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date thereafter. Instead the Journal Entries of 20th October 2008 suggests that the adequacy of the affidavit has been a matter between Mr. Sumanthiran, who represented the Petitioner in the original Application, and Mr. Musthapha PC who represented the 8th Respondent-Petitioner. An undertaking resulting from an arrangement does not attract punishment by contempt as contemplated in the precedents referred to above.

In the circumstances, I hold that, His Excellency the President, being the appointing authority in terms of Article 52 of the Constitution, would be free to consider appointing the 8th Respondent Petitioner to the post of Secretary to the Ministry of Finance notwithstanding the undertaking contained in paragraph 13 of the affidavit dated 16th October 2008 filed in this Court by the 8th Respondent Petitioner.

In all the circumstances of this case, I make no order for costs.

October 13th 2009

SHIRANEE TILAKAWARDANE, J., (DISSENTING)

Pursuant to a Petition filed by the 8th Respondent Petitioner (the "petitioner") on 7th July 2009, and twice amended by him on 11th July 2009 and 31st July 2009 (the "Petition"), this application was listed before a Bench of 7 Judges of the Supreme Court. At the conclusion of proceedings, the Court's order, as dictated by the Chief Justice on behalf of the Bench, was stated to be;

Relief granted with Tilakawardane, J., dissenting.

This order was apparently subsequently amended in chambers of the Chief Justice with the concurrence of the other Judges, to read as follows;

Court, having considered the submissions of Counsel and Mr. Nihal Sri Amerasekera who appeared in person, refuses the reliefs sought in paragraph (a) and (b) of the prayer to the amended Petition dated 31st July 2009. However the Court is inclined to grant other relief under paragraph (c) of the prayer to the amended Petition. Accordingly by a majority decision [Hon. Tilakawardane, J. dissenting], the Court decides that His Excellency, the President, being the appointing authority in terms of Article 52 of the Constitution would be free to consider appointing the 8th Respondent Petitioner, to the Post of Secretary to the Ministry of Finance notwithstanding the undertaking given to Court by the 8th Respondent Petitioner.

Having subsequently called for and perused this amended order, I take the opportunity to reiterate my complete and full opposition to the granting of any relief whatsoever sought by the Petitioner in his amended Petition and my dissent with my esteemed colleagues in their decision to do so.

The judgment delivered on 21st July 2008 in this case (the "Original Judgment") dealt with, in large part, the complicity of the petitioner, as Chairman of the Public Enterprise Reform Commission, in an improper scheme to effect the sale of shares of Lanka Marine Services Ltd., (the "LMSL") to John Keells Holdings without, among other things:

1. prior authorization of the Cabinet of Ministers.

2. the appointment and approval of a Cabinet Approved Tender Board (the "CATB") as mandated by a circular published by the Petitioner himself to ensure transparency, fairness and honesty in the procurement process, and instead allowed the Petitioner unfettered discretion as the final authority on all matters.

3. a valuation of LMSL's shares by the Chief Valuer, and instead, one issued by a private bank resulting in such a deep undervaluation of the stock such that the profits of LMSL in years, alone, would be more than double the share price being offered.

In recognition of the above, and other unauthorized actions and behaviour, the Court concluded that the Petitioner, "from the very commencement of the process, acted outside the authority, of the applicable law being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He has not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased." It needs to be mentioned that the extent and magnitude of the findings against the Petitioner as set out in the Original Judgment are so strong that even the most forgiving employer would balk at his re-employment at such a record of moral turpitude.

It is my considered opinion that this application reveals fatal errors of law which would militate against any relief being granted to the Petitioner.

Setting aside the obvious question raised by the facts that the Petition before us was filed a full year after the Court's allegedly "invalid inducement" of the Petitioner's Affidavit - a long time to suffer what the majority contends is a patently invalid restriction – the Petitioner, amended the petition on 21st July 2009 *without obtaining* permission from Court to do so. More specifically, the supporting affidavit made in connection with the amendment lacks a signature of a Justice of the Peace/Commissioner, such omission rendering

invalid and false the *jurat* contained therein. The amended Petition dated 21st July 2009, thus remained unsupported by a valid Affidavit, and, consequently, the said Affidavit should have been rejected *in limine.*

When this matter was taken up on 3rd August 2009 a fresh set of papers were filed, consisting of a second amended Petition dated 31st July 2009 and a purported Affidavit dated 31st July 2009, *once again* without having obtained permission of Court. On the same day he sought permission to file an Affidavit within 10 days, which was "of a confidential nature".

It was this defective, second amended Petition dated 31st July 2009 that introduced, for the first time, the allegations that the order dated 8th October 2008, which preceded the filing of the impugned affidavit, was:

(a) made without affording an opportunity for the Petitioner to be heard and, therefore, was made in breach of the principles of Natural Justice.

(b) made without the Attorney General or the Petitioner or any other party being heard in that regard, and that the Petitioner believed that the Court would not entertain any objections thereto.

(c) made in such a manner and with such a tenor that the Petitioner had reasonable grounds to believe that the said order was coercive in nature and that he would not be permitted to object thereto.

(e) made *per incuriam* and in violation of the fundamental right guaranteed to the Petitioner under Article 14 (1) (g) of the Constitution.

In response to these allegations, the Petitioner has sought **only** the following prayers from the Court:

(a) Vacate the said order dated 8th October 2008 (the "Order"), in so far as it relates to the inclusion in the Affidavit of a firm statement that the present Petitioner "would not hold any office in any Governmental institution, either directly or indirectly, or purport to exercise in any manner executive or administrative functions";

(b) To make an order relieving the present Petitioner of the undertaking contained in paragraph 13 of the said Affidavit dated 16th October 2008, tendered by the present Petitioner pursuant to the order of Your Lordships' Court marked "D" to this application;

(c) grant such other and further relief as to Your Lordships' Court shall seem fit and meet.

It is the contention of the Majority Decision that the binding nature of the Affidavit the Petitioner seeks to withdraw in undone, in part, by the fact that Benches "considering this matter" subsequent to the issuance of the Original Judgment differed in composition to that of the one which issued the Original Judgment. Pronouncing on this very point, Amerasinghe, J., referring to Article 132(2) stated in *Jeyaraj Fernandopulle v. Premachandra de Silva and Others (Supra)* "when any division of the Court constituted in terms of the Constitution sits together, it does so "as the Supreme Court" and that "it is one Court though it usually sits in several divisions... each division had co-ordinate jurisdiction." In light of *Fernandopulle's* judgment the Supreme Court's divisions is a product of administrative expediency and nothing more, and in the light of 114(d) presumption under the Evidence Ordinance – which presumes that judicial acts have been regularly performed – the suggestion that a change in composition of a particular Bench itself somehow extinguishes jurisdiction, is proved to be patently

incorrect. Indeed the remedy sought by the Petitioner is an action of the same nature as those found to be impugned. The prayer to vacate the Order is a re-visitation of a judgment by the Supreme Court, and in this case, by a Bench differing in composition than the one which issued the Order. Therefore, we are – in following such an argument – precluded from being able to take such action.

Interestingly, the *Fernandopulle* case finds further relevance to this situation before us with its detailed reiteration to the general rule that "when the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter." This is made evident by the *Fernandopulle* judgment's extensive and explicit statements of the need to pay allegiance to this rule when faced with "an application made in the original action or matter or in a fresh action brought to review the judgment or order." Importantly, the *Fernandopulle* judgment pre-empts the expected argument of extraordinary circumstance, stating that "when the decision is that of the 'final' Court, as is every decision of the Supreme Court, due consideration should be given that fact" even though "some people may regard a particular case as being unusual or extraordinary or of special significance for one reason or another." In light of *Fernandopulle's* judgment, I hold that to grant relief of the type that reverses a prior judgment of this Court is untenable and has no basis in Law and therefore no relief can be granted on prayer (a).

As further reason to strip the Affidavit of its binding nature, the Majority Decision has expressed "concern" regarding the nature of the Affidavit as one being filed in compliance with and compelled by the Order. This "concern", however, when viewed in the light of the Constitutional powers afforded to the Court to deal with situations like the

one before us, proves to be quite misplaced. The Constitution unequivocally empowers the Supreme Court to be the ultimate guardian of rights of the citizenry of Sri Lanka, going so far as to confer the Court sole and exclusive jurisdiction over matters relating to Fundamental Rights. The Hon. J. A. N De Silva, C. J., in *SCFR No. 352/2007* [25] rightly stated that:

> As is made amply clear by subsection (4) of Article 126, inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and effect action so long as such relief and actions are "just and equitable" – a simple and unqualified two-word threshold clearly meant to give the broad discretion and power required of the Supreme Court to effectively address the infinitely myriad ways in which Fundamental Rights can be violated. It is important to recognize, then, that the Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the unique nature of these matters for which the Court has been empowered to protect. Put simply, Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude with respect to their review and redress in order to encompass the equitable jurisdiction exercised in these applications.
>
> The concept of Fundamental Rights encompasses the inalienable rights of the citizens of the State. Violation of such rights by the State or by the State in connivance with private actors is an attack on the very "being" of the citizens who have reposed their trust in the State to guard and protect them from violations of their Fundamental

> Rights. Hence, Where Fundamental Rights are concerned, the *fruits of judgments affording relief and remedy are especially in need of being accessible by the victims of such violations; it is the duty of the Court as the ultimate guardian of these rights to see to it that this is so.*

It should be quite clear, then, that the decision by this Court to issue an Order requiring the Petitioner to forego any future opportunities to hold public office in response to the *extensive, long-running, abuses of power and corrupt behavior he committed in his capacity as a public officer* was not an instance of the Court being used "as an instrument of persecution", but rather, an instance of the Court upholding its duty to zealously protect the citizenry from a State actor who is known to have extensively violated the trust they have reposed in him. To paint the Petitioner as the victim of an overreaching Court is, frankly, alarming.

In its pith and substance, prayer (b) of the Petition requires that a part of the Affidavit filed by the Petitioner be withdrawn. An Affidavit is a voluntary declaration in writing by a person who swears on oath or solemnly affirms to the truth of the facts therein to which he is able to testify of his own knowledge and observations before a person authorized by law to administer oath or affirmation such as any Court, Justice of the Peace or Commissioner of Oaths. An Affidavit by its very nature cannot be withdrawn as it is made in the first person, by the maker of an Affidavit, from personal knowledge of the truth of the facts stated therein or from information obtained from documents he or she has access to and has perused. It is a solemn declaration of the truth of the facts therein, made before a person authorized to administer an oath or affirmation. It is tendered as evidence for the purpose of proving the facts therein to the Court,

Tribunal, Authority or person to whom it is tendered, so that it can be relied on and acted upon. Therefore since an Affidavit is a solemn declaration of the truth of the facts stated therein made by a person from his personal knowledge and is evidence given on oath for the purpose of being relied on and acted upon, it cannot be withdrawn.

As in the case of evidence given orally under oath or affirmation and recorded, an affidavit cannot be retracted from the record once it is filed in Court. Any retraction on the evidence given by affidavit will entail similar consequences as going back on oral evidence. The consequence of any person who willfully and dishonestly swears or affirms falsely, to facts contained in an Affidavit, would be gulity of making a false statement to Court, which attracts penal consequences.

In other words, once an Affidavit is filed of record, the law of estoppel precludes the maker of the Affidavit, from withdrawing it to prevent any prejudice to any person affected thereby. It is apposite and pertinent to note that an admission of law is permitted to be withdrawn, but not an admission of fact made by a party or his representative in Court. *Vide Uvais v Punyawathie*[26]

There may however, in certain circumstances be a situation where an Affidavit may be permitted to be withdrawn if it can be established and proved that it was not made voluntarily but that the maker at the time of making or shortly prior to it was subjected to threat, coercion or duress. At this stage it is opportune to refer to the proceedings contained in the Journal Entry of 8th September 2008.

> *... Counsel further submits that the officer in respect of whose conduct adverse findings has been made by Court is yet continuing to hold public office, notwithstanding the*

fact that the findings of this Court, that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution. Thus he is disqualified from holding public office.

Court is of the view that there is merit in this application and that the matter should be referred to the Bench which heard the case for further orders.

Consequently the case was to be mentioned on 29th September 2008, before the same Bench that heard the main case. On 29th September 2008 the Petitioner was represented by Additional Solicitor General. No objections were taken with regard to the constitution of the Bench. On this date, the following order is reflected in the Journal Entry.

"The other matter concerns the conduct of the 8th Respondent. ***This Court had come to firm findings that the 8th Respondent has acted contrary to law against the public interest, in the conferment of benefits to a private party.*** *(Emphasis is mine). There is a firm finding that he has infringed the Fundamental Rights guaranteed by Article 12 (1) of the Constitution. The motion indicates that notwithstanding these findings which clearly show that he had acted in flagrant violation of the Constitution the 8th Respondent is yet continuing to hold Public office."*

Additional Solicitor General submits that the Attorney General has revoked the Proxy of the 8th Respondent. In the circumstances the Court directs the Registrar to issue a notice directly on the 8th Respondent to be present in Court on the next date and to reveal to Court; whether he continues to hold office under the Republic and if so the nature of such office and the place at which he is

functioning, whether he is holding office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka and if so the nature of such office. Registrar is to issue Notice on the 8th Respondent to appear in Court on 8th October 2008. This matter to be resumed before the same Bench on 8th October 2008.

In terms of this Order notices were issued to the Petitioner on 3rd October 2008. On 8th October 2008 several reports were tendered to Court and submissions made by the Additional Solicitor General that the investigations against the Petitioner had commenced and were pending, by the CID, under the Inspector General of Police, by the Commission to Investigate Allegations of Bribery or Corruption and The Securities and Exchange Commission of Sri Lanka.

The petitioner was present and represented by President's Counsel Mr. Faiz Mustapha with Mr. Shantha Jayawardene, Attorney-at-Law. The Order made pertaining to the Petitioner is quoted from the proceedings of that date.

Mr. Faiz Mustapha appears for the 8th Respondent and submits that within four days of the judgment the 8th respondent tendered his resignation from the post of Secretary Ministry of Finance. He however submits that the 8th Respondent continued to function in that post to discharge official duties since the resignation was not accepted until much later. He further submits that the 8th Respondent resigned from the Chairmanship of Sri Lankan Airlines on 19.9.2008. This was accepted on 30.9.2008. He further submits that the 8th respondent does not hold any office in any government establishment or in any establishment that the government has any interest. Counsel for the Petitioner submits that according to his

instructions the 8th Respondent has an interest in a Company incorporated, in which the Government has interest. He refers to two such companies. Mr. Mustapha submits that he only holds a single share in these companies and that he would severe links with these companies. He further submits that the 8th Respondent tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. Hence the 8th respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and firm statement that he would not hold any office in any government institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Further affidavit to be filed as early as possible. Mention for a final order on the matter on 20.10.2008.

During the argument in this case, learned President's Counsel appearing for the Petitioner argued that this order was coercive and its tenor did not leave any option but to file an affidavit which he had no desire or intention to make. It is to be noted that prior to any Order of the Court with regard to the filing of the affidavit, through oral submissions made by the same eminent President's Counsel speaking on behalf of the Petitioner, an unequivocal expression of regret was tendered. He declared that he had voluntarily severed himself from holding any public office or performing public functions. He had himself recognized that the adverse findings and content of the judgment, had grave repercussion, and precluded him as a fit and proper person to hold such office.

This same Counsel, in terms of the contemporaneous proceedings recorded on that date, raised no demur to the fact he should not hold public office, did not seek to argue whether he should or should not hold public office, did not even seek an opportunity to he heard on this subject either

on the fact or on the Law. In this context his plea, that he was not afforded an opportunity to be heard is untenable and cannot be accepted.

This also concurred with the contentions of the learned Counsel Mr. Sumanthiran for the petitioner who submitted that in the light of the finding in the judgment and the infringement of the Constitution, that he had violated the oath of office in terms of Article 53 of the Constitution. He however contested the fact that the Petitioner had relinquished all the offices held by him.

In the light of these conflicting submissions, the Court offered a method of resolving the conflict, namely, by granting the opportunity for the Petitioner to file an affidavit. *Ex facie* the order reads "he may consider. .." These words cannot be reasonably interpreted to be coercive or mandatory. The Order was accepted without demur. The Order itself was consistent and in conformity with the clear, undisputed findings that his continuance to hold public office would be inimical to the findings of the judgment and indeed to the ongoing investigations by the 25th, 28th and 30th Respondents, namely the Criminal Investigation Department, the Bribery Commission and the Securities and Exchange Commission.

Consequently an affidavit was filed in Court including the impugned undertaking contained in paragraph 13 of the affidavit which reasonably set out that if he was presently unfit to hold public office in view of the judgment, then he could possibly not hold such public office in the future. This understanding was simply an affirmation of what had been said by his Counsel in Court. If indeed he was coerced as alleged, why was he not withdrawing the entire affidavit? Was the rest of the affidavit made voluntarily and in recognition

that he is not fit to hold public office after the disclosures of the judgment? If he tendered an unreserved apology, spontaneously, without the need to do so, for continuing to hold office how could he rescind from this over-all stance taken by him? I hold that there is nothing in the proceedings or orders to indicate coercion. The silence and inaction of the Petitioner for almost a year after the filing of the affidavit also militates against coercion.

The "affidavit of a confidential nature" filed by the petitioner, though not argued by President's Counsel, contained an allegation of bias. On being questioned the learned Presidents Counsel for the Petitioner stated that he made no such allegations against all the members of the Court but only against the retired Chief Justice. This document, not tendered to some of the Justices, was filed after the amended petition as an "affidavit of confidential nature", something alien to the normal practice of Court and the law, and which of course lost its "confidentiality" the moment it was filed, became a matter of public record, and served on the petitioner.

The allegation rests solely on a speech delivered on 26th July 2008 which was (i) made after the delivery of the judgment, (ii) does not refer to the Petitioner by name, and (iii) does not patently reflect bias against the Petitioner. Indeed findings against him were made on documents of public record, affidavits, counter affidavits and admitted facts before the Court, as is patently evinced in the facts adverted to in the judgment. It is to be noted that no reference to alleged bias has been made in any of the correspondence between the Petitioner and the Secretary to the President in the many letters sent by the Petitioner until its belated expression in the 3rd set of documents filed in Court. In terms of the Law, bias must be based on reasonable grounds and proved on material facts and/or documents. In my opinion

an oblique reference in a speech delivered with typical candour and perhaps lack of judicious caution, at a function relating to judicial officers and officers of the Court, does not remotely sustain even an allegation of bias. In my view there is no reasonable ground whatsoever for this serious allegation and, in fact, only merits consideration of charges to be preferred against the Petitioner for contempt of Court.

Under these circumstances I therefore hold that prayer (a) and (b) should be refused, and dismiss the Petition dated 31st July 2009.

During arguments it was suggested that the order was made *per incuriam* and in violation of the Fundamental Right guaranteed to the Petitioner under Article 14(1) (g) of the Constitution. This was not argued at length, clearly because President's Counsel himself realized the futility of such arguments. Relief in terms of Article 17 is only in "respect of infringement or imminent infringement, by executive or administrative action…'. This argument has no basis in Law.

It reasonably follows that since the undertaking given to Court cannot be withdrawn and the application to do so is refused, the Petitioner would be, in my view, standing in contempt of this Court for violating an undertaking he has given to it.

Finally can the Court on its own volition free him from this undertaking merely because the President has expressed a concern to have him back? In considering this I am mindful of the fact that despite affidavits being tendered to Court, apologies being made to Court and the findings of the judgment, the Petitioner has *falsely made contrary representations* to the Secretary to the President in letters (marked "A") dated 25th July 2008 and (marked "F") dated 3rd June 2009. In his

letters to the Secretary he contradicts the contents of his own affidavit, the submissions of his own counsel made at the time in Court and which is recorded in contemporaneous proceedings, and, in that sense, appears to be uncertain and confused. Did the Petitioner, in his affidavit, mean what he said or has he fabricated his stance? To say the least his word, in its varied contradictions, appears fickle.

Undoubtedly, the appointing authority is the President, as Article 52 mandates as much. When any incumbent President exercises these powers he or she is also under the same Constitutional mandate to act in accordance with the Doctrine of Public Trust that is reposed through the Sovereignty of the People (Article 4) and under the Law. No single Article of the Constitution can be given greater prominence than or read in isolation from another. It must be read and interpreted in a manner that accords with the pith and substance and, indeed, the spirit of the entire Constitution. It is, after all, the executive power of the People that is exercised by any incumbent President. (Article 4b) Therefore "unfettered discretion cannot exist where the rule of law reigns." Vide *Premachandra v. Major Montague Jayawickrame and another*[27].

Article 28 of the Constitution which deals with the Fundamental Duties states that the **exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations** (emphasis added) and, accordingly, it is the duty of every person of Sri Lanka:

(a) to uphold and defend the Constitution and the law;

(b) to further the national interests and to foster national unity;

(c) to work conscientiously in his chosen occupation;

(d) to preserve and protect public property and to combat misuse and waste of public property;

(e) to respect the rights and freedoms of others;

(f) to protect nature and conserve its riches.

Therefore the power to appoint should be linked to the abovementioned duties. The provision of an Article empowering a person to make an appointment cannot be considered in isolation, disregarding the basic structure and tenet of the Constitution which is embodied in other Articles.

Therefore his or her acts as President, as a noble and gracious leader, must always be guided by the underlying duty to preserve and protect public property and to combat its waste and misuse. In a monarchy the ruler rules under the "pleasure principle", and could act in a dictatorial manner. But under our Democratic Socialist Republic governed by the Constitution, which guarantees democracy to its people, even an Executive President does not have untrammeled power and all acts of governance, especially those that involve public finance, must be in tune with the spirit of the Constitution which mandates good and responsible governance.

Furthermore "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective." *Vide In re The Nineteenth Amendment to the Constitution*[28]. Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability." See *Abdul Cader Ayoob v The Inspector General of Police and Others*[29]. The entire fabric of the

Constitution mandates that the Rule of Law be the ultimate framework of all acts carried out under the Constitution, including the acts of the executive, the legislature and the judiciary. The Judgment of this Court has found the Petitioner a corrupt officer under the law. Even in its widest sense this would be inimical to his appointment to public office. My opposition to the granting of relief requested by the petitioner follows squarely from my allegiance to the Rule of Law, the sole foundation upon which the strength of this Court lies and the principle which mandates the we not arbitrarily dismiss prior rulings of this Court – including the one originally issued in this case – merely for issues of political expediency or convenience.

After all, the Rule of Law is the backbone of good governance. The nurturing of these twin institutions leads ultimately to a stable and healthy nation. The stunting of one necessarily leads to a halt in the growth of the other. The promptings of a kind compassionate heart or sympathetic urgings must necessarily be bridled in dealing with the resources of the State, for it ultimately belongs to the People and must be in the custodianship of honest, disciplined, hardworking and effective public officers.

I accordingly dismiss the amended petition. No Costs.

By Majority decision relief sought under para (c) of the amended petition granted.

Court refuses relief sought under para (a) and (b) of the amended of petition By majority decision Court holds that. H. E. The President would be free to consider appointing the petitioner to the post, Secretary Ministry of Finance.

CENTRAL BANK OF SRI LANKA AND OTHERS
V.
LANKEM TEA AND RUBBER PLANTATIONS (PVT) LTD

SUPREME COURT
S. N. SILVA, C. J.
TILAKAWARDANE, J. AND
MARSOOF, P.C., J.
S. C. APPEAL NO. 81/2004
SC (SPL). L. A. NO. 252/2004
COURT OF APPEAL NO. 1112/2000
AUGUST 1ST, 2005
MARCH 9TH, 2006
JULY 17TH, 2006

Exchange Control Act – Sections 10(1), 11(1), 51(1), 51(3), and 52(8) – Writ of Certiorari – Quash a decision which is ultra virus – Duty to give reasons.

This an appeal taken by the appellants from the decision of the Court of Appeal to quash, by way of *certiorari,* the penalty imposed on the Petitioner – Respondent (Lankem Tea and Rubber Plantations (Pvt) Ltd.) for the alleged contravention of Section 10(1) read with Section 51(1) of the Exchange Control Act No. 24 of 1953.

The alleged contravention originated from certain transactions which formed part of a "takeover bid" initiated by a private Company incorporated in Thailand with the aim of taking over control of Kotagala Plantations Ltd., then owned by the Government. The takeover was sought to be effected through the acquisition of total control over George Steuart Management Serviced Ltd., which managed Kotagala Plantations Ltd.

The Controller of Exchange called for explanation from the Petitioner – Respondent and the Petitioner – Respondent denying liability, sought to explain its stand in relation to the allegation made. This explanation was rejected by the Controller of Exchange and a penalty was imposed. However, this penalty was reduced by H. E. the President in her capacity as the Minister of Finance, in terms of Section 52(8) of the Exchange Control Act. In neither of the letters by which the initial penalty and

the reduced penalty were communicated to the Petitioner – Respondent and also any reasons were given for the imposition of the penalty or for its reduction.

The Court of Appeal held that there was no evidence to support the decision taken to impose the said penalty, nor any legal basis told that the Petitioner – Respondent had contravened Section 10(1) of the Exchange Control Act and that the decision cannot stand in any event, as no reasons whatsoever have been given by the relevant authorities to justify the same. The Court of Appeal accordingly quashed the decisions contained in 'P10' and 'P14' through the issue of a mandate in the nature of *Certiorari.*

The Supreme Court granted special leave to appeal against the judgment of the Court of Appeal.

Held:

(1) It is trite law that the legal personality of a corporate body such as Lankem Tea and Rubber Plantations (Pvt) Ltd., is distinct from that of its members and directors, and even if it be the case that none of the current members of that Company were Directors or even shareholders of Lankem Tea and Rubber Plantations (Pvt) Ltd, at the time of the commission of the alleged offence, that would not affect its liability under Section 51(1) of the Exchange Control Act.

(2) The offence constituted by Section 10(1) of the Exchange Control Act does not require the proof of the specific *mens rea* or culpable state of mind, nor does Section 51(1) make reference to any such mental element.

(3) Lankem Tea and Rubber Plantations Ltd., and Lankem are distinct legal persons and one cannot be held liable for the acts or omissions of the other. Hence the former cannot be held liable for the violation of Section 10(1) of the Exchange Control Act in connection with the charge contained in the letter marked 'P1'.

Held Further:

(4) The changes taking place in other jurisdictions have also had their influence in our Courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions.

(5) In the circumstances of this case, the decisions contained in P10 and P14 cry out for reasons, and the failure to give any, render them devoid of any legal validity. Failure to give reasons rendered the decisions contained in P10 and P14 nugatory.

Case referred to:

(1) *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* – (1915) AC 705 HL

(2) *Admiralty v. Owners of the Steamship Divina (The Truculent)* – (1951) 2 AER 968

(3) *The Lady Gwendolen* – [1965] 2 AER 283 CA

(4) *Meridian Global Funds Management Asia Ltd. v. Securities Commission* – [1955] 2 AC 500 PC

(5) *United States v. Ionia Management SA* – 999F. 3d 9 (1st Circuit)

(6) *R. v. Mental Health Review Tribunal, ex. Parte Clatworthy* – (1985) 3 All ER 699

(7) *The Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* – (1947) AC 109

(8) *R v. Gaming Board for Great Britain, Ex. P. Benaim and Khaida* – (1970) 2 QB 417

(9) *Mc Innes v. Onslow – Fane* – [1978] 1 WLR 1520

(10) *R. v. Civil Service Appeal Board Ex. P. Cunningham* [1991] 4 A E R 310

(11) *Samalanka Ltd., v. Weerakoon, Commissioner of Labour and Others* – (1994) 1 S. L. R. 405

(12) *Yaseen Omar v. Pakistan International Air Lines Corporation and others* – (1999) 2 SLR 375

(13) *R. v. Secretary of State for the Home Department Ex. p. Doody* – [1994] 1 AC 531

(14) *R. v. Minister of Defence ex-parte Murray* – (1998) COD 134

(15) *M. Deepthi Kumara Gunaratne and Two Others v. Dayananda Dissanayake and another* – SC (FR) Application No. 56/2008 (S. C. Minutes dated 19th March 2009)

(16) *R. v. Higher Education Funding Council* – (1994) 1 AER 651

APPEAL from Judgment of Court of Appeal.

Y. J. W. Wijetilake, DSG the 1st to 3rd Respondent – Appellants.

H.L. de Silva P. C. with *Nigel Hatch P. C. ,* with *V. K. Choksy* and *Ms. K. Geekiyanage* for the Petitioner – Respondent.

Indika Demuni de Silva, S. C. for the Attorney – General.

Cur.adv.vult

July 06th 2009

SALEEM MARSOOF, J.

This is an appeal taken by the 1st to 4th Respondent-Appellants, respectively the Central Bank of Sri Lanka, the Monetary Board of the Central Bank of Sri Lanka, the Controller of Exchange, and the Attorney General (hereinafter collectively referred to as "the Appellants"), from the decision of the Court of Appeal dated 9th February 2004 to quash, by way of *certiorari,* the penalty imposed on the Petitioner – Respondent, Lankem Tea and Rubber Plantations (Pvt.) Ltd., (hereinafter referred to as Lankem T&RPL") for alleged contravention of Section 10(1) read with Section 51(1) of the Exchange Control Act No. 24 of 1953. The Controller of Exchange (hereinafter sometimes referred to as "the Controller"), purporting to exercise the powers of the Central Bank of Sri Lanka as provided in Section 3 of the Exchange Control Act, imposed on Lankem T&RPL penalty of Rs. 11,667,000/- by his letter dated 20th November 1997 (P10), which penalty was reduced on appeal to Rs. 3,889,000/- by Her Excellency the President of Sri Lanka in her capacity as the Minister of Finance under Section 52(8) of the said Act, which decision was communicated to Lankem T&RPL by the Controller by his letter dated 7th August 2000 (P14). Lankem T&RPL challenged the said decisions in writ proceedings initiated in the Court of Appeal in which the Attorney General was cited as the 4th Respondent in terms of Article 35 of the Constitution.

The writ proceedings filed in the Court of Appeal relate to certain transactions which formed part of a "takeover bid" initiated by two foreign nationals, namely Naganathan Ayadurai, a Malaysian, and his wife Mary Ong, and Rovenco Co. Ltd., a private company incorporated in Thailand but

controlled by the said two foreigners, with the objective of taking over control of Kotagala Plantations Ltd., (hereinafter referred to as "KPL") then owned by the State. The takeover was sought to be effected through the acquisition of total control over George Steuart Management Services Ltd., (hereinafter sometimes referred to as "GSMS") which had, by virtue of being the management company of KPL been offered by the Public Enterprises Reform Commission (PERC) the 'first option' to purchase at a "market determined" Price, 51 per centum of the share capital of KPL then held by the Secretary to the Treasury on behalf of the State.

It is to be noted that GSMS was a member of the 'George Steuart' group of companies and had been incorporated in 1992 specifically to manage the State-owned KPL in accordance with the then prevailing policy that the management of State-owned estates should be done through separate management companies. The George Steuart group of companies consisted of George Steuart & Co. (Pvt) Ltd., (hereinafter sometimes referred to as "GS") which is the oldest Commercial House in Sri Lanka and had commenced business in 1835, initially as a partnership, and was incorporated as a private limited liability company in 1954, and several subsidiaries including GSMS, George Steuart Exports Ltd., and George Steuart Teas & Marketing (Pvt) Ltd. The intensity of the internal rift that the said takeover bid gave rise to within the George Steuart group is reflected in the alleged removal of D. L. B. Jansze from the Directorship of GS and its subsidiaries including GSMS, and the ensuing bitter litigation. It is necessary to observe that the memorandum dated 6th August 1996 (3R9) addressed by D. L. B. Jansze to the Parliamentary Consultative Committee appointed to inquire into the sale transactions of KPL, not only provide valuable insights into the internal battle that raged within the

George Steuart group, but also reveal how the corporate veil had been used to perpetrate fraud and to evade applicable exchange control and revenue laws.

As far as this appeal is concerned, the main provision of the law that is alleged to have been violated is Section 10(1) of the Exchange Control Act, which provides as follows:-

"10(1) Except with the permission of the bank, no person shall in Sri Lanka issue any security or, whether in Sri Lanka or elsewhere, issue any security which is registered or to be registered in Sri Lanka, unless the following requirements are fulfilled:-

(a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Sri Lanka, and

(b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee."

The "bank" that is referred to in the above-quoted provision is the Central Bank of Sri Lanka, which has been established under the Monetary Law Act No. 58 of 1949, as amended, and is the authority responsible for the administration and regulation of the Monetary and Banking System of Sri Lanka. Section 10 (1) of the Exchange Control Act makes it compulsory for any person issuing any security in Sri Lanka, and for any person issuing any security even from abroad which is, or is intended to be registered in Sri Lanka, where either the person to whom such security is issued or the person on whose behalf another person acquires security as nominee, or both, is resident outside Sri Lanka, to obtain the permission of the Central Bank of Sri Lanka for such *issue of shares.*

It is common ground that the proceedings that led to the imposition of the impugned penalty on Lankem T&RPL commenced with the letter dated 30th June 1997 (P1) sent to Lankem T&RPL by the Controller of Exchange. It is instructive to reproduce the said letter in full as it contains the matters with respect to which Lankem T&RPL stood charged, and I have also italicized the key words used by the Controller in paragraph 1 thereof to describe the offence alleged to have been committed by Lankem T&RPL.

"Confidential: Registered Post

Dept. of Exchange Control,
Central Bank of Sri Lanka,
Janadhipathi Mawatha,
P. O. Box 590,
Colombo 1,
Sri Lanka.
1997.06.30

The Chairman,
Lankem Tea & Rubber Plantations (Pvt) Ltd.,
760-762 Baseline Road,
Colombo 9.

Inquiry Regarding Transfer/Issue/Sale/ Purchase of Shares of George Steuart Management Services (Pvt) Ltd. (GSMS) and Kotagala Plantations Ltd. (KPL) and Sale of Debentures issued by KPL

On investigation conducted by the Exchange Control Department pertaining to the transfer/issue/sales/purchase of shares of George Steuart Management Services (Pvt.) Ltd., and Kotagala Plantations Limited, I observe that *your company has allotted three thousand three hundred and forty (3,340) shares of the company (then named George Steuart*

Management Services (Pvt.) Ltd.,) to Rovenco Co. Ltd., 15A, Regent on the Park I, No. 32, Sukhumvit 26, Bangkok 10110, Thailand, without the permission of the Central Bank of Sri Lanka, in contravention of the provisions of Section 10(1) of the Exchange Control Act No. 54 of 1953 and thereby committed an offence in terms of Section 51 of the said Act.

2. In the circumstance, you are requested to furnish your explanation, if any, so to why a penalty in terms of Section 52 of the Exchange Control Act should not be imposed on your company, in respect of the offence mentioned in paragraph 1 above.

3. Your explanation should reach me on or before the 11th of July 1997.

Yours faithfully,
Sgd/
Controller of Exchange."

In response to the aforesaid letter dated 30th June 1997 (P1), Lankem T&RPL by its letter dated 8th July 1997 (P2) sought time till 31st July 1997 to give its explanation, but in fact provided its explanation in its letter dated 28th July 1997 (P3) addressed to the Controller of Exchange. By the aforesaid letter, Lankem T&RPL, while denying liability, sought to explain in detail its stand in regard to the said allegation contained in P1, and specifically took up the position that none of the Directors or shareholders of Lankem T&RPL owned and/ or controlled and / or managed GSMS at the time the transfer of the said shares took place. Lankem T&RPL also explained that, in any event, at the relevant time, the 3,340 shares issued by GSMS to Rovenco Co. Ltd., of Thailand constituted a mere 40 per centum of the total equity shareholding of GSMS which consisted of 8,346 shares,

and that the said issue of shares should be deemed to have been approved by the Central Bank in view of the "general approval" granted by the Controller of Exchange by the Gazette Notification marked P5. It was also stressed that by its letter dated 10th November 1995 (P7B) the Board of Investment (BOI) had granted approval for GSMS to make the said issue of shares to Revenco.

It is in evidence that by its letter dated 20th November 1997 the Central Bank responded to these explanations by informing Lankem T&RPL that "your explanation in respect of the contravention of the said provisions of the Exchange Control Act No. 24 of 1953, cannot be accepted", and imposed the said penalty without setting out the reasons for said decision. It is also noteworthy that in the letter dated 7th August 2000 (P14), by which the Controller communicated to GSMS the decision made by Her Excellency the President in Her capacity as the Minister of Finance to reduce the penalty to Rs. 3,889,000/-, no reasons were given for the imposition of the penalty or for its reduction.

Lankem T&RPL challenged the aforesaid decisions P10 and P14 by which the said penalty was imposed on the basis that they were *ultra vires* the powers of the relevant authorities under the relevant provision of the Exchange Control Act, and that they were also void for the failure to give reasons. By its judgment dated 27th August 2004, the Court of Appeal held that there was no evidence to support the decisions taken to impose the said penalty, nor any legal basis to hold that Lankem T&RPL had contravened Section 10(1) of the Exchange Control Act, and that the decisions cannot stand in any event, as no reasons whatsoever have been given by the relevant authorities to justify the same. The Court of Appeal accordingly quashed the decisions contained in P10 and P14 through the issue of a mandate in the nature of *certiorari.*

This Court has granted special leave to appeal against the said judgment for the Court of Appeal on the following questions of law:

(a) Did the learned Judge misdirect himself by assuming that Lankem (Ceylon) Ltd. changed its name to Lankem Tea and Rubber Plantations (Pvt.) Ltd (Respondent Company)?

(b) Did the learned Judge misdirect himself in holding that the penalty imposed on the Respondent Company can only be for the violation of Section 7 and Section 11(1) of the Exchange Control Act?

(c) Did the learned Judge err in law in holding that the Respondent Company could not be made liable for violation of Section 10 (1) of the Exchange Control Act on the basis that it was Lankem (Ceylon) Ltd. that changed its name to Lankem Tea and Rubber Plantations (Pvt.) Ltd.?

(d) Did the learned Judge misconstrue the document marked as 3R28 in the said proceedings and come to the finding that the said document does not disclose any violation by the Respondent Company?

(e) Did the learned Judge err in law in holding that as the shareholders and/or Directors of the Respondent Company did not own and/or control and /or manage George Stuarts Management Services (Pvt.) Ltd. at the relevant time, the Respondent Company is not liable for the contravention of Section 10(1) of the Exchange Control Act?

(f) Did the learned judge err in law in holding that not giving reasons on appeal always result in a denial of Justice and an error of law?