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DIGEST

In addition to the above questions of law, the Petitioner-Respondent (Lankem T&RPL) was also allowed to raise the following question of law.

(g) Was the Respondent entitled to enter into this transaction by reason of the General Permission granted under the Exchange Control Act by the Government Gazette Nos. 720/12 of 24th June 1992 and 721/4 of 29th June 1992?

Corporate Criminal Liability

It is convenient to dispose of straight away, a question of fundamental importance that has been raised as question (e) above, namely whether the Court of Appeal erred 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 Stuart 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. Learned Deputy Solicitor General has invited the attention of Court to the following passage from the judgment of the Court of Appeal –

> "It was not in dispute that none of the shareholders and/ or directors of the Petitioner Company owned and/ or controlled and/ or managed GSMS at the relevant time when the share allotment was made. In the circumstances, I do not see any legal basis on which the Petitioner Company could be made liable for violation of Section 10(1) of the Exchange Control Act."

I do not think it factually correct to say that it was not in dispute that none of the shareholders of Lankem T&RPL owned, controlled or managed GSMS at the time when the

share allotment in question was made, when it is clear from 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, that even by the time the impugned share allotment was made, he had not given up the single share held by him in GSMS. Even after the various transactions that took place in 1995 and 1996 through which all the other shares changed hands and ultimately got vested in Lankem (Ceylon) Ltd., (herein after referred to as "Lankem") which is the holding company of Lankem T&RPL, Jansze continued to hold his single share.

Be that as it may, it is trite law that the legal personality of a corporate body such as Lankem T&RPL, 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 T&RPL 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. It is noteworthy that the offence constituted by Section 10(1) of the Exchange Control Act does not require the proof of any specific *mens rea* or culpable state of mind, nor does Section 51(1) make reference to any such mental element.

Furthermore, even in cases in which a special state of mind is requisite, the common law has developed the doctrine of 'identification' to impose criminal liability directly on the company irrespective of the fact that the acts or omissions which amounted to a violation of the law are the acts or omissions of its employees or agents. See, *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[1]; *Admiralty v. Owners of the Steamship Divina (The Truculent)*[2] 968; *The Lady Gwendolen*[3]; *Meridian Global Funds Management Asia Ltd. v. Securities Commission*[4]; *United States v. Ionia Management*[5] It is, however, unnecessary in the circumstances of this

case to embark on an inquiry as to the "state of mind" of Lankem T&RPL, since as already noted no specific *mens rea* needs to be proved to impose liability on the said company. I am not unmindful of Section 51(3) of the Exchange Control Act which seeks to extend liability to a director or other official of a body corporate which commits an offence under the Act "unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence…" The state of mind of a director or other official could become relevant to exclude personal criminal liability under Section 51(3), but this provision does not come into play at all in a case such as this, where only a company is charged with the offence. I would therefore answer question (e) in the affirmative, and in favour of the Appellants.

Antecedents of Lankem T&RPL

It is not necessary to dwell at length into question (a) on which special leave was granted by this Court, which seeks to focus on the antecedents of the Petitioner-Respondent, Lankem T&RPL, since at the commencement of the hearing of this appeal it was conceded by all Counsel that it was GSMS, and not Lankem that changed its name to Lankem T&RPL. It was also conceded that the said change of name came into effect on 7th January 1997 in terms of Section 20 of the Companies Act No. 17 of 1982.

It is obvious that if it was Lankem (Ceylon) Ltd., that had changed its name to Lankem Tea and Rubber Plantations (Pvt.) Ltd., then Lankem T&RPL 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 dated 30th June 1997 (P1) which has been framed on the basis that Lankem T&RPL contravened the said provision by

allotting 3,340 shares of the said company *at a time when it* was known as George Stuart Management Services (Pvt) Ltd., (GSMS), to Rovenco Co. Ltd., of Thailand, without obtaining the requisite permission of the Central Bank. It is clear that Lankem T&RPL and Lankem are distinct legal persons and one cannot be held liable for the acts or omissions of the other. Fortunately, the confusion has been clarified, and in fairness to the Court of Appeal, it has to be observed that it was the Appellants themselves who were responsible for causing the confusion through their pleadings and written submissions filed in the Court of Appeal. I note that in paragraph 28 of the affidavit of the 3rd Respondent-Appellant Controller of Exchange dated 27th March 2001 filed in the Court of Appeal, he has explicitly stated that "having purchased GSMS, Lankem (Ceylon) Ltd., changed its name to Lankem Tea and Rubber Plantation (Pvt) Ltd.," and the error is repeated in the written submissions filed by the learned Deputy Solicitor General in the Court of Appeal.

It is also noteworthy that in arriving at its decision, the Court of Appeal had been rather cautious in regard to making any findings as regards the antecedents of Lankem T&RPL, as there was a paucity of evidence with respect to this matter despite its fundamental importance. Sripavan, J., had been careful to leave the matter open as is apparent from the following passage from his judgment of the Court of Appeal –

> "*Assuming* that Lankem Ceylon Limited changed its name to Lankem Tea and Rubber Plantations (Pvt.) Ltd., and that the petitioner company would become liable for any violation of the Exchange Control Act, it would then appear that the penalties imposed were based on violations of Sec. 7 and 11 (1) of the Exchange Control Act, as evidenced by 3R28. Whether the petitioner or its directors violated Sec. 7 and 11 (1) of the said Act were

not the charges on which the explanation of the petitioner company was sought." *(emphasis added)*

I therefore have no difficulty in answering question (a) in the negative and holding that the Court of Appeal has not erred in regard to the antecedence of Lankem T&RPL.

Violation of the Exchange Control Act

I now come to questions (b), (c) and (d) on which leave to appeal has been granted by this Court, which focus on the nature of the offence alleged to have been committed by GSMS prior to the change of its name to Lankem T&RPL. In order to answer the aforesaid questions on which leave to appeal has been granted, it is also necessary to outline the rather complicated facts relating to the matter as alleged by the Appellants. It is in evidence that from about early 1995, GS had intimation that 51 per centum of shares of KPL then held by the Secretary to the Treasury, would be offered to GSMS, which then functioned as the Managing Agent of KPL. However, it appears that as neither GS nor GSMS had the finances to purchase the said shares in KPL, they decided to invite investors to purchase the shares in GSMS, and through it to purchase the 51 per centum of shares in KPL. At this point of time, the total share capital of GSMS consisted of 5,506 shares held by GS, its subsidiaries George Stuart Exports Ltd., and George Stuart (Teas and Marketing) Ltd., and a few of its Directors.

It appears from the affidavits, statements and other material filed by the parties in the Court of Appeal that Naganathan Ayadurai, a Malaysian national, and Sellacut-tuiyapillai Muthusamy, a Sri Lankan national, signed the Memorandum of Understanding (MOU) dated 4th August 1995 (3R4) with GS which stated that the said Ayadurai and

Muthusamy were interested in acquiring the controlling interest in KPL and that they had requested GS to transfer its rights to GSMS and give the right of first option to acquire the controlling interest in KPL to the said investors. The said MOU also provided *inter alia* that GS had agreed with the 'investors' to give the first option of transfer of its total shares in GSMS for a premium of Rs. 100 Million, subject to the terms and condition of the MOU, and that the said 'investors' had agreed to pay Rs. 100 Million, in stages as consideration for the transfer of a total of 5005 shares in GSMS owned by GS and its directors. It is significant to note that in the said MOU, it is explicitly provided that the term "investors" means and includes "the said Naganathan Ayadurai of Rovenco Company Ltd., its successors and permitted assigns" and Sellacuttiyapillai Muthusamy, his heirs, executors and administrators. This suggests that the said Ayadurai entered into this MOU not in his personal capacity but as the agent of the said Rovenco Co. Ltd., of 15A, Regent on the Park I, No. 32, Sukhumvit 26, Bangkok 10110, Thailand. However, the said Naganatan Ayadurai has admitted in his statement marked 3R12 made to the Controller in the course of the investigation into this matter, that the said company was controlled by his wife and himself.

There is sufficient evidence to establish that on 4th August 1995, Ayadurai made available to GSMS, a pay order for Rs. 5 Million from a commercial bank which GSMS deposited with PERC. It is also in evidence that he furnished GSMS with a pay order dated 2nd November 1995 (3R23) in favor of the Secretary to the Treasury from ABN Amro Bank for Rs. 17.2 Million, which was 10 per centum of the down payment required to purchase KPL shares, and GSMS had forwarded the pay order to the Chairman of the Public Enterprises Reform Commission (PERC). It is evident that on

the same day, Ayadurai paid a further Rs. 7 Million by means of an ABN Amro Bank pay order to GSMS as part payment for the purchase of GSMS shares. It is also evident from the letter dated 17th April 1996, issued by ABN Amro Bank marked 3R5 that on 24th November 1995, Ayadurai and Mary Ong made available to GSMS the following sums of money which GSMS was required to pay in terms of the letter dated 26th October 1995 issued by PERC:-

(a) Rs. 1,020,000/- to the Commissioner General of Inland Revenue;

(b) Rs. 1,200,000/- to the Commissioner General of Inland Revenue;

(c) Rs. 118,800,000/- to KPL; and

(d) Rs. 79,800,000/- to the Secretary to the Treasury.

It is submitted on behalf of the Appellants, that as stated in paragraph 26(n) of the affidavit of the Controller of Exchange (3rd Respondent – Appellant) dated 27th March 2001, a Sale Purchase Agreement (SPA) was entered into between Naganathan Ayadurai, Mary Ong and Rovenco Co. Ltd. of Thailand on 4th December 1995, in which the said foreigners and Thai company were described as "investors" on the one part, and GS and GSMS on the other, whereby it was agreed that:-

(i) GS would execute and cause the other shareholders of GSMS to execute transfer forms, to transfer all the shares described in the schedule to the "investors", upon payment of the purchase price and the premium.

(ii) immediately after the execution of transfer forms, the Board of Directors of GS will be reconstituted to include the said Ayadurai and Mary Ong.

It is also stated in the said affidavit of the controller that the SPA expressly declared that Sellacuttiyapillai Muthusamy is not any more interested in purchasing the shares in GSMS or pursuing his rights under the MOU of 4th August 1995. It is the case of the Appellants that, as set out in paragraph 26(o) of the affidavit of the Controller, and as evidenced by the letter dated 17th April 1996 of ABN Amro Bank marked 3R5, that on 4th December 1995, Ayadurai and Mary Ong paid GS Directors Gerard Edward Scott Dirckze, Somasundaram Skandakumar, J. M. Wimalagooneratne and K. M. de Silva Rs. 16,980 each as consideration for the single shares held by them in GSMS. On the same date it also appears that they had paid two subsidiaries of GS, namely George Stuart Exports Ltd., Rs. 8,489,500 for 500 GSMS shares and George Stuart (Teas and Marketing) Ltd., Rs. 32,260,100 for 1900 GSMS shares, while also paying a sum of Rs. 37,162,400 to GS direct for 2607 GSMS shares with an additional sum of Rs. 5,000,000 being paid to GS as management fees. It is alleged that after the above payments were made on 4th December 1995, 5,005 shares, being the total share holding of GSMS (less one share that was held by Mr. D. L. B. Jansze), had been transferred "in blank" without indicating the name of the transferee in the transfer form, as evidenced by the blank transfer marked 3R26. It appears that on the same day a Letter of Indemnity was signed by two Directors of GS on behalf of the Company and addressed to Ayadurai, Mary Ong and Rovenco Co. Ltd., wherein it is stated *inter alia* that "we further declare and confirm that the 5005 shares transferred by us to you do not carry any encumbrances. . . ."

What is crucial for the purposes of this appeal is that the Appellants rely on the letter dated 17th April 1996, issued by ABN Amro Bank marked 3R5, to establish that it order to facilitate the payment of amounts payable by Ayadurai

and Mary Ong as contemplated by the MOU of 4th August 1995 and the SPA dated 4th December 1995, including the purchase price of the said 5,005 shares of GSMS, the said foreign nationals remitted into Sri Lanka, approximately Rs. 313,505,012/-, which at the parity rates prevalent at that time amounted to US $ 5,879,955. It is alleged by the Appellants that none of the said inward remittances had been routed through a Share Investment External Rupee Account (SIERA).

At this stage, it is necessary to observe that in my opinion, the aforesaid transactions are not directly relevant to the charge contained in the letter dated 30th June 1997 (P1) by which the Controller has charged Lankem T&RPL (formerly GSMS) for the alleged violation of Section 10(1) of the Exchange Control Act by *allotting* 3,340 of its shares to Roverco Co. Ltd. This is because, what was contemplated and given effect to by the MOU of 4th August 1995 and SPA of 4th December 1995 was the *transfer* of certain GSMS shares held by GS, its Directors and its subsidiaries George Steuart Exports Ltd., and George Steuart Teas & Marketing (Pvt) Ltd., and not the *issue of shares* by GSMS. It is obvious that neither GSMS nor Lankem T&RPL could be liable with respect to these transactions under Section 10(1) of the Exchange Control Act as the said shares had been issued by GS and not GSMS or Lankem T&RPL.

The facts that are directly relevant to the charge contained in letter dated 30th June 1997 (P1) have been set out in sub-paragraphs (u), (v), (w), (x), (y) and (z) of paragraph 26 of the affidavit of the 3rd Respondent-Appellant Controller of Exchange dated 27th March 200l. It is therein alleged that as evidenced by the Share Certificate dated 11th January 1996 (3R26), GSMS allotted to Rovenco Co. Ltd. of Thailand,

3,340 shares representing 40 per centum of its share capital *by way of a fresh share issue.* In other words, while the initial shareholdings of GSMS consisted of 5,006 shares, by virtue of the said fresh issue of shares, the share capital of GSMS was increased to 8,346. It is alleged in the said affidavit that the fresh allotment of 3,340 shares was made after Ayadurai, Mary Ong and Rovenco Co. Ltd. of Thailand had taken over control of GSMS and the Board of Directors had been reconstituted making Ayadurai and Mary Ong Directors of GSMS. It is the position of the Appellants that this was a violation of Section 10(1) of the Exchange Control Act, insofar as the said issue of shares was without the permission of the Central Bank as required by the said provision.

It may be of some relevance to note that, as asserted by the Controller of Exchange in paragraph 27 of his affidavit dated 27th March 2001, after the issue of 3,340 shares to Revenco, the 8,345 shares of GSMS held by Ayadurai, Mary Ong and Rovenco Co. Ltd., was sold by them to Lankem under a Memorandum of Understanding (MOU) dated 1st April 1996 (3R8) entered into by them. Accordingly, the 5,005 GSMS shares that had previously been transferred "in blank" to Ayadurai by GS and others and the 3,340 shares issued in the name of Rovenco were transferred to Lankem in terms of the MOU. This meant that, apart from the single share held by D. L. B Jansze, all other shares of GSMS came under the control of Lankem. In addition to these shares, Lankem also acquired a large number of shares and debentures held by GSMS in KPL from Ayadurai, Mary Ong and Revenco Co. Ltd., the total consideration paid by Lankem for the entire transaction being Rs. 400 Million. By virtue of these transactions, Lankem achieved virtual control over KPL.

It is on the basis of these facts that it is alleged by the Appellants that Lankem T&RPL (while it carried the name of

GSMS) had violated Section 10(1) of the Exchange Control Act. What is significant for the purposes of this appeal is that neither the Controller of Exchange nor any other Appellant has furnished any documentary evidence to show how the 3,340 shares of GSMS had been paid for. The remittances referred to in the letter dated 17th April 1996 issued by ABN Amro Bank marked 3R5 clearly does not cover this transaction. Moreover, Lankem T&RPL has responded to the allegations contained in P1 by consistently taking up the position that GSMS had the approval of both the BOI and the Central Bank for the issue of the 3,340 shares to Rovenco. The approval of the Board of Investment (BOI) was granted to GSMS by its letter dated 10th November 1995 (P7B) specifically for the issue 40 per centum of its shares to Revenco Co. Ltd. of Thailand, subject to the condition that GSMS, after making the said issue of shares, should continue to maintain an equity structure with minimum 60 per centum of local equity participation.

Lankem T&RPL has also relied on the 'general permission' said to have been granted by the Controller by his order dated 29th June 1992, published in the Gazette of the Democratic Socialist Republic of Sri Lanka bearing No. 721/4 of 29th June 1992 (marked P5), permitting the issue of shares to foreigners and foreign corporate bodies. While the main thrust of the case presented by the Appellants against GSMS is that the exclusions, limitations and conditions subject to which the general permission was granted by P5 have been breached by GSMS thereby violating Section 10(1) of the Exchange Control Act, the Appellants also claim that the condition relating to local equity participation set out in P7B has not been honoured. This issue will be further examined when dealing with question (g) above.

The bone of contention in this appeal was whether the Court of Appeal erred in holding that in the circumstances of this case, Lankem T&RPL could only be liable for the violation of Section 7 and/ or 11(1) of the Exchange Control Act and not for a violation of Section 10(1) thereof, as asserted in the letter dated 30th June 1997 (P1). Section 10(1) of the Act, which has been already quoted in full, seeks to regulate *the issue* of securities registered or to be registered in Sri Lanka to any person resident abroad, whereas Section 11(1) seeks to prohibit *the transfer* of securities to any person who is not resident in Sri Lanka, except with the permission granted by the Central Bank. Section 7 of the Act is a more general provision, which seeks to prohibit the making of any payment in Sri Lanka to, or to the credit of, a person resident outside Sri Lanka without the approval of the Central Bank. The indecision on the part of the Controller of Exchange in regard to the provision under which liability can be attributed to Lankem T&RPL is seen in the fact that, in the attachment to his affidavit entitled "Penalties on the Basis of Gains Received" marked 3R28, various penalties have been separately computed for the alleged violation of Section 11(2) of the Act by GSMS shareholders, for the alleged violation of Section 10(1) of the Act by GSMS and for the alleged violation of Section 7 and 11(1) of the Act by Lankem, and they have then been added together to make a grand total of Rs. 346,602,500.

As has already been noted in dealing with question (a) above, in view of the paucity of evidence in regard to the antecedents of Lankem T&RPL, the Court of Appeal had observed that *if it be the case that it was Lankem (and not GSMS) that changed its name to Lankem T&RPL,* on the basis of the averments in the affidavit of the Controller and the other material placed before Court, there is no way in which an

offence under Section 10(1) of the Exchange Control Act could be made out, as Lankem had not got involved in any *issue of shares*. Lankem came into the scene quite late in the series of transactions and purchased almost all GSMS shares under the MOU dated 1st April 1996 from Ayadurai, Mary Org and Revenco Co. Ltd. The only provisions of the Exchange Control Act that could have been violated by Lankem in these circumstances, as correctly noted by the Court of Appeal, are Sections 7 and Section 11(1) of the Act, as the purchasers of the shares were two foreign nationals and a foreign company. If, however, as has been conceded by all the parties to this appeal, it is GSMS that changed its name to Lankem T&RPL, and *if it had failed to obtain the permission of the Central Bank* for issuing 3,340 of its shares to Rovenco as alleged in P1, then it can only be liable under Section 10(1) of the Exchange Control Act for this violation. I wish to add that the Court of Appeal referred to 3R28, which is the Controller's own document, to restate what is apparent on the face of that document, namely that the only provisions of the Exchange Control Act which Lankem T&RPL may have violated in the circumstances of this case are Sections 7 and 11(1) thereof. Accordingly, I answer questions (b), (c) and (d) in the negative, and against the Appellants.

The General Permission

At this stage it is convenient to consider question (g) on which leave to appeal has been granted by this Court, which relates to the general permission on which Lankem T&RPL has relied so heavily. I note that the Gazette Notification mentioned in question (g), namely Gazette No. 720/12 of 24th June 1992 (P4) merely contained the *Guidelines for the Purchase of Shares by Non-residents in Sri Lankan Companies and for Matters Relating thereto* adopted by the Cabinet of

Ministers and published by the Secretary to the Ministry of Finance for general guidance, and do not constitute the permission of the Central Bank for any of those things that can be done only with the approval of the said Bank under the provisions of the Exchange Control Act. The general permission relied on by Lankem T&RPL was granted by the Controller of Exchange, presumably in the exercise of his power under Section 3 of the Exchange Control Act, by the order dated 29th June 1992, published in the Gazette of the Democratic Socialist Republic of Sri Lanka bearing No. 721/4 of 29th June 1992 (P5). By the said order permission was granted in general terms for the *issue and transfer* of shares in a company up to 100 per centum of the issued capital of such company, to *inter alia* corporate bodies incorporated outside Sri Lanka and individuals resident outside Sri Lanka (inclusive of Sri Lankans resident outside Sri Lanka), subject to the exclusions, limitations and conditions set out in the said order. Paragraph 2 of the said order simply excluded businesses such as money lending, pawn broking, retail trading with a capital below US $ 1 million and coastal fishing, none of which are relevant in the context of this case, from the purview of the order.

However, an important limitation to the ambit of the order marked P5 is found in paragraph 3 (iii) of the said order which limits the general permission thereby granted in respect of shares in a company "carrying on or proposing to carry on" *inter alia* the businesses of "growing and primary processing of Tea, Rubber, Coconut, Cocoa, Rice, Sugar and Spices" up to 40 per centum of the issued capital of such company, or if approval has been granted by the Board of Investment (BOI) for a higher percentage, up to such higher limit. Learned Deputy Solicitor General has invited the attention of the Court to the Memorandum of Association

of GSMS (3R27) which shows that although the foremost primary object of GSMS was "the managements of the plantations owned, leased or held in trust by Kotagala Plantations Ltd.," its primary objects included *inter alia* the growing and primary processing of tea, rubber and coconut. Learned DSG contends that GSMS was a company to which the limitation contained in paragraph 3 (ii) of the said order applies, and therefore it did not in law have permission to issue more than 40 per centum of its issued share capital to non-residents. This submission overlooks the position that at the time when GSMS made a fresh share issue and allotted 3,340 shares to Rovenco Co. Ltd., of Thailand, the issued share capital of GSMS was thereby increased to 8,346 shares, and that the number of shares issued to Rovenco did not exceed 40 per centum of its issued share capital. Furthermore, it has been contended by learned President's Counsel for Lankem T&RPL that despite the fact that the primary objects of GSMS found in the Memorandum of Association 3R27 included growing and processing of tea, rubber and coconut, in fact Lankem T&RPL only engaged in the management of KPL, and did not in fact indulge in the growing and processing of tea, rubber or coconut in estates of its own. He therefore submitted that the general permission granted by P5 extended in the case of GSMS to 100 per centum of its share capital.

It is relevant to note in this context that, notwithstanding the general permission granted by P5, GSMS had sought permission from BOI to issue 3,340 shares not exceeding 40 per centum of its equity to Rovenco, and by its letter dated 10th November 1995 (P7B), the BOI had granted the necessary permission for this purpose. Learned Deputy Solicitor General has, however, pointed out that the permission granted by P7B was subject to the condition that the prevailing equity structure of GSMS should be continued so that there would

be at least 60 per centum local equity participation even after the fresh issue of shares. He has strenuously contended that by 4th December 1995, 5,005 shares of GSMS (which at that time was 100 per centum less one of the GSMS share capital) had been surreptitiously transferred in blank to Ayadurai, Mary Ong and Rovenco Co. Ltd., and that on 11th January 1996 when the fresh shares in number 3,340 were allotted to Rovenco, the foreign participation clearly exceeded 40 per centum of the GSMS share capital. He therefore submitted that the permission granted by P7B was of no application, While in my view, this submission of the learned DSG is irrefutable, I am of the opinion that in any event, the BOI permission would be redundant if the general permission granted by P5 is applicable.

A further submission made by the learned Deputy Solicitor General on behalf of the Appellants was that certain conditions set out in paragraph 4 of P5 have not been complied with in the process of allotting 3,340 shares to Rovenco. For instance, he has submitted that Rovenco failed to make a declaration to the effect that it was resident outside Sri Lanka on the share application form. I am of the opinion that if at all, this is only a technical violation, as all concerned including the BOI were aware that Rovenco was not a company resident in Sri Lanka. The other submission made by learned Deputy Solicitor General to the effect that Rovenco failed to pay for the shares through a Share Investment External Rupee Account (SIERA) is also untenable in the absence of any evidence as to how the said shares had been paid for. As already noted, the remittances referred to in the letter dated 17th April 1996 issued by ABN Amro Bank marked 3R5 clearly do not cover the payment made by Rovenco for the 3,340 shares.

In the circumstances, I am inclined to hold that the Petitioner-Respondent Lankem T&RPL was entitled to enter into the transaction referred to in P1 by reason of the general permission granted by P5. Accordingly, I answer question (g) in the affirmative, and against the Respondent-Appellants.

The Duty to Give Reasons

Question (f) on which leave to appeal has been granted by this Court may now be looked at closely. The question is, did the Court of Appeal err in law in holding that not giving reasons on appeal always results in a denial of justice and an error of law? Our attention has specifically been drawn to the following passage from the judgment of Sripavan, J. –

> "Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In *R v. Mental Health Review Tribunal, ex. Parte Clatworthy*[6] it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did, and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing."

In seeking to defend the reasoning of the Court of Appeal, learned President's Counsel for Lankem T&RPL has invited the attention of Court to the manner in which the Controller of Exchange conducted his investigations and inquiry into this matter. In particular, he has submitted that no allegation that GSMS has violated a condition subject to which the general permission was granted was made in the Controller's letter dated 30th June 1997 (P1) or in any subsequent correspondence. Even when Lankem T&RPL relied on the general permission conferred by P5, the Controller had not taken up

the position that there had been a breach of a condition or limitation specified in the general permission granted by P5. Nor did the Controller specifically take up the position that Lankem T&RPL had violated the equity capital ratio specified in the BOI approval contained in the letter dated 10th November 1995 (P7B). When Lankem T&RPL responded to the allegation in P1 by P3, the Controller in his reply dated 20th November 1997 (P10) merely stated that "your explanation . . . . cannot be accepted" without giving any reason for the rejection of the explanation. Even in the course of the appeal made to the Minister of Finance by the letter dated 10th December 1997 (P13), Lankem T&RPL had no opportunity of meeting the allegation that a condition or limitation of P5 or P7B had been breached. Learned President's Counsel stressed that a fair hearing had been denied to Lankem T&RPL even at that stage, and furthermore, the decision of the relevant Minister contained in P14 did not give any reason for affirming the imposition of the penalty albeit with a reduced quantum.

He has submitted that it was only after Lankem T&RPL filed the writ application in the Court of Appeal seeking to quash P10 and P14, that the Controller by his affidavit dated 27th March 2001 (nearly four years later) belatedly sought to justify the imposition of the penalty on the ground that the conditions and limitations qualifying the general permission granted by P5 have been breached and the equity capital ratio specified in the BOI approval contained in the letter dated 10th November 1995 (P7B) has not been maintained. Learned President's Counsel has submitted that these grounds and reasons had not been communicated to Lankem T&RPL at any stage prior to that, and that the omission to do so was a blatant denial of natural justice. He also submitted that the failure to give reasons impeded the exercise of the

right of appeal conferred by law on Lankem T&RPL as it was kept guessing as to what could have been the reasons for the imposition of the penalty.

However, learned Deputy Solicitor General has strenuously agued that the common law does not recognize a general duty to give reasons, and that the provisions of the Exchange Control Act do not create any statutory obligation to do so. He further submitted that neither the rules of natural justice nor those of procedural fairness require the giving of reasons. He relied on the following passage from S. A. de Smith's *Judicial Review of Administrative Action,* 6th Edition, 2007, page 411 –

> ". . . . a decision – maker is not normally required to consider whether fairness or procedural fairness demands that reasons should be provided to an individual affected by a decision because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety."

He has also referred us to *The Minister of National Revenue v. Wrights' Canadian Ropes Ltd*(7) *R. v. Gaming Board for Great Britain, Ex. P. Benaim and Khaida*(8) *Mc Innes v. Onslow – Fane*(9) and *R. v. Civil Service Appeal Board Ex. p. Cunningham* (10) for the proposition that there is no general common law duty to give reasons for decisions, and submitted that a similar line of reasoning has been followed by our courts in *Samalanka Ltd., v. Weerakoon, Commissioner of Labour and Others* and *Yaseen Omar v. Pakistan*(11) *International Airlines Corporation and Others*(12)

As against this, learned President's Counsel for Lankem T&RPL has pointed out that the position has changed radically in recent times, and invited the attention of Court to the following passage from Prof. S. A. de Smith's work

Judicial Review of Administrative Action, wherein at page 413 he observes that –

> ". . . . it is certainly now the case that a decision – maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, so fast is the case law on the duty to give reasons developing, that it can now be added that *fairness or procedural fairness usually will require a decision – maker to give reasons for its decision.* Overall the trend of the law has been towards an increased recognition of the duty to give reason. . . ." *(emphasis added).*

He has also refered to more recent decisions of the English Courts such as *R. v. Civil Service Appeal Board, Ex. p. Cunningham (Supra) R. v. Secretary of State for the Home Department, Ex. p Doody*[13] and *R. v. Minister of Defence ex parte Murray* [14], where the Courts have been more willing to infer a duty to give reasons. Many justifications may be advanced for insisting on a statement of reasons, such as fair play (Report of the Committee on Administrative Tribunals and Enquiries (Frank Committee) Cmnd. 218 1957, page 98) procedural fairness (Galigan, *Due Process and Fair Procedures* page 437) and transparency (*per* Lord Mustill, in *R. v. Secretary of State for the Home Department, Ex. p. Doody (supra)* However, as Prof. H. W. R. Wade observes in *Administrative Law,* 9th Edition, page 522.

> "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. *Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice.* It is also a

healthy discipline for all who exercise power over others." *(emphasis added)*

It is important to note that the changes taking place in other jurisdictions have also had their influence on our Courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions. The Sri Lankan authorities were examined recently by the Supreme Court in *M. Deepthi Kumara Guneratne and Two Others v. Dayananda Dissanayaka and Another*[15] in which the Supreme Court has moved towards recognizing a general duty to give reasons. After making an exhaustive examination of the judicial trend is Sri Lanka and elsewhere in the backdrop of recent academic thinking, Justice (Dr.) Shirani A. Bandaranayake observed that –

". . . . . as pointed out by Prof. Wade (*Administrative Law,* 9th Edition page 527), *the time has now come for the Court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness.* Prof. Wade (supra) had further stated that: Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them." *(emphasis added)*

The question therefore is, whether there was a duty to give reasons in all the circumstances of this case. In view of the fact that Section 52(7) of the Act expressly confers a right of appeal against the decision of the Central Bank to impose a penalty, and even the decision of the Minister on appeal, is reviewable in writ proceedings, I am inclined to follow the reasoning adopted by the Privy Council in *Minister of National Revenue v. Wrights Canadian Ropes Ltd. (supra)* wherein it was observed that –

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action. . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal . . . The Court is . . .. always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are. . . . insufficient in law to support it, the determination cannot stand. . . ."

As observed by Sedley, J., in *R v. Higher Education Funding Council* (16)

> ". . . . . each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not."

I am of the opinion that 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. I hold that the failure to give reasons rendered the decisions contained in P10 and P14 nugatory, and answer question (f) on which leave has been granted, in the negative and against the Appellant.

Conclusions

For the forgoing reasons I dismiss the appeal and affirm the decision of the Court of Appeal. There shall be no costs in all the circumstances of this case.

HON. S. N. SILVA, P. C. – I agree

HON. SHIRANEE TILAKAWARDANE – I agree

DR. PUVANENDRAN AND ANOTHER
V.
PREMASIRI AND TWO OTHERS

SUPREME COURT
SHIRANEE TILAKAWARDANE. J.
AMARATUNGA. J.
MARSOOF J.
SC 59/2008
SC SLA 127/08
CA 1384/2005 (WRIT)
OCTOBER 23, 2008

Writ of Mandamus – To compel the Registrar of Lands to remove an entry from the records of the Land Registry – Disputed question of facts – No Writ of Mandamus lies?

The petitioner sought a writ of *mandamus* from the Court of Appeal seeking to compel the Registrar of Lands to remove an entry in the records of the Land Registry, on the basis that, he is the legal owner of the premises in question and the Registrar had wrongly inserted in the relevant records of the Land Registry the name of one E. T. as the owner of the property. The petitioner contended that the Registrar refused to remove the impugned entry. The Court of Appeal refused to grant the writ of *mandamus*, on the ground that there were disputed questions of fact.

On special leave being granted

Held

(1) The writ of *mandamus* is principally a discretionary remedy – a legal tool for the dispensation of justice when no other remedy is available. Given the power of such a remedy, the Common Law surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by Court.

(2) The Court will issue a writ only if (1) the major facts are not in dispute and the legal result of the facts are not subject to controversy and (2) the function that is to be compelled is a public duty with the power to perform such duty.

Cases referred to:-

1. *Thajudeen v. Sri Lanka Tea Board and another* – 1981 – 2 Sri LR 471
2. *Hakmana Multipurpose Co-operative Society Ltd v. Ferdinando* – 1985 - Sri LR 272
3. *Siva v. Ambawatte 1968* (71 NLR 348).

APPEAL from a judgment of the Court of Appeal.

A. R. Surendran P.C. with *K. C. Ganesharaja* for petitioners.

Vikum de Abrew SSC for respondents.

Cur.adv.vult

February 16, 2009

SHIRANEE TILAKAWARDANE, J.

The Petitioners-Petitioners-Appellants (hereinafter referred to as "the Appellants") sought special leave to appeal from the decision of the Court of Appeal, dated 5th May 2008, wherein the said Court refused the Applicants' application for a writ of *mandamus* to compel the 1st Respondents – Respondents – Respondents (hereinafter referred to as the "1st Respondent") to remove the entry reading "Enthuran Thambiah", appearing at Division 508 of Folio 60, in the records of the Colombo Land Registry. This Court granted special leave to appeal from that Order on the 09th of July 2008.

The Appellants purchased the land in dispute (hereinafter referred to as the "Land") by Deed of Transfer No. 2247/5077 dated 11th June 1971 and 24th June 1971, and marked XI at page 104-108 of the brief marked "X" (hereinafter referred to as the "Brief"). Around 1998, the Appellants began constructing a house thereon with the approval of the Colombo Municipal Council which was marked as X3 at page 110 of the Brief and which was completed by 2001.

Intending to sell the Land, the Appellants published a newspaper advertisement in 2004, marked X4, at pages 11, 112 of the Brief. A prospective buyer had subsequently brought to the attention of the Appellants' the fact that the name of one Enthuran Tambiah of Palaly Road, Jaffna, had been inserted in the aforesaid Division 508 of Folio 60, in the records of the Colombo Land Registry, as being the present owner of the said Land (hereinafter referred to as the "Impugned Entry")

In the course of seeking clarification on this matter, the Appellants had confirmed the existence of the impugned entry and recognized the implication that, for all intents and purposes, Enthuran Thambiah was registered as the current owner of the said Land. In their Petition the Appellants categorically stated that they did not at any time transfer or alienate the said Land premises to any other person nor enter into any transaction concerning the said Land. The impugned transfer was purportedly effected by a Deed bearing No. 3729 dated 11th January 1992 and executed by one K. C. H. Perera, Notary Public (hereinafter referred to as the "Impugned Deed").

The Appellants have filed documents which clearly establish that at the time of the purported execution of the Deed they had been residents of Singapore and not physically in Sri Lanka. As proof of this fact, the Appellants had produced certified copies of their passports, marked as X6A and X6B and contained in pages 116-142 of the Brief.

After determination of the alleged discrepancy, the 1st Appellant, by his application dated 4th November 2004 requested a certified copy of the aforesaid Deed No. 3729 from the 1st Respondent. On the same day the 1st Respondent replied by letter informing the 1st Appellant that the Notary

Public who had purportedly executed the said deed referred to above, had died on 24th January 1992. The 1st Respondent had further reiterated that the last Deed of attestation by the said Notary Public for the month of January of 1992 was a Deed bearing the number 3722 and dated 14th January 1992, and as such, he was unable to issue certified copy of the said Deed at the request of the Appellants, implicitly on the grounds that the impugned entry was *ex facie* false. The 1st Respondent's letter and its English translation were marked as X7 and X7A at pages 143 and 144 of the Brief.

Thereafter the Appellants through their Registered Attorneys and by letter dated 26th/29th November 2004 and marked X8 at page 145 of the Brief, requested the 1st Respondent to furnish a certified copy of the Deed No. 3729. Once again the 1st Respondent, by his letter dated 27th January 2005, replied to the appellants' Registered Attorneys, but this time stated peculiarly that he was unable to conform to such a request due to the misplacing of the volume containing the said Deed No. 3729. This letter is marked X9 at pages 146 of the Brief.

In light of the aforementioned circumstances, the Appellants through their Registered Attorneys and by letter dated 28th June 2005, called upon the 1st Respondent to take steps to remove the impugned entry from the records of the Colombo Land Registry. However, the 1st Respondent did not comply with the request.

Thereafter, the Appellants filed a Petition dated 24th August 2005 in the Court of Appeal seeking a writ of *mandamus* in order to direct the 1st Respondent to remove the Impugned Entry and the Court issued notice on the 1st Respondent. The 1st Respondent filed his Statement of

Objections to which the Appellants filed their counter objections. While the said application was pending the 1st Respondent ceased to hold office as the Land Registrar of the Colombo Land Registry and the 1A Respondent succeeded in the place of the 1st Respondent. Thereafter, the 1A Respondent was added as a party and, on direction of the Court, Enthuran Thambiah was also added as the 2nd Respondent.

As evidenced by the Courier's Report marked as X, at page 61 of the Brief, the notice issued by the said Court on the 2nd Respondent was returned, undelivered and the courier had made an endorsement that the 2nd Respondent could not be located, despite several attempts being made to serve such notice.

Court sought assistance of the Hon. Attorney General and thereafter a Senior State Counsel appeared as *Amicus Curiae* and oral and written submissions were made on behalf of all the parties. On 5th March 2008, the Court of Appeal by its judgment, dismissed the applications filed by the Appellants stating *inter alia* that the Appellants case was based on 'disputed facts' and therefore the Court was not inclined to issue such a writ. Despite the significant evidence to support the Appellants' allegation, we believe this dismissal to have been legally correct.

The nature of the *writ of mandamus* was clearly articulated in the case of *Thajudeen v. Sri Lanka Tea Board and another*[1] In *Thajudeen*, the Honourable Justice Ranasinghe, quoting de Smith's **Judicial Review of Administrative Action** (4th ed) pgs. 540, 561 stated that –

> "*Mandamus* has always been awarded as an extraordinary, residuary and 'supplementary' remedy to be granted only when there is no other means of obtaining

justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the Court will decline to exercise its discretion in his favour if a specific alternative remedy "equally convenient, beneficial and effectual" is available."

Thus the writ of *mandamus* is principally a discretionary remedy – a legal tool for the dispensation of justice, when no other remedy is available. Given the power of such a remedy, the common law surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by Court. Only if (a) the major facts are not in dispute and the legal result of the facts are not subject to controversy. (vide *Thajudeen v. Sri Lanka Tea Board and Another (supra)* and (b) the function that is to be compelled by the writ is a public duty with the power to perform such duty (vide *Hakmana Multipurpose Cooperative Society Ltd. v. Ferdinando*[2] *Silva v. Ambawatte* [3] will the writ of *mandamus* lie.

By its judgment dated 5th May 2008, the Court of Appeal refused to grant the writ of *mandamus* on the ground that there were disputed questions of fact. The said Court observed that even though the Petitioners had provided strong evidence to prove the fact that they were the rightful and lawful owners of the said premises, the entry adverted to above in the Register of Lands contradicted this assertion. It appears to us that the learned Judge of the Court of Appeal correctly recognized the existence of a factual dispute and rightly refused to compel removal of the impugned entry by a writ of *mandamus*.

While several facts in the case which point to ownership by the Appellants are undisputed – *inter alia*, the Appellant's 1971 deed, the inability to find Mr. Thambiah, the Appellants