMMISSION AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
DISSANAYAKE, J.
SOMAWANSA, J.
FR 385/2003
JUNE 11, 2007
JULY 16, 19, 31, 2007

Fundamental rights – Article 12, Constitution – Executive or administrative action? – Tests? – Conversion of Public Corporations and Government Owned Business undertakings into Public Companies Act – No. 23 of 1987

The two petitioners – trade unions – which represented all the employees of the 2nd respondent Sri Lanka Insurance Company Ltd (SLIC Ltd) and the 3rd petitioner an employee of SLIC Ltd, had contended that the decision of the 2nd respondent SLIC Ltd., to retire employees who have reached the age of 55 years on the basis of the letters of retirement already issued and or on the basis of criteria other than fitness of the employee to work would be an infringement of Article 12 (1). It was also contended that the right of employees of the 2nd respondent to extension of service beyond the age of 55 years was a right enjoyed not only when it was a State owned corporation but also when it was converted into a share based public company under Act 23 of 1987, and that the employees have always had the right to request for extension of service after 55 years up to 60 years of age.

The respondent contended that, the refusal of the petitioners' extension of service do not constitute executive or administrative action.

Held:

Per Dr. Shirani Bandaranayake, J.

> "The constitutional guarantee of fundamental rights are directed against the State and its organs, however there is no definition of executive or administrative action in the Constitution, its definition is postulated by the decisions of this Court which have been arrived at after several deliberations at various stages through majority and dissenting judgment".

(1) Except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated there are no share of 2nd respondent SLIC Ltd., held by the Government – SLIC Ltd., did not have a single Director representing the Government in its Board of Directors. No financial assistance is being provided to the 2nd respondent SLIC Ltd., by the Government and it does not enjoy a State conferred or State protected monopoly.

(2) It is evident that the 2nd respondent – SLIC Ltd. is not an instrumentality or an agency of the Government and there is no deep and pervasive Government control over the 2nd respondent – since the signing of the share sale and purchase agreement on 11.04.2003.

Per Dr. Shirani Bandaranayake, J.

"The percentage of the share capital of the relevant institution held by the Government the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action, as a consideration of all the circumstances it is apparent that there is no state control over the 2nd respondent and it is not an instrumentality or an agency of the Government".

APPLICATION under Article 126 of the Constitution on a preliminary objection taken.

Cases referred to:-

(1) *Leo Samson* v *Sri Lanka Air Lines Ltd and others* 2001 Sri LR 914

(2) *Ajay Hajia* v *Khalid Mujib* AIR 1981 SC 487

(3) *S. C. Perera* v *U. G. C.* FRD Vol. 103

(4) *Velmurugu* v *Attorney-General* 1981 1 Sri LR 406

(5) *Mariadas* v *Attorney-General* FRD Vol. 11 397

(6) *Ratnasara Thero* v *Udugampola Superintendent of Police* 1983 1 Sri LR 461

(7) *Gunawardane* v *Perera* 1983 1 Sri LR 305

(8) *Wijetunga* v *Insurance Corporation* 1982 1 Sri LR 1

(9) *Chandrasena* v *Paper Corporation* FRD Vol 11 281

(10) *Rajaratne* v *Air Lanka Ltd.* 1987 2 Sri LR 128

(11) *Rajanthan State Electricity Board Jaipur* v *Mohanlal* AIR 1967 SC 1857

(12) *Sukhder Singh* v *Bhagatram* AIR 1975 SC 1331

(13) *In re R. D. Shelty International Airport Authority of India* All IR 1979 SC 1628

(14) *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd* and *others* 2001 1 Sri LR 365

Batty Weerakoon with *Chamantha Weerakoon Unamboowe* for petitioner.

S. L. Gunasekera with *Priyantha Jayawardena* for 2nd respondent.

Nerin Pulle, SSC for 1st and 3rd to 6th respondents.

December 12, 2007

DR. SHIRANI BANDARANAYAKE, J.

The 1st and 2nd petitioners are two trade unions, duly registered under the Trade Union Ordinance, which represent all the employees of the 2nd respondent and the 3rd petitioner was an employee of the 2nd respondent. The petitioners stated that the employees of the 2nd respondent have always had the right to request for extensions of service after the age of 55 years up to 60 years of age. This, according to the petitioners, had been the practice from the time of the establishment of the Insurance Corporation of Sri Lanka. The petitioners alleged that the right of employees of the 2nd respondent to extensions of service beyond the age of 55 years was a right they enjoyed not only when it was a state owned Corporation, but also when it was converted into a share-based Public Company under Act, No. 23 of 1987. Accordingly the petitioners submitted that by the decision of the 2nd respondent to retire employees, who have reached the age of 55 years on the basis of the letters of retirement already issued and/or on the basis of criteria other than fitness of the employee to work considering the health and service record, irremediable loss would be caused to the said employees and would be an infringement of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

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

When this matter was taken for hearing several preliminary objections were raised by the learned Senior State Counsel for the 1st, 3rd, 4th, 5th and 6th respondents and the learned Counsel for

the 2nd respondent. Learned Senior State Counsel, accordingly took up the following preliminary objections:

01. The refusal of the petitioners, extensions of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution; and

02. This application is time barred.

Learned Counsel for the 2nd respondent, whilst associating himself entirely with the aforementioned preliminary objections also raised the following preliminary objections:

03. The 1st and 2nd petitioners are Trade Unions which do not have corporate personality and therefore have no fundamental rights guaranteed to them by the Constitution;

04. the 3rd petitioner had made an application to the Labour Tribunal which granted him compensation in a sum of Rs. 260,850/- and that order was set aside in appeal by High Court of the Western Province and therefore he is not entitled to any relief in terms of section 31B(5) of the Industrial Disputes Act;

05. Since there is no allegation whatsoever of the violation of a fundamental right of any person by the 2nd respondent, the petitioners cannot be granted any relief against the 2nd respondent; and

06. Article 126 only permits a petitioner to make an application in respect of the violation of a fundamental right of such petitioner and relief only in respect of such petitioner.

At the hearing it was agreed that out of the aforementioned preliminary objections only the items No. 01, 02 and 03 would be taken into consideration.

The refusal of the petitioners extension of service do not constitute executive or administrative action within the meaning of Article 126 of the Constitution.

Learned Senior State Counsel contended that on several grounds it is evident that this application should be dismissed *in*

limine, as the impugned decision of the 2nd respondent to refuse extensions of service to its employees and more specifically to the 3rd petitioner, is clearly a decision outside the scope of executive or administrative action in terms of Article 126 of the Constitution. Accordingly his position was that the 1st and 3rd to 6th respondents have no control as the 2nd respondent has ceased to be an agency of the Government.

Learned Senior State Counsel specifically submitted that since 11.04.2003, upon the signing of the Share Sale and Purchase Agreement, the Government of Sri Lanka ceased to have any control and/or authority in the management of the 2nd respondent. Moreover, since 11.04.2003 there was not even a single Director representing the Government in the Board of Directors of the 2nd respondent Company.

The contention of the learned Counsel for the petitioners in this regard was based on the submission made by the 2nd respondent in its objections at paragraph 3.1, where it was stated that,

> "*The entire case of the petitioners..... is founded upon the alleged conduct of the 2nd respondent in refusing extensions of service to the 3rd petitioner and other unnamed and unidentified employees of the 2nd respondent.... which according to the petition itself occurred in June 2003 while the 'privatization' took place in April 2003*".

Based on the aforementioned position, learned Counsel for the petitioners contended that this statement projected a patently false position. It had been the understanding of the petitioners that the infringement of their fundamental right in terms of Article 12(1) of the Constitution had commenced with the privatization of the Sri Lanka Insurance Corporation Ltd., and was revealed to the petitioners only by the 1st respondent's letter dated 07.07.2003 (P26). Accordingly the petitioners' contention was that the sale of the State's 90% of shares of the 2nd respondent by the Government through the 1st respondent under the Public Enterprises Reform Commission Act, that necessary steps to protect the rights of the employees of the Company to security of service, which included the right to be considered for yearly extensions of service after they had completed 55 years of age

(as amended later to 57 years), has not been taken.

Having stated the position taken by the respondents and the petitioners let me now turn to consider whether the refusal of the petitioners' extension of service constitute executive or administrative action within the meaning of Article 126 of the Constitution.

The 2nd respondent's affidavit is quite revealing in this regard as it contains the relevant details pertaining to pre 2003 and post 2003 position. Accordingly, the 2nd respondent was initially incorporated in terms of the Insurance Corporation Act, No. 2 of 1961 and was known as the Insurance Corporation of Ceylon. The status of the 2nd respondent had changed in 1993 as it was converted into a company incorporated under the Companies Act in terms of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987. Since the conversion, the 2nd respondent was known as the Sri Lanka Insurance Corporation Ltd.

A Director of the 2nd respondent had averred in his affidavit that since the said incorporation in 1993 until 11.04.2003, the 2nd respondent was wholly owned by the Government of Sri Lanka.

The contention of the respondents was that this position changed on 11.04.2003 with the Government of Sri Lanka entering into an agreement for the sale of shares of the 2nd respondent with Milford Holdings (Pvt.) Ltd., Greenfield Pacific E. M. Holdings Ltd., The Distilleries Company of Sri Lanka Aitken Spence and Co. Ltd., and Aitken Spence Insurance (Pvt.) Ltd. (2R1). Accordingly the Government of Sri Lanka had sold 45 million shares representing 90% of the issued share capital of the 2nd respondent on 11.04.2003 to Milford Holdings (Pvt.) Ltd and Greenfield Pacific E. M. Holdings Ltd. in terms of the agreement 2R1. Under the said agreement, provision was also made to give an option to the permanent employees of the 2nd respondent to purchase the balance 10% of the issued shares of the 2nd respondent. Such quantity of shares, which were not purchased by the said employees were to be purchased by the said Milford Holdings (Pvt.) Ltd., and Greenfield Pacific E.M. Holdings Ltd., and until such

time the said shares were purchased by the employees of the 2nd respondent and/or the said two Companies, the Government of Sri Lanka were to retain ownership of the said 5 million shares. Further, provision was made in the said agreement that the Government of Sri Lanka,

> *"shall have no special right to the Company (i.e. the 2nd respondent) (including without limitation the right to nominate Directors of the Company), but the seller (i.e. the Government of Sri Lanka) be entitled to exercise the voting rights attached to such employee shares."*

Accordingly out of the said balance of 10% of shares, 0.1229% (61,441 shares) were opted to be taken as shares by the employees and 9.8336% (4,916,807 shares) were purchased by the Milford Holdings (Pvt.) Ltd., the proceeds of which had been distributed among the employees. The balance 0.0435% (21,750 shares) was retained by the Secretary to the Treasury in respect of disputed claims to shares and the shares, which would be allocated to employees against whom disciplinary inquiries were pending, in the event of them being exonerated. The said Director of the 2nd respondent had further averred in his affidavit that after 11.4.2003 when 90% of the issued share capital of the 2nd respondent was sold to the aforementioned two Companies, the Government of Sri Lanka ceased to have any control in the management of the 2nd respondent (except to the extent that it had the voting powers ordinarily enjoyed by any shareholder of a Company of limited liability) and did not even have a Director representing it on the Board of Directors of the 2nd respondent.

On a consideration of the aforementioned circumstances, the question arises as to whether the 2nd respondent can be regarded as an agency and/or institute or instrumentality of the Government after 11.04.2003. Supporting his contention that since 11.04.2003, the 2nd respondent had ceased to be an agency or an instrumentality of the Government, learned Senior State Counsel relied on the decision in *Leo Samson* v *Sri Lankan Air Lines Ltd. and Others*[1].

In that matter the petitioners had complained of the termination of service and posting of an officer as Manager, Kuwait by the Sri Lanka Air Lines Ltd.,which in their view was violative of Article 12(1)

of the Constitution. A preliminary objection was raised on behalf of the Sri Lanka Air Lines Ltd., that consequent to the shareholder agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka, the impugned acts do not constitute executive or administrative action. Further it was stated that the amended Memorandum and Articles of Association, the business of the Company was to be conducted by a Board of Directors having 7 members, 4 of whom were appointed by the Government and the other 3 members were appointed by Emirates, which number included the Managing Director. It was held by a Divisional Bench of this Court that on a consideration of the provisions of the Memorandum and Articles of Association and the shareholders Agreement that the control and authority over the business of the Company was vested in the investor. Applying the test of government agency or instrumentality, and referring to the decision of Bhagwati, J. (as he then was) in *Ajay Hasia* v *Khalid Mujib*(2), Ismail, J. in his judgment (*supra*) stated that,

> *".... it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement... that the Government has lost the 'deep and pervasive' control exercised by it over the Company earlier. The action taken by Sri Lankan Airlines cannot now be designated 'executive or administrative action'."*

The Constitutional guarantees of fundamental rights are clearly directed against the state and its organs *S. C. Perera* v *University Grants Commission*(3). According to Article 17 of the Constitution,

> *"every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions....."*

However, there is no definition of executive or administrative action in the Constitution. Its definition is postulated by the decisions of this Court, which has been arrived at, after several deliberations at various stages through majority and dissenting judgments *Velmurugu* v *Attorney-General*(4), *Mariadas* v *Attorney*

General[5], *Ratnasara Thero* v *Udugampola, Superintendent of Police*[6], *Gunawardene* v *Perera*[7].

The decision in *Wijetunga* v *Insurance Corporation*[8] could in this context be cited as a case in point, where serious consideration was given to the question of the relationship between the then Insurance Corporation and the State. Referring to this question Sharvananda, A.C.J. (as he then was) stated that,

> *"Is it a Department of Government or servant or instrumentality of the State? Whether the Corporation should be accorded the status of a Department of Government or not must depend on its Constitution, its powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions. For determining the integral relationship between the State and the Corporation we have to examine the provisions of the statute by which the Corporation has been established."*

In *Wijetunga's* case (*supra*), the Supreme Court, after considering the provisions of the Insurance Corporation, Act, No. 2 of 1961, took the view that even if the functional test or governmental control test is applied, the Corporation cannot be identified as an organ of the State and its action cannot be designated 'executive or administrative' action in terms of Articles 17 and 126 of the Constitution.

Following the decision in *Wijetunga* v *Insurance Corporation* (*supra*), a similar view was taken in *Chandrasena* v *Paper Corporation*[9], where it was held that, in terms of Act, No. 49 of 1957, the Paper Corporation was not an instrumentality of the government for the action in question to come within the scope of 'executive or administrative action'.

In *Rajaratne* v *Air Lanka Ltd.*[10], Atukorale, J. referred to several decisions of our Supreme Court and of the Indian Supreme Court in deciding that Air Lanka was an agent or organ of the Government and its action could be designated as executive or administrative action for the purpose of granting relief in terms of Article 126 of the Constitution.

Considering the test applicable in determining, whether a particular institution would come within the meaning of executive or administrative action in terms of Article 126 of the Constitution, it would be of paramount importance to examine, briefly the decisions in *Rajanthan State Electricity Board, Jaipur* v *Mohanlal*[11], *Sukhder Singh* v *Bhagatram*[12] and *Ajay Hasia* v *Khalid Mujib Schravardi* (*supra*).

In *Rajanthan State Electricity Board, Jaipur* (*supra*) the question, which arose was whether the Rajanthan Electricity Board was an authority within the meaning of 'other authorities' in terms of Article 12 of the Indian Constitution. Article 12 of the Indian Constitution states that,

> *"In this part, unless the context otherwise, requires, 'the State' includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."*

Considering the question at issue Bhagwati, J. (as he then was), delivering the majority judgment held that the phrase 'other authorities' included all statutory authorities on whom powers are conferred by law.

In *Sukhder Singh* v *Bhagatram Sardan* (*supra*) the question which arose was whether the Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12 of the Indian Constitution. Considering the issue at hand, Mathew, J., expressed the view that, in order to answer the question, it would be necessary to ascertain for whose benefit the Corporations were carrying on their business and stated that,

> *"When it is seen from the provisions of that Act that on liquidation of the Corporation, its assets should be divided among the shareholders, namely, the Central and State governments and others, if any, the implication is clear that the benefit of the accumulated income would go to the Central and State governments."*

The position taken by Mathew, J., in Sukhder Singh *(supra)* was cited with approval by Bhagwati, J., (as he then was) in *Ajay Hasia* v *Khalid Mujib* (*supra*), where the Court considered whether a society registered under the Societies Registration Act is an 'authority' falling within the definition of 'state' in terms of Article 12 of the Indian Constitution. In the process of considering this question, Bhagwati, J., (as he then was) summarised the relevant tests, which were culled out from the decision in *R. D. Shelty International Airport Authority of India*[13] stating that,

"These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution."

The said tests as stated by Bhagwati, J. (as he then was) are as follows:

"(a) ... if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government;

(b) where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character;

(c) it may also be a relevant factor ... whether the Corporation enjoys monopoly status which is the State conferred or State protected;

(d) existence of 'deep and pervasive' State control may afford an indication that the Corporation is a State agency or instrumentality;

(e) if the functions of the Corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government; and

(f) specifically, if a department of the Government is transferred to a Corporation it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

Having stated the Indian decisions in relation to the matter in issue and specially the tests identified by the Indian Supreme Court, let me now turn to consider the question in hand pertaining to this application.

As stated earlier, except the 0.0435% retained by the Secretary to the Treasury for the purpose of disputed claims to shares, which would have to be allocated to employees against whom disciplinary inquiries are pending in the event of they being exonerated, there are no shares of the 2nd respondent held by the Government. In Leo Samson's case (*supra*), where this Court had held that the acts of Sri Lankan Airlines Ltd. do not constitute executive or administrative action, Emirates had acquired only 26% of the shares although they had agreed to purchase 40% of the shares of Air Lanka.

Moreover, in terms of the amended Memorandum and Articles of Association of the Sri Lankan Airlines Ltd., the business of the Company was to be conducted by a Board of Directors having seven (7) members out of which four (4) were approved by the government.

Learned Senior State Counsel for the 1st and 3rd to 6th respondents submitted that the 2nd respondent did not have a single Director representing the Government in the Board of Directors of the 2nd respondent. Furthermore, it was stated that, no financial assistance is being provided to the 2nd respondent by the Government and that it does not enjoy a State conferred or State protected monopoly status.

In the circumstances, on the basis of the test stipulated in International Airport Authority of India (*supra*), it is evident that the 2nd respondent is not an instrumentality or agency of the Government and there is no deep and pervasive Government control over the 2nd respondent since the signing of the Share Sale and Purchase Agreement on 11.04.2003 (2R1).

Our attention was also drawn to the decision in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd. and Others*[14] where this Court had held that the State had the effective ownership and control over the Sri Lanka Insurance and Robinson Hotel Co. Ltd.

It is to be clearly borne in mind that *Jayakody* (*supra*) was decided in 2001, prior to the privatization of the 2nd respondent Corporation. For the purpose of the present application what is relevant would be the Share Sale and Purchase Agreement dated 11.04.2003 (2R1) which clearly stipulates that except for the 0.0435% of share retained by the Secretary to the Treasury, the rest of the shares were purchased by the 2nd respondent.

Thus it is to be noted that since 11.04.2003, the character of the the then Sri Lanka Insurance had been changed from its previous status and a comparison suggestive of State control based on the position of the 2nd respondent prior to 11.04.2003 cannot be considered for the purpose of this application.

The percentage of the share capital of the relevant institution held by the Government, the amount of financial assistance given to such an institution by the State and the existence of deep and pervasive control exercised by the Government over an institution, in my view are the most reliable tests that could be applied in deciding whether a particular institution would come within the scope and ambit of executive or administrative action contemplated in terms of Article 126 of the Constitution. On a consideration of all the circumstances of this application it is apparent that there is no State control over the 2nd respondent and it is not an instrumentality or an agency of the Government.

In such circumstances I uphold the preliminary objection raised by the learned Senior State Counsel for the 1st and 3rd to 6th respondents with which the learned Counsel for the 2nd respondent associated himself entirely that the refusal of the petitioners' extensions of service does not constitute executive or administrative action within the meaning of Article 126 of the Constitution.

Since the said preliminary objection has been upheld I see no reason to indulge in an examination of the other preliminary objections raised by learned Counsel for the respondents.

For the reasons stated above, this application is dismissed *in limine*.

I make no order as to costs.

DISSANAYAKE, J. – I agree.

SOMAWANSA, J. – I agree.

Application dismissed.

RAMBUKWELLA
v
UNITED NATIONAL PARTY AND OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
JAYASINGHE, J. AND
DISSANAYAKE, J.
S.C. (EXPULSION) NO. 1/2006

Expulsion of a member of a recognised political party who is a Member of Parliament – Articles 3.3.(c), 3.3(d), 3.4.(d) and 9.7 of the Constitution; Validity of the expulsion in terms of proviso to Article 99 (13)(a) of the Constitution; Procedural impropriety – Right to representation by an Attorney-at-Law – Section 41(2) of the Judicature Act No. 2 of 1978.

The petitioner was a Member of Parliament representing the United National Party which is a recognized political party. He successfully contested the Parliamentary Elections held in the years 2000, 2001 and 2004 as a nominee of the 1st respondent for the Kandy District. On 13.01.2006 at a meeting of the Kandy District Balamandalaya of the Party, attended by the 2nd respondent as the leader of the U.N.P. and over 400 party activists including Members of the Parliament, Members of the Provincial Council and other District level representatives, chaired by the petitioner who made a speech and among other matters he had stated thus "..... at this critical juncture in the affairs of the country people's representatives should join together setting aside political divisions to strengthen the hand of the President to defeat the terrorism...."

Few days after the said meeting he received letter dated 16.01.2006 from the President which referred to the statement made by the petitioner regarding cooperation with the Government across party barriers and the letter ended with a request by the President to accept a Ministerial portfolio. On 25.01.2006 the petitioner was appointed as the Minister of Policy Development and Implementation and was also appointed as the National Security and Defence spokesman of the Government.

Upon the acceptance of the Ministerial portfolio by the petitioner the Working Committee of the party initiated the process of disciplinary action against the petitioner. The petitioner pleaded that no explanations were called for from the petitioner and that he was denied legal representation. Subsequently, he was expelled from the Party on a decision of the Working Committee.

Held:

(1) The standard of review of a decision of expulsion should be akin to that applicable to the review of the actions of an authority empowered to decide on the rights of persons in Public Law. Such review comes within the rubric of Administrative Law.

(2) Where a person has the right to be heard the provisions of section 41(2) of the Judicature Act will apply and such person is entitled to be represented by an Attorney-at-Law. The Panel of Inquiry acted in breach of the principles of natural justice in denying legal representation to the petitioner.

Per S.N. Silva, C.J. -

"This court has consistently held that the member affected has a right to be heard in compliance with the principles of natural justice. The phrase "*quazi* judicial" has evolved through decisions of Courts to encompass an act which adversely affect the right of a person, bringing within the scope of its exercise the duty to act judicially...",

(3) In terms of section 41(2) of the Judicature Act No. 2 of 1978 the right to representation by an Attorney-at-Law can be denied only if there is express provisions by law to the contrary, the guidelines issued by the then General Secretary cannot be considered as an express provision of law.

Per S.N. Silva, C.J. -

".... A political party comes into existence as a matter of private arrangement (contract) between persons who have the object of gaining power at elections but the character of such Association alters to a certain extent after gaining recognition as a Political Party as provided in section 7 of the Parliamentary Elections Act No. 1 of 1981. Thus a Political Party which commences as a private Association gains statutory recognition in reference to its Constitution with specific legal powers generally in regard

to elections and it plays a vital role in the realm of Democratic Governance..."

APPLICATION in terms of Article 99(13)(a) of the Constitution challenging expulsion from the United National Party.

Cases referred to:

(1) *Council of Civil Service Union and others* v *Minister for the Civil Service* 1985 AC 374.
(2) *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* 1948 1KB 223.
(3) *Edward* v *Bairstow* 1956 AC 14.
(4) *Gamini Dissanayake* v *Kaleel* 1993 2 SLR 135.
(5) *Jayatilake* v *Kaleel* 1994 1 SLR 319.
(6) *Sarath Amunugama* v *Karu Jayasuriya* 2000 1 SLR 173.

D.S. Wijesinghe, P.C. with *Wijedasa Rajapakse*, P.C., *Upali Senaratne*, *Kapila Liyanagamage* and *Kaushalya Molligoda* for the petitioner.
K.N. Choksy, P.C., with *Daya Pelpola* for the 1st, 2nd and 3rd respondents.
L.C. Seneviratne, P.C., with *Ronald Perera* for 4th, 5th and 6th respondents.
Ms. Indika Demuni de Silva D.S.G. for the 7th and 8th respondents.

Cur.adv. vult.

November 6, 2006.

SARATH N. SILVA, C.J.

The petitioner being a Member of Parliament has filed this application in terms of Article 99(13)(a) of the Constitution, for a determination that his expulsion from the 1st respondent, the United National Party (UNP), communicated to the Secretary General of Parliament being the 8th respondent and the petitioner by letters dated 10.8.2006, by the General Secretary of the UNP, being the 3rd respondent, is invalid and for a declaration that he continues to be and remains a Member of Parliament.

The petitioner has pleaded without contradiction by the respondents that he joined the Democratic United National Front (DUNF) in 1992 and successfully contested the Provincial Council Election for the Central Province and was appointed a Minister of the Provincial Council in 1994. In 1999 he contested the Provincial

Council Election as a nominee of the UNP and although he was in remand custody throughout the period of campaign, he secured the highest number of votes at that Election. Similarly, he successfully contested the Parliamentary Elections held in the years 2000, 2001 and 2004 as a nominee of the UNP for the Kandy District and secured large numbers of preferential votes. He also served as a Minister in the Government of which the Leader of the UNP, the 2nd respondent was the Prime MInister. At the Presidential Election of November 2002, the petitioner was in charge of the election campaign in the Kandy District and the 2nd respondent secured a significant majority of votes in that District.

As regard subsequent events, the petitioner has stated that when the Budget was presented by the President, in December 2005 considering the beneficial proposals, on several occasions both in and out of Parliament, he "praised" its contents in proof of which he produced publication marked P3. The petitioner produced publications dated 3.1.2006, 6.1.2006 and 11.1.2006 marked P4 in which it was specifically stated that he will be appointed a Minister by the President.

On 13.1.2006, the 2nd respondent as the Leader of the UNP was present at a meeting of the Kandy District Balamandalaya of the Party attended by over 400 Party activists including members of Parliament, Members of the Provincial Council, Pradeshiya Sabha's and other District level representatives, chaired by the petitioner as the Kandy District President. The petitioner has produced a copy of the minutes of that meeting marked P5. A copy of the minutes had been sent by the District Manager annexed to his letter dated 17.1.2006 to the General Secretary of the UNP (P5(a)), receipt of which was acknowledged by letter dated 24.1.2006 of the Deputy General Secretary (P5b).

These minutes contain a record of the speech made by the petitioner at the said meeting. Amongst other matters he had stated at this critical juncture in the affairs of the country, people's representatives "should join together setting aside political divisions to strengthen the hand of the President to defeat terrorism and find a political solution to ethnic issues whilst preserving the sovereignty of the People and the territorial integrity of the country. He stated that such a course of action would be in keeping with the

repeated statements made by the 2nd respondent at the Presidential Election campaign that if he wins he would seek the cooperation of the SLFP and other parties and would give them ministerial appointments to seek a solution to the "national question."

The petitioner has pleaded that a few days after the said meeting he received letter dated 16.1.2006 (P6) from the President which referred to statements made by the petitioner regarding cooperation in Government across party barriers and states that such views have been expressed by other members of the UNP including its senior leadership. The letter ends with a request by the President to accept a Ministerial portfolio to advance the endeavour to establish peace. Thereafter on 25.1.2006, the petitioner was appointed the Minister of Policy Development and Implementation and was also appointed as National Security and Defence spokesman of the Government of Sri Lanka, in which capacity he is yet functioning.

The acceptance of the Ministerial portfolio by the petitioner set in motion the process of disciplinary action against him. The steps in this process and the specific grounds of challenge raised by the petitioner would be dealt with hereafter. Quite apart from these legal grounds, Counsel for the petitioner made a general submission on the basis of the facts outlined above that have been extensively pleaded and supported with contemporary documents, contents of which have not been refuted by the respondents, that the course of action taken by the petitioner was not shrouded in secrecy amounting to deception on his part. He made statements in and outside Parliament which received wide publicity of his intention to support the President for reasons that were stated culminating in the speech at the District Balamandalaya attended by the Leader of the Party. The Leader who spoke after the petitioner at the meeting did not censure or check him on the proposed course of action. The petitioner has specifically pleaded that neither the 1st, 2nd and 3rd respondents nor the Party Working Committee sought his explanation as to the publicly declared course of action announced by him. In these circumstances Counsel submitted that disciplinary action was not warranted. Counsel for the 1st, 2nd and 3rd respondents submitted that it is

not alleged that the petitioner is guilty of deception in relation to the Leader or the Party Working Committee. However, he submitted that silence on the part of the 1st to 3rd respondents and the Party Working Committee cannot be construed as tacit approval of the petitioner's conduct and the petitioner should have sought specific approval for his proposed course of action. In the absence of which he is liable to disciplinary action in terms of the Constitution of the Party.

Although membership of the Party has a concomitant liability to disciplinary action in terms of the Constitution of the Party as correctly submitted by Counsel for the respondents, in deciding on the validity of an expulsion, which has the further implication of the loss of the seat in Parliament, the overall conduct of the person subject to such action has to be taken into account. The years of dedicated service that resulted in electoral gains for the Party and the attendant circumstances such as the repeated statements of the Leader of the Party that if he wins the Presidential Election, he would offer Ministries to members of the SLFP and other parties, may be relevant in considering the validity of the impugned expulsion of the petitioner from the perspective that the decision is arbitrary and unreasonable. But, the main thrust of the petitioner's case is directed at the legality *per se* of the expulsion, which has to be dealt with first in the light of the process of disciplinary action to which I would now advert.

As noted above the petitioner received an invitation from the President to accept a MInisterial Portfolio on 16.1.2006 (P6) and he was appointed a Minister on 25.1.2006. On 26.1.2006 a person by the name of Methsiri Paranavithana residing at New Mulleriyawa handed over a letter (P11) at the UNP Headquarters requesting that disciplinary action be taken against Mr. Mahinda Samarasinghe and the petitioner being Members of Parliament elected on UNP nomination lists accepted Cabinet Portfolios committing a "clear violation of the constitution, code of conduct and the policies and principles of the UNP." The 1st to 3rd respondents have produced marked 3R4 an extract from the minutes of the Party Working Committee held on the same day, the 26th January at 4.30 at which the complaint against the petitioner was tabled and a decision taken to appoint a disciplinary panel consisting of the 4th, 5th and

6th respondents to inquire into the matter. The minute does not contain any record of the discussion that took place at the meeting.

The 3rd respondent being the General Secretary of the Party sent letter dated 2.2.2006 (P7) to the petitioner stating that the Party Working Committee appointed a Panel of Inquiry consisting of the 4th, 5th and 6th respondents to inquire into "certain matters" relating to his "conduct as a member of the party" and that a further communication would be addressed to the petitioner by the panel.

The Chairman of the Panel, the 4th respondent sent letter dated 24.3.2006 (P8) to the petitioner calling for his explanation on the complaint of Methsiri Paranavithana, referred to above. The petitioner replied by letter dated 6.5.2006 (P12), having obtained a copy of the complaint, stating that appointment of the Panel of Inquiry is contrary to the Constitution of the UNP and that the Panel has no jurisdiction to seek his explanation. Without prejudice to the plea on jurisdiction, he denied having violated Constitution as alleged by Paranavithana.

In the meanwhile, the said Paranavithana of New Mulleriyawa made another complaint by letter dated 4.4.2006 alleging that Mr. Mahinda Samarasinghe and the petitioner against whom he made the previous complaint "now openly campaign for the PA whilst promoting the Mahinda Chinthanaya, which is directly in conflict with the policies of the UNP". The complaint (P15) had also been hand delivered at the Party Headquarters. The Working Committee at its meeting on 7.4.2006 (3R5) decided to refer this complaint as well to the Panel of Inquiry and the Chairman of the Panel by his letter dated 11.5.2006 called for the petitioner's explanation on his complaint (P14). The petitioner replied by letter dated 23.5.2006 (P16) on the same lines denying jurisdiction of the Panel. I would pause at this point, to note that the said Paranavithana from New Mulleriyawa appears to have been a ready complainant, virtually at the door step of the Party Headquarters, hand delivering complaints that promptly got tabled at Working Committee meetings with a swift reference to a Panel of Inquiry without there being any record of the discussions that took place on the matter amongst the members of the Committee. The complaints of Paranavithana that run into a few lines contain bald

statements of matters that should have been within the knowledge of the Working Committee.

Viewed from another perspective, considering that the petitioner was himself a member of the Working Committee from 1990 (paragraph 10 of the petition admitted by the respondents) and Paranavithana was only a member of the Party (not an elected representative or an office bearer of any one of the several representative bodies in the organizational structure of the Party), a question arises whether the members of the Working Committee had to get activated against a colleague on a complaint of a mere member of the Party, in respect of matters in the public domain since Paranavithana only relied on newspaper publications annexed to his letter to support his complaint.

Be that as it may, the next stage in the process, was the charge sheet issued on the petitioner by letter dated 16.6.2006 of the General Secretary (P17). The letter states that the Panel of Inquiry "has not been satisfied with the explanation contained in the petitioners letters P12 and P16 and has forwarded the charge sheet." The petitioner was requested to be present for an inquiry at the Party Headquarters on 5.7.2006 at 4.00 p.m. It has to be noted that the petitioner in his replies did not seek to explain the contents of Paranavithana's letters sent to him by the Panel but raised the question as to the jurisdiction of the Panel to seek his explanation. Hence, there is no question of the Panel not being satisfied with the explanation of the petitioner. The proper course of action would have been for the Panel to have referred the question of jurisdiction raised by the petitioner to the Working Committee on whose authority the Panel acted. If such a course of action was taken the question of jurisdiction (power to decide) in the matter of taking disciplinary action, that has loomed large in these proceedings would have been at the least considered prior to the impugned decision being taken. Counsel for the petitioner raised the further matter in this regard that as evident from the contents of P17 the charge sheet had not emanated from the Disciplinary Committee which was appointed by the Working Committee (3R6) on 26.1.2006 being the same day on which Paranavithana's complaint was received at the Party Headquarters.