THE
Sri Lanka Law Reports

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

[2008] 1 SRI L.R. – PARTS 5 & 6

PAGES 113 - 168

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

Price : Rs. 40.00

DIGEST

CONSTITUTION ARTICLE 3, 4 – Article 12 (1), 126 – 13th Amendment – Sale of shares of Lanka Marine Services Ltd – Acting without lawful authority – Public Enterprise Reform Commission Act, No.1 of 1996 – Ostensible authority – Right to equality – Privatization – Bias – Rule of law – Locus Standi – Defence of time bar – Severability of executive action – Just and equitable relief under Article 126 – Provincial land list – Advice of Provincial Council necessary? Petroleum Products (sp. provisions) Act 63 of 2002.

Vasudeva Nanayakkara v Choksy and others (John Keells Case) 134
(Continued in part 7)

CONSUMER AFFAIRS ACT NO. 9 OF 2003 – Section 3 (4), section 13 (1) – leaking gas cylinder – Complaint to Authority – Compensation ordered – Quorum – Authority not properly constituted – legality of the award?

Shell Gas Lanka Ltd. v Consumar Affairs Authority and others 128

LAND ACQUISITION ACT-S10 (5) – Section 12 (4), section 17, section 27, section 28 – Compensation awarded – Appeal to Board of Review – Appeal to the Court of Appeal Should the appellant state the questions of law to be argued in the petition of appeal? Is the appeal on a question of law only? Industrial Disputes Act section 31D – compared – Finality clause – Constitution Article 128(1).

Amarasinghe v. Acquiring Officer, Kegalle 120

PENAL CODE – Section 296 – Evidence Ordinance – Section 8(2), section 27, section 30, section 114 – Credibility of main witness – Absence of direct evidence as to Actus Reus – Ellenborough principle – Common murderous intention? Evidence Ordinance sections 8, 27(1), sections 36, 9, 114. – alibi Burden of Proof.

Wimalaratne Silva and another v Attorney-General 113
(Continued from Part 4)

(c) In applying the test of spontaneity and belatedness, Siriyawathi has failed to adduce a justifiable and plausible reason to justify the belated and involuntary nature of her statement to the police.

(1) *Sumanasena* v *Attorney-General* (3)

(2) *Queen* v *Pauline de Croos* (4)

(d) Siriyawathi's evidence as to the involvement of the appellants in the death of the deceased is not corroborated by any other conclusive, direct or circumstantial evidence.

In view of the foregoing reasons, I am firmly of the view that Siriyawathie lacked creditworthiness and it would have been unsafe to have founded a conviction on the uncorroborated testimony of Siriyawathie. In view of the above the first contention adduced on behalf of the appellants should succeed.

I now proceed to dwell on the 2nd contention raised on behalf of the appellant as to the sufficiency of evidence to base a conviction for murder against the appellants either on individual liability or by way of joint liability on the basis of the concept of common intention. On a perusal of the judgment it is quite confusing and ambiguous as to on what basis the convictions were founded. At the outset the learned trial Judge opines that the prosecution should prove the presence of common intention but the last passage of the judgment concludes by convicting the appellants on the basis of individual liability.

At page 43 of the judgment (Page 262 of the original record), the learned trial Judge quite emphatically declares "චූදිතයන් දෙදෙනාට එරෙහිව ඉදිරිපත් කර ඇති චෝදනාවේ පදනම පොදු අදහසයි. ඒ අනුව චූදිතයන් දෙදෙනාගේ පොදු අදහස ඉෂ්ඨ කර ගැනිමේ දී මෙම අපරාධය සිදු වූ බවට පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් කළ යුතු ය. මෙම මිනිමැරීමේ සිද්ධියට ඇසින් දුටු සාක්ෂිකරුවන් නොමැති හෙයින් අපරාධය සිදු වූ අවස්ථාවේ දී චූදියන් දෙදෙනා ක්‍රියා කලේ පොදු චේතනාවකින් හෝ අදහසකින් බව පෙන්විය හැක්කේ චූදිතයන් පසුව පවසන ලද වචනවලින් අහවන අදහස් මාර්ගයෙනි. මේ ගැන රජු එරෙහිව අසප්පු (58 වන නීති වාර්තා 389) නඩුවේ කියවේ." and proceeds to hold that the 1st accused-appellant was activated with a murderous intention at the time of the commission of the offence, based firstly on the utterance of the 1st accused to Chandrakanthi the following day and secondly on the failure of the 1st accused to produce

evidence that would consolidate his innocence and contradict the prosecution evidence. In the last paragraph of the judgment (Page 264 of the record), the learned trial Judge has finally held:-

"පැමිණිල්ල විසින් මෙම නඩුව සාධාරණ සැකයෙන් ඔබ්බට චූදිතයන් දෙදෙනාට ම එරෙහිව පුද්ගල වගකීම් (individual liability) පදනම අනුව ඔප්පු කර ඇති බවට මම තීරණය කරමි. and proceeded to convict both appellants for the offence of murder.

The judgment of the learned trial Judge is flawed for the following reasons.

(1) A conviction has to be founded either on individual liability or vicarious liability or sometimes both. It should be based on concrete evidence and not on surmise and conjecture.

(2) Due to the absence of evidence as to the commission of the actus reus in this case, a conviction cannot be based on individual liability as against each accused-appellant, due to the lacuna of evidence as to which blow dealt by which accused caused fatal injuries on the deceased which directly caused his death. There is no evidence whatsoever, circumstantial or otherwise, to decide beyond reasonable doubt that each of the accused-appellants dealt fatal blows on the deceased directly causing his death. It could very well be that only one of the appellants dealt fatal blows on the deceased, in which event the other accused-appellant cannot be held liable on the basis of individual liability, unlike on the basis of vicarious liability and the concept of common intention.

(3) Whatever the influx of circumstantial evidence as to motive, opportunity, previous conduct and subsequent conduct cannot fill this lacuna of evidence as to the commission of the *actus reus* itself, unless there is clear-cut circumstantial evidence as to which accused dealt which fatal blow in order to base a conviction on individual liability.

(4) The alleged confession to Siriyawathie by the 2nd appellant cannot be proved against the 1st appellant under section 30 of the Evidence Ordinance. As the testimonial creditworthiness of Siriyawathie is questionable, it is not safe to convict the 2nd appellant on the basis of individual liability on this uncorroborated testimony alone.

For the above reasons, the decision of the learned trial Judge to convict both appellants on the basis of individual liability cannot be sustained.

It is now left to examine whether there was sufficient evidence to convict the appellants for the offence of murder on the basis of vicarious liability and common intention. Here too, the judgement is flawed for the following reasons, as the learned trial Judge had failed to observe the following rules.

(1) The acts and complicity of each accused must be considered separately. *King* v *Assappu*(5) Justice Dias.

(2) The inference of common intention must not be drawn unless it is an irresistible and necessary inference from which there is no escape. *W. Richard* v *The Republic* (76 NLR 534).

(3) The Prosecution must prove that each of the accused were harboring a common murderous intention at the time of the commission of the offence.

Punchi Banda v *The Queen*(6) Justice Sirimanne.

It is now opportune to examine the circumstantial evidence available against each accused separately in compliance with the above guidelines in order to determine whether a conviction for murder can be sustained against them on the basis of common intention.

Evidence against the 1st accused-appellant

(1) Presence at Siriyawathie's house on the night of 03.08.97, the last time the deceased Piyaratne was seen alive:- (Siriyawathie and Oliver De Silva) This would constitute evidence of opportunity only.

(2) Being assaulted by the deceased Piyaratne at Siriyawathie's house:- (Siriyawathie) This would constitute evidence of motive and provocation only.

(3) "ආයේ ජීවත්වන්නේ නැහැ. ටෝච් එක අරන් ගියා." (1st appellant's utterance to witness Chandrakanthi on the following day 04.08.97). This would imply that by the next day after the disappearance of the deceased, the 1st appellant was aware that the deceased had died. It may be through his own personal knowledge or from what was told to him by another such as the 2nd appellant. It does not prove beyond

reasonable doubt of the complicity of the 1st appellant in the death itself of the deceased.

(4) Recovery of the axe (P3) on the Evidence Ordinance section 27 statement (P4) made by the 1st appellant. There is no evidence to connect the axe to the crime. The fact that a sharp-cutting weapon was used to kill the deceased does not necessarily mean that this same axe was used. If human blood which tallies with that of the deceased was detected on the axe by the Government Analyst, it would have constituted a strong piece of circumstantial evidence against the 1st appellant. When part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is only evidence that the accused knew where the article discovered could be found, and nothing more.

H. M. Heen Banda v *The Queen* (7)

The totality of the above circumstantial evidence certainly does not give rise to an irresistible inference that the 1st appellant was harboring a common murderous intention with the 2nd appellant to kill the deceased Piyaratne. Therefore the charge of murder under section 296 of the Penal Code against the 1st appellant, even on the basis of common intention, should fail.

Evidence against the 2nd accused-appellant

(1) Evidence of Siriyawathie of the repeated utterances by the 2nd appellant as to the deceased leaving the village, that the deceased will not come back and do not be afraid, and finally the confession that the 2nd appellant together with the 1st appellant attacked the deceased with a rice-pounder and killed and buried him in the marshy canal near their paddy field. In this regard the following salient features have escaped the attention of the learned trial Judge.

(a) The existence of a serious doubt as to the creditworthiness of Siriyawathie.

(b) The alleged rice-pounder has not been recovered.

(c) Though suppressed by Siriyawathie, as the evidence points to a sexual intimacy, Siriyawathie had with the 1st appellant and not with 2nd appellant, and as it was the 1st appellant and not the 2nd appellant who intervened to

save Siriyawathie from the clutches of the deceased on the night of 03.08.97 and got assaulted by the deceased into the bargain, in applying the test of probability and improbability, it would be more reasonable to presume under section 114 of the Evidence Ordinance, that if at all a confession has to be made, in all probability it would have been the saviour the 1st appellant, and not the 2nd appellant, who would intimately disclose the gruesome details of the murder to Siriyawathie.

(2) The discovery of the body consequent to information provided to the police by Siriyawathie and the 2nd appellant.

This item of evidence, admissible against the 2nd appellant under section 8(2) of the Evidence Ordinance by way of subsequent conduct, would only prove that the 2nd appellant was aware where the body was buried and nothing more. It does not prove his complicity in the crime beyond reasonable doubt. It would very well be that the 1st appellant or Siriyawathie herself could have informed the 2nd appellant where the body was. In view of the above, a conviction for murder under section 296 of the Penal Code cannot be sustained against the 2nd appellant, even on the basis of common intention.

For the aforesaid reasons the 2nd contention raised on behalf of the appellants too should succeed.

In view of the above findings in favour of the appellants with regard to the contentions A and B already dealt with I do not propose to dwell at length on contention C as to the effect of the accused persons being seated in wrong places in the dock, except to comment that the proper procedure would have been, after discovery of the error, for the learned trial Judge to recall the prosecution witnesses already led and rectify the confusion. Fortunately, the accused persons were known to the witnesses by their aliases namely "Appu" and "Putha" which would have redeemed the situation to a certain extent so as to avoid a confusion as to the identity of each accused.

However, I cannot refrain from adding a few comments of disapproval with regard to the last contention D as to how the learned trial Judge has misdirected himself on the question of burden of proof and the application of the *Ellenborough* principle. In

evaluating the defence evidence, the learned trial Judge had commented on the evidence adduced by the accused persons to the effect that. "චූදිතයන් දෙදෙනාගේ ම සාක්ෂි ප්‍රතික්ෂේප කිරීමට තවත් හේතුවක් වන්නේ ඔවුන් විසින් ඉදිරිපත් කරන ලද කරුණුවලින් ඔවුන්ගේ නිර්දෝෂිභාවය හා සැසඳෙන කිසිදු කරුණක් සඳහන් නොවන සාක්ෂියක් වන බැවින් ද එකී සාක්ෂි තුළින් පැමිණිල්ලේ නඩුවේ සාවද්‍යභාවය හෙලිදරව් කරන කිසිදු කරුණක් අඩංගු නොවන සාක්ෂියක් ද වන හෙයිනි. In other words, the learned trial Judge has gravely misdirected himself by imputing a burden on the accused to prove their innocence and to disprove the prosecution evidence. Further, commenting on the evidence of the two defence witnesses who have impliedly set up a defence of alibi, the learned trial Judge has commented. "චූදිතයන් දෙදෙනා වෙනුවෙන් අමතර සාක්ෂි දෙකක් කැඳවුව ද ඒ තුළින් මෙම නඩුවට අදාල කිසිදු කරුණක් පිළිබඳ ව වචනයක්වත් සඳහන් නොවීම නිසා වටිනාකමකින් තොර සාක්ෂියක් බව මගේ හැඟීමයි." (Page 262 of the record). The learned trial Judge has again misdirected himself by failing to evaluate the evidentiary plea of alibi in order to determine whether it would create a doubt in the prosecution case whether the accused persons were present at the scene at the time of the commission of the offence.

Lionel alias Hitchikolla v *A. G.*[8]

Furthermore, at page 263 of the record, the learned trial Judge had commented " කෙසේ වෙතත් පළමු චූදිතට එරෙහිව ශක්තිමත් නඩුවක් ඉදිරිපත් කර තිබුණ ද, පැමිණිල්ලේ නඩුවේ සාවද්‍යභාවය හෝ ඔහුගේ නිර්දෝශීභාවය හා සැසඳෙන කිසිදු කරුණක් පිළිබඳ ව තම සාක්ෂියේ පවසා නැත. පළමු චූදිතට එරෙහිව එම කරුණ සැලකිල්ලට ගත හැකි බවට ඉලංගතිලක නඩුවෙන් තීරණය කර ඇත.

Apparantly, the learned trial Judge was referring to the dictum of *Lord Ellenborough in Rex* v *Cochaine*[9] which is followed in our law and succinctly quoted as follows:-

"When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him"

Eg:- (1) *Sumanasena* v *A. G.* (*Supra*)

(2) *Geekiyanage John Singho* v *The King* [10]

(3) *Sirisena alias Cyril Baas* v *A. G.*[11]

It must be emphasized that the *Ellenborough* dictum should not be drawn haphazardly in order to bolster the sagging fortunes of an otherwise weak prosecution case as in the present case. Prosecution should as a pre-requisite establish strong and incriminating evidence against the accused. The rationale behind this is to afford an opportunity for an innocent accused person to explain away the circumstances of guilt which was in his own power to do so. In the present case, the learned trial Judge had failed to perceive, that the chain of circumstantial evidence against the accused persons was impregnated with lacunas on several vital aspects in that it was insufficient to point an unwavering finger of guilt at the accused on a charge of murder, in which event the evidence falls short of the requirements to apply the *Ellenborough* dictum.

On the basis of the above, the contention D too raised on behalf of the appellants has to be resolved in their favour.

It is the paramount duty of courts to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise. Where the prosecution has failed to establish the charge beyond reasonable doubt, the benefit of the doubt should always be given to the accused.

For the foregoing reasons, I allow the appeal and set aside the conviction and sentence under section 296 of the Penal code imposed on the 1st accused-appellant and the 2nd accused-appellant by the learned High Court Judge of Ampara on 18.03.2002 and acquit the accused-appellants of the charge of murder under section 296 of the Penal Code.

The registrar is directed to inform the prison authorities accordingly and to forward a copy of this order to the High Court of Ampara forthwith.

IMAM, J. - I agree

Appeal allowed.

AMARASINGHE
v
ACQUIRING OFFICER, KEGALLE

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA/LAQ/BR 1/ 2005
CAB OF R KG/200
NOVEMBER 22, 2007
JANUARY 24, 2008.

Land Acquisition Act-S10 (5), section 12 (4), section 17, section 27, section 28 – Compensation awarded – Appeal to Board of Review – Appeal to the Court of Appeal Should the appellant state the questions of law to be argued in the petition of appeal? Is the appeal on a question of law only? Industrial Disputes Act section 31D – compared – Finality clause – Constitution Article 128 (1).

The Land Acquisition Board awarded compensation in respect of a land acquired under the Land Acquisition Act. The Board of Review enhanced the compensation. Thereafter an appeal was lodged in the Court of Appeal seeking a further enhancement.

The respondent raised a preliminary objection that the appellant has failed to state the question of law to be argued in the appeal as required by section 28 (2) of the Land Acquisition Act – Therefore the appeal should be dismissed in limine.

The petitioner contended that, the points of law enumerated in the body of the petition of appeal constituted questions of law as they came under one or more categories of questions of law defined in *Collettes* case. It was also contended that there is no legal requirement to specifically formulate the questions of law in the petition of appeal as long as on a plain reading of the petition the points or questions of law to be argued are apparent and easily discernible.

Held:

(1) In terms of section 28 – where a party is dissatisfied with the Boards decision on the appeal, he may by written petition appeal against that decision on a question of law. Section 28 (2) states that the petition of appeal should state the question of law to be argued, it shall bear a certificate by an Attorney-at-Law that such question is fit for adjudication by the Court of Appeal.

Per Sarath de Abrew, J.

> "Since an appeal on question of law is intended to be a beneficial remedy, the provisions of section 28 of the Land Acquisition Act, have to be interpreted broadly and liberally. A litigant who is aggrieved of the quantum of compensation awarded to him with regard to the state acquiring valuable land and property- affecting the substantial rights should not be denied the statutory right of appeal on a mere technicality".

(2) Section 31D – Industrial Disputes Act (IDA) could be distinguished from section 28 of the Land Acquisition Act, as the IDA requires – stating the question of law to be argued in the petition of appeal and a certificate by an Attorney-at-Law that such question is fit for adjudication by the Court of Appeal.

(3) Section 28 of the Land Acquisition Act when interpreted broadly and liberally, does not confine an appellant to one single questions of law but an appellant could lodge his appeal on several questions of law. This provision does not stipulate that the question or questions of law should be specifically and categorically enumerated and listed in so many words in the petition. It would suffice for the question or questions of law to be stated in the averments in the petition which would be easily discernible and apparent on the face of the petitioner.

(4) Applying the observations in *Collettes* case, it is clear that the points of law – paragraphs 8 – 11 of the petition of appeal could be construed as questions of law. The appellant has fulfilled the other requirements of a certificate by an Attorney-at-Law to the effect that the questions of law embodied in the averments to the petition of appeal are fit for adjudication by the appellate court.

APPEAL from an order of the Board of Review under the Land Acquisition Act.

Cases referred to:-

1. *De Silva* v *Nuwara Eliya Tea Estates Co. Ltd* – 75 NLR 265
2. *Collettes Ltd.* v *Bank of Ceylon* – 1982 – 2 Sri LR 514
3. *General Manager, Ceylon Electricity Board and another* v *Gunapala* – 1991 – 1 Sri LR 304
4. *Lanka Wall Tiles Ltd.* v *K. A. Cyril* – 1998 – 2 CALA 344
5. *The Public Trustee* v *D. Rajaratnam* – 75 NLR 391

Upul Fernando for appellant-appellant.

Priyantha Nawana SSC for respondent-respondent.

Cur.adv.vult.

March 5, 2008

SARATH DE ABREW, J.

This is an appeal from a decision of the Land Acquisition Board of Review dated 06.08.2004 awarding compensation to the appellant in respect of a land acquired situated in Anguruwella in Kegalle District. The corpus acquired consisted of 105.12 perches of land in which a building was situated. The appellant who owned a half share of this land and the entirety of the building was awarded total compensation of Rs. 51,700/- by the Acquiring Officer under section 17 of the Land Acquisition Act. Following an appeal to the Board of Review the compensation was enhanced to Rs. 127,225/- by order of 06.08.2004. Being aggrieved of this order, the appellant-appellant (hereinafter referred to as the appellant) has appealed to this Court seeking the total compensation to be increased to Rs. 226,875/-.

When the matter was taken up for hearing, the learned Senior State counsel for the respondent-respondent (hereinafter referred to as the respondent) raised a Preliminary objection that the appellant had failed to state the question of law to be argued in the petition of appeal as required by section 28(2) of the Land Acquisition Act as amended, and therefore this appeal is misconceived in law and should be dismissed. After tendering oral submissions on this preliminary objection, both parties have filed written submissions. Henceforth, this order is confined to the preliminary objection raised by the learned counsel for the respondent.

The learned Senior State Counsel submitted that an award made in appeal by the Land Acquisition Board of Review is protected by a "finality clause" as contained in section 27 of the Land Acquisition Act. It was further submitted that section 28 of the said Act has provided for an appeal on a very restrictive manner and such an appeal has been declared valid only on "a question of law" under section 28(1) when submitted in conformity with the elaborate procedure laid down in section 28(2) of the said Act. The learned Senior State Counsel for the respondent further argued that even though section 28(2) requires the appellant to "State the question of law to be argued' in the petition of appeal, the petition

of appeal of the appellant in his case does not disclose any question of law whatsoever thought it contains a purported certificate by an Attorney-at-Law, which only reads "the questions of law set out in this appeal are fit questions for adjudication by the Court of Appeal."

It was further submitted that this Court could assume jurisdiction and proceed with the appeal only upon determining the question of law to be argued at the appeal. Therefore the preliminary objection was raised that in the absence of formulation of question or questions of law, the appellant is disentitled from seeking relief by way of an appeal against the quantum of compensation payable. In support of his argument the learned Senior State Counsel cited the case of *De Silva* v *Nuwara Eliya Tea Estate Co. Ltd*(1) where Tennekoon CJ reiterated the legal position that the Supreme Court would not interfere with a decision of the Land Acquisition Board of Review awarding compensation except upon a question of law.

In support of the preliminary objection raised, the learned Counsel for the respondent took up the following position.

(a) Section 28 of the Land Acquisition Act invariably requires a specific formulation of a question or questions of law embodied in the petition of appeal to be argued at the appeal.

(b) A careful perusal of the petition of appeal clearly reveals that the appeal is based purely on questions of fact.

(c) Even at the hearing before this Court the learned counsel for the appellant failed to enlighten Court as to the existence of such a question of law.

In view of the above, the learned Senior State Counsel for the respondent urged that the appeal in this case is misconceived in law and should be dismissed.

The learned counsel for the appellant in reply, took up the position that commencing from paragraph 08 of the petition several questions of law are embodied in the petition of appeal as enumerated in the written submissions filed on behalf of the appellant. He also cited in support the decision of a divisional bench of four Justices of the Supreme Court in *Collettes Ltd.* v *Bank of Ceylon*(2) where Sharvananda, J. specifically spelt out what

can be considered " a question of law" and "a substantial question of law." Accordingly, the learned counsel for the appellant argued that the points of law enumerated in the body of the petition of appeal commencing from paragraph 08 clearly constituted questions of law as they came under one or more categories of questions of law defined in the above decision of the Supreme Court in Collettes case.

The learned counsel for the appellant further took up the position that there is no legal requirement to specifically formulate the question or questions of law in the petition of appeal as long as on a plain reading of the petition the points or questions of law to be argued are apparent and easily discernible. In support of the above contention the following cases were cited.

(1) *General Manager, Ceylon Electricity Board and another* v *Gunapala*[3] – D.P.S. Gunasekera, J.

(2) *Lanka Wall Tiles Ltd.* v *K. A. Cyril* [4] Jayalath, J.

In view of the above, the learned counsel for the appellant argued that the petition of appeal filed in this case was in conformity with the requirements laid down in section 28 of the Land Acquisition Act, and therefore the preliminary objection raised on behalf of the respondent should be overruled.

Having perused the proceedings before the Board of Review, the impugned order of 06.08.2004 of the Board of Review, the petition of appeal filed in this case and the totality of the written submissions and case law authorities submitted by both parties I am inclined to overrule the preliminary objection raised by the respondent for the following reasons.

Section 28 of the Land Acquisition Act states as follows: 28(1) Where a party to an appeal to the board is dissatisfied with the board's decision on that appeal, he may, by written petition in which the other party is mentioned as the respondent, appeal to the Court of Appeal against that decision on a question of law.

Provided that no such appeal may be preferred on any question determined by any decision which is declared by section 10 (5) or section 12 (4) to be final.

28(2). A petition of appeal under subsection (1) shall state the question of law to be argued, shall bear a certificate by an Attorney-at-Law that such question is fit for adjudication by the Court of Appeal, and shall be presented in duplicate to the board by the appellant within twenty-one days after the date of the board's decision against which the appeal in preferred.

Since an appeal on a question of law is intended to be a beneficial remedy, the provisions of section 28 of the Land Acquisition Act have to be interpreted broadly and liberally. Authority for this proposition is the view taken by four Justices of the Supreme Court in the divisional bench landmark decision in *Collettes Ltd* v *Bank of Ceylon*, (*supra*) where the Supreme Court, in interpreting provisions of Article 128(1) of the Constitution as to the right of appeal to the Supreme Court on a substantial question of law, took a similar liberal view. A litigant who is aggrieved of the quantum of compensation awarded to him with regard to the State acquiring valuable land and property affecting his substantial rights should not be denied his statutory right of appeal on a mere technicality.

The two cases cited in support by the counsel for the appellant are based on section 31D of the Industrial Disputes Act, where there is no statutory requirement to state the question of law to be argued in the petition of appeal. However, section 28 of the Land Acquisition Act could be distinguished from section 31D of the Industrial Disputes Act, in that the latter requires:-

(1) Stating the question of law to be argued in the petition of appeal.

(2) A certificate by an Attorney-at-Law that such question is fit for adjudication by the Court of Appeal.

Section 28 of the Land Acquisition Act, when interpreted broadly and liberally, does not confine an appellant to one single question of law but an appellant could base his appeal on several questions of law. Similarly, this provision does not stipulate that the question or questions of law should be specifically and categorically enumerated and listed in so many words in the petition of appeal. In my view, it would suffice for the question or questions of law to be stated in the averments in the petition which would be easily

discernable and apparent on the face of the petition. I am satisfied that the appellant has subscribed to the above requirement for the following reasons.

On a perusal of the petition of appeal, paragraphs 08-11 disclose the following questions of law.

(a) The Board had erred in law as it has failed to make proper evaluation of the evidence of the valuer ...

(b) ....the Board has failed to give any reason whatsoever for not accepting the evidence of Mr. Ubert (the valuer) ...

(c) ....sufficient evidence was led on behalf of the appellant to prove that correct date of the actual taking over of possession and that the building was in a good condition at the time of vesting and taking over, which fact the Board erred in law in not taking into consideration.

(d) The Board has also erred in law in not considering the comparable sales on the ground that they are long after the relevant date.

(e) The Board had erred in law in considering only the previous acquisition of land for the children's park which was four fold in extent.

(f) The Board had failed to make a proper analysis and judicial evaluation of the comparable sale prices of lands in the immediate neighbourhood.

(g) The Board has ... erred in law in not awarding costs of appeal to the appellant.

In the Collettes case referred to above the following have been determined as question of law.

(a) The proper legal effect of a proved fact is necessarily a question of law. A question of law is to be distinguished from a question of "fact." Questions of law and questions of facts are sometimes difficult to disentangle.

(b) Inferences from the primary facts found are matters of law.

(c) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into

account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law. Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law.

(d) Where the evidence is in the legal sense sufficient to support a determination of fact is a question of law.

(e) If in order to arrive at a conclusion on facts it is necessary to construe a document of title of correspondence then the construction of the document or correspondence becomes a question of law.

(f) Every question of legal interpretation which arises after the primary facts have been established is a question of law.

(g) Whether there is or is not evidence to support a finding, is a question of law.

(h) Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect or such provision are all questions of law.

(i) Where the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law.

On a construction of the above, it is clear as crystal that the points of law averred by the appellant in paragraphs 08-11 of the petition of appeal could be construed as questions of law. On a perusal of the proceedings and the impugned order of the Board of Review, it is apparent that the Board has not analysed nor given reasons for the rejection of the expert evidence of the valuer W. D. A. Ubert. In *The Public Trustee* v *D. Rajaratnam* (5) the Supreme Court reversed the decision of the Board of Review and enhanced compensation awarded to the appellant due to the Board assessing the value of the corpus arbitrarily, which amounted to a question of law.

The appellant has fulfilled the other requirement of a certificate by an Attorney-at-Law to the effect that the questions of law embodied in the averments to the petition of appeal are fit for adjudication by the Court. The proviso to section 28(1) of the Land Acquisition Act which qualifies the right of appeal has no relevance to this matter as section 10(5) and 12(4) deal with references to the District Court.

On a corollary of the above findings, I hold that the petition of appeal is in conformity with the provisions of section 28 of the Land Acquisition Act and therefore overrule the preliminary objection raised by the learned counsel for the respondent and direct that the matter be fixed for further hearing.

IMAM, J. - I agree.

Preliminary objection overruled.
Matter set down for argument.

SHELL GAS LANKA LTD.
v
CONSUMER AFFAIRS AUTHORITY AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 1495/2005
FEBRUARY 25, 2008
MARCH 24, 2008.

Consumer Affairs Act No. 9 of 2003 – Section 3 (4), section 13 (1) – Leaking gas cylinder – Complaint to Authority – Compensation ordered – Quorum – Authority not properly constituted – Legality of the award?

The 3rd respondent complained to the 1st respondent in relation to the sale of LPG as the gas cylinders were leaking and it is dangerous and not suitable for use, and claimed compensation. After inquiry the Authority awarded compensation.

The petitioner company sought to quash the order on the basis that the order was made by the 1st respondent Authority which was not properly constituted as there was no quorum. The order was made by three members when the quorum was four.

Held

(1) The power to inquire into complaints and to make an order under section 13 is vested in the Consumer Affairs Authority. The lawful exercise of the power of the Authority has to be made according to the provisions of the said Act.

(2) Section 3 (4) in its schedule contemplates that the quorum for any meeting of the authority shall be four members. This is mandatory and in order to have legal force of any decision made by the 1st respondent Authority must have been made at least by four members of the Authority.

The inquiry was held by three inquiring officers and the order was made by them and they have signed the said order. In the absence of a quorum the order is devoid of any legal effect.

APPLICATION for a *writ of certiorari.*

Cases referred to:-

(1) *Moosajees Ltd* v *Eksath Engineru Saha Samanya Kamkaru Samithiya* – 79 (1) NLR 1285 at 288.

(2) *Sarath Hulangamuwa* v *Siriwardene, Principal Vishaka Vidyalaya, Colombo and five others* – 1981 – 1 Sri LR 275 at 281.

(3) *Shell Gas Lanka Ltd* v *Consumer Affairs Authority and two others* – CA 604/2006 – CAM 05.03.2007.

Chanaka de Silva for petitioner.

Vikum de Abrew SC for 1st and 2nd respondents.

Kuvera de Soysa with *Dilumi de Alwis* for 3rd respondent.

Cur.adv.vult.

May 15, 2008

SRISKANDARAJAH, J.

The petitioner is a body corporate incorporated in Sri Lanka. The petitioner supplies and distributes Liquid Petroleum Gas (LPG) in Sri Lanka. The LPG is sold in Sri Lanka for domestic consumption in cylinders of two categories, namely, 12.5 Kg and 2.3 Kg. The gas cylinders are imported by the petitioners from internationally reputed manufacturers.

The 1st respondent is a body corporate incorporated by the Consumer Affairs Authority Act, No.9 of 2003. The 3rd respondent had made a complaint to the 1st respondent in relation to the sale of LPG as it was leaking and it is dangerous and not suitable for use. The said complaint was made under section 13 of the Consumer Affairs Authority Act.

It provides:

13. (1) The Authority may inquire into complaints regarding:

(a) the production, manufacture, supply, storage, transportation or sale of any goods and to the supply of any services which does not conform to the standards and specifications determined under section 12; and

(b) the manufacture or sale of any goods which does not conform to the warranty or guarantee given by implication or otherwise, by the manufacturer or trader.

(2) A complaint under subsection (1) which relates to the sale of any goods or to the provision of any service shall be made to the Authority in writing within three months of the sale of such goods or the provisions of such service, as the case may be.

(3) At any inquiry held in to a complaint under subsection (1), the Authority shall give the manufacturer or trader against whom such complaint is made an opportunity of being heard either in person or by an agent nominated in that behalf.

(4) Where after an inquiry into a complaint, the Authority is of opinion that a manufacture or sale of any goods or the provision of any services has been made which does not conform to the standards or specifications determined or deemed to be determined by the Authority, or that a manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication or otherwise by the manufacturer or trader, it shall order the manufacturer or trader to pay compensation to the aggrieved party or to replace such goods or to refund the amount paid for such goods or the provision of such service, as the case may be.

(5) ...

(6)...

The 1st respondent held a preliminary discussion on 15th December 2004 in the presence of the parties. At the discussion the said gas cylinder was examined in the presence of the petitioner's representatives and the statements were recorded. When the 3rd respondent gave her statement she claimed for compensation. The statement is marked as 2R1.

The 1st respondent laid down certain conditions and the steps that have to be taken by the petitioner before 21st December 2004 namely:

a) Improve the quality of consumer service,

b) Implement a dealer training programme,

c) Initiate action to protect the quality of the product (inform the relevant authorities on illegal import and filling of cylinder)

d) Publish an advertisement on the safe use of gas by the consumer.

On the 22nd of January 2005 the petitioner provided a replacement cylinder to the 3rd respondent.

The 1st respondent in terms of section 13(1) of the said Act held an inquiry on the 16th of February 2005 on the said complaint of the 3rd respondent. The inquiry was taken up on several dates and when the inquiry was finally taken up on 18th July 2005 the petitioner reiterated its position that it was not agreeable to make a money payment as it did not accept liability for the alleged leak of the cylinder. Thereafter written submissions were tendered by both parties and the 1st respondent Authority by its letter dated 31st August 2005 communicated its decision to the petitioner. The 1st respondent Authority in the said decision has made the following order:

"Having taken into consideration the above facts and the nature of seriousness, the Authority is of the view that the replacement or the refund of the price is not adequate. Therefore, the relevant respondent company, namely, Shell Gas (Lanka) Ltd is ordered to pay a sum of Rs. 75,000/- by way of compensation to the aggrieved party, namely Mrs. Devika Perera, and it is further ordered that the respondent company shall arrange to pay the said sum of Rs. 75,000/- to her on or before the 10th of September 2005."

The petitioner in this application is seeking a *writ of certiorari* to quash the aforesaid order on the basis that:

1. The Order was made by the 1st respondent Authority which was not properly constituted as there was no quorum.
2. The 1st respondent Authority in making the said Order has acted out side the scope and ambit of Consumer Affairs Authority Act and it is *ultra vires.*
3. That the Authority has not taken relevant facts into consideration in arriving at the said decision.

The 1st respondent raised a preliminary objection in this application that the petitioner in this application has suppressed material facts to this court and therefore this application has to be dismissed. The respondent contended that the petitioner in paragraph 17 of the petition and in the corresponding paragraph in the affidavit has stated that at the discussion on 15th December 2004 there is no reference to the compensation being sought by the 3rd respondent. The respondent marked the inquiry notes of the said discussion as 2R1 and the statement made by the 3rd respondent requesting for compensation is marked as 2R1 (a) and submitted that the petitioner has suppressed this material fact.

In *Moosajees Limited* v *Eksath Engineru Saha Samanya Kamkaru Samithiya* (1) at 288 the court held that suppression of material facts is fatal to an application and observed:

"The pleadings in their petition and affidavit do not contain a full disclosure of the real facts of the case and to say the least the petitioner has not observed the utmost good faith and has been guilty of a lack of *uberrima fides* by suppression of material facts in the pleadings. It was neither fair by this court nor by his counsel that there was no full disclosure of material facts."

The court took a similar view in *Sarath Hulangamuwa* v *Siriwardena, Principal, Visakha Vidyalaya, Colombo 5 and Others*(2) at 282 it was held:

"A petitioner who seeks relief by *writ* which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised.

In the instant case the fact that the petitioner had a residence at Dehiwela is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory."

The suppression of facts has to be material to the determination of the application. This application is to quash an order to pay compensation which the petitioner contends is *ultra vires.* The challenge is not on the basis that the 3rd respondent has not made a request for compensation but on the vires of the powers of the 1st respondent Authority to grant such a relief. The compensation was sought by the 3rd respondent in the preliminary inquiry, even though the representative of the petitioner was present in the said preliminary inquiry the proceedings of the said inquiry was not made available to the petitioner. In these circumstances the claim made by the 3rd respondent for compensation in the said inquiry is not correctly stated in the petition cannot be considered as suppression or misrepresentation of material fact. Therefore I overrule the preliminary objection of the respondents.

The petitioner submitted that the impugned order marked 2R3(a) was made by three members of the said Authority. The quorum of any meeting of the Authority shall be four members and hence the said order was made without jurisdiction.

The power to inquire into complaints and to make an order under section 13 of the said Act is vested in the Consumer Affairs Authority. The lawful exercise of the power of the said Authority has to be made according to the provisions of the said Act. Section 3(4) of Act, No.9 of 2003 in its Schedule contemplates that the quorum for any meeting of the Authority shall be four members. Thus, it is mandatory that in order to have legal force of any decision made by the 1st respondent-Authority must have been made at least by four members of the Authority; *Shall Gas Lanka Limited* v *Consumer Affairs Authority and two others.*(3)

It is an admitted fact that the inquiry was held by three inquiring officers and the impugned order marked 2R3(a) was made by them and they have signed the said Order which was communicated by

the letter dated 31.08.2005 P14. The duty of the court is to see that power shall not be exercised in unlawful and arbitrary manner, when exercise of such powers affects the basic rights of individuals. The courts should be alert to see that such powers conferred by the statute are not exceeded or abused. The Authority is constituted by at least four members sitting together (the quorum). In the absence of a quorum for the meeting of the members of the Authority to hold and inquiry and to make an Order is devoid of any legal effect. Hence this court issues a *writ of certiorari* to quash the said order communicated to the petitioner by letter dated 31.08.2004 marked P14.

The application for writ of certiorari is allowed without costs.

Application allowed.

VASUDEVA NANAYAKKARA
v
CHOKSY AND OTHERS
(JOHN KEELLS CASE)

SUPREME COURT
S. N. SILVA, CJ.
AMERATUNGA, J.
BALAPATABENDI, J.
SC FR 209/2007
MARCH 14, 27, 2008
MAY 12, 26, 2008.

Constitution Article 3, 4 – Article 12 (1), 126 – 13th Amendment – Sale of shares of Lanka Marine Services Ltd – Acting without lawful authority – Public Enterprise Reform Commission Act, No.1 of 1996 – Ostensible authority – Right to equality – Privatization – Bias – Rule of law – Locus Standi – Defence of time bar – Severability of executive action – Just and equitable relief under Article 126 – Provincial land list – Advice of Provincial Council necessary? Petroleum Products (sp. provisions) Act 63 of 2002.

The petitioner filed application in the public interest in terms of Article 126 alleging an infringement of the fundamental right to the equal protection of the law. The impugned executive action is the action primarily of the 8th respondent – P. B. Jayasundara (PBJ) who functioned as Chairman of the Public Enterprise Reform Commission (PERC) and of the Cabinet of Ministers including the Prime Minister – 3rd respondent. It is alleged that PBJ caused the sale of shares of Lanka Marine Services Ltd (LMSL) a wholly owned

company of the Ceylon Petroleum Corporation (CPC) which was a profit making debt free tax paying company to John Keells Holdings (JKL) 18th respondent without prior approval of the Cabinet of Ministers in a process which is not transparent and was biased in favour of JKL. It was also alleged that he did not obtain a valuation of LMSL from the Government Valuer and relied only on a valuation secured at the discretion of a private Bank. It was further alleged that, there was an illegal state grant given to LMSL by the then President within the Port of Colombo 2 years after the sale of shares stating that it was made upon the payment of approximately Rs. 1.2 Billion by LMSL to the Government whereas no such money was paid. It was further alleged that in a collateral proceeding JKH obtained tax free status for its investment in LMSL from the Board of Investments (BOI) and that since the applicable regulation did not cover the agreement entered into, JKH got the regulation amended and a fresh agreement entered into by the BOI. It was alleged that the impugned privatization was lopsided and moved in the reverse direction of Public Enterprise Reform by converting a tax paying Public Enterprise to a tax free private enterprise which claimed a monopoly in the relevant business.

It was further alleged that after the bid of JKH was accepted the specimen of the Common User Facility (CUF) agreement was also amended by PBJ at the detest of JKH and a new clause included which provided that the Government of Sri Lanka Ports Authority (SLPA) and CPC would ensure that all bunkers would be supplied using the CUF. It was further alleged that the new clause effectively prevented an alternative supply of bunkers and created a monopoly in LMSL now owned by JKH.

Held

(1) The process of divestiture of state ownership which was initially done on an *ad hoc* basis in respect of enterprises that were incurring losses was formalized on 01.03.1995 and described as the Public Enterprise Reform Programme with the establishment of a Special Task Force appointed by the President. The Reform Programme was further enhanced and given legal dimension by Act No.1 of 1996 established by the PERC. Thus Public Enterprises Reform which lay in the area of Executive discretion came strictly to the legal domain as being public process regulated by law. The functions and the objects of PERC are set out in section 4 of the Act.

Since the role of advising and assisting is vouched by section 4 in mandatory terms, it necessarily follows that the Government cannot carry out public enterprise reform including divestiture without receiving advice and assistance from PERC. Furthermore all the objects of PERC are intended primarily to benefit the people – section 5(1).

(2) The committee of officials reconciled a cautious approach of preserving the monopoly of LMSL within the Port and liberalization the sector by the grant of 3 licences for the supply of bunkers outside the Port of Colombo. The Committee which included a Director of PERC did not recommend the sale of shares of LMSL.

The steps taken by PBJ and the PERC towards affecting a sale of shares of LMSL is not in any way mandated by the decision of the Cabinet of Ministers and is manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular.

(3) The Cabinet had not even authorized the PERC to make reconsideration as to the sale of LMSL shares. The only matter on which the Cabinet had authorized action was the liberalization of the bunkering service in the area outside the Colombo Port, which had been effectually put into cold storage by PERC. This action is not based on a lawful exercise of Executive power in terms of the PERC Act and was contrary to the decision of the Cabinet of Ministers.

(4) All ostensible authority involves a representation by the principal as to the extent of that agents authority. No representation by the agent as to the extent of his authority can amount to a "holding out" of the principal. No public officer unless he possess some special power, can hold not on behalf the state that he or some other public officer has the right to enter into a contract in respect of the property of the state when in fact no such right exists.

(5) The 13th Amendment provided for the exercise of legislative and executive power within a province in respect of matters in the provincial land list on a system akin to the Westminster model of government. The power reposed in the President in terms of Article 33 (d) read with section 2 of the State Lands Ordinance is circumscribed by the provisions of "Appendix II" in item 18.

"Appendix 11" established an interactive legal regime in respect of state land within a Province. Whilst the ultimate power of alienation and of making a disposition remains with the President the exercise of the power would be subject to conditions in Appendix 11 being satisfied. A pre condition is that an alienation or disposition of state land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council.

(6) The rule of law postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness of prerogative or wide discretionary authority on the part of the government.

(7) The principle enunciated in Articles 3 and 4 of the Constitution is that the respective organs of government, the legislature, the executive and the judiciary are reposed power as custodians for the time being to be exercised for the people. The resources of the state are the resources of the people and the organs of state are guardians to whom the people have committed the care and preservation of these resources.

There is a positive component in the right to equality guaranteed under Article 12 (1) and where the executive being the custodian of the people's power all *ultra vires* and in derogation of the law and procedures that are intended to safeguard the resources of the state, it is in the public interest to implead such action.

(8) The defence of time bar must necessarily fail since the impugned transfer was not conducted according to law in a fair and transparent process.

Held further

(9) The petitioner has a sufficient *locus standi* to institute these proceedings in the public interest and has established an infringement of the fundamental right guaranteed by Article 12 (1) in respect of 90% of the shares of LML.

Per Sarath N. Silva C.J.

"From the perspective of JKH I hold that the company has secured advantages and benefits through the illegal process and in specific instances by misrepresentation that have been made.

Per Sarath N. Silva C.J.

"The findings in the judgment demonstrate that the action of PBJ has not only been arbitrary and *ultra vires* but also biased in favour of JKH.

Per Sarath N. Silva C.J.

"Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12 (1) would result in a restoration of the status *quo ante*. However since the jurisdiction vested in this court in terms of Article 126 (g) is to grant relief or to make directions as it may seem just and equitable, it is open to the court to ascertain whether the implications of the impugned executive action is severable.

An **APPLICATION** under Article 126 of the Constitution.

Cases referred to:-

1. *Attorney-General* v *A. D. de Silva* – 34 NLR 529 (PC)
2. *Rawlands* v *A. G.* – 72 NLR 385
3. *Visvalingam* v *Liyanage* – 1983 – 1 Sri LR 236
4. *Premachandra* v *Jayasundara* – 1994 – 2 Sri LR 9
5. *Bulankulama and others* v *Secretary Ministry of Industrial Development* – 2000 – 3 SLR 243
6. *Senaratne* v *Chandrika Kumarasinghe* – 2007 – 1 Sri LR 59.

M. A. Sumanthiran with *Viran Corea* for petitioner

Nihal Fernando PC with *Ronald Perera* and *V. K. Choksy* for 1st respondent

L. C. Seneviratne PC with *A. P. Niles* for 3rd respondent

Viraj Premasinghe for 10th respondent

Romesh de Silva PC with *Harsha Amarasekera* for 18th – 21st respondents

Y. J. W., Wijayatilleke PC *ASG* with *Viraj Dayaratne* SSC for 8th, 15th - 19th, 26th and 31st respondents

22nd respondent – *Nihal Sri Amarasekera* in person.

Shibly Azeez PC for 32nd - 34th added respondents.

July 21, 2008.

SARATH N. SILVA P.C., C.J.

The petitioner, Vasudeva Nanayakkara, in the capacity of a national politician and a social worker has filed this application in the public interest in terms of Article 126 of the Constitution, alleging an infringement of the fundamental right to the equal protection of the law guaranteed by Article 12(1) of the Constitution. The impugned executive action as alleged by the petitioner is the action, primarily of P. B. Jayasundera, the 8th respondent who functioned at the material time as Chairman of the Public Enterprise Reform Commission (previously and presently Secretary to the Treasury) and of the then Cabinet of Ministers, including the 3rd respondent, Ranil Wickremasinghe, who was the Prime Minister. The then President is cited as the 4th respondent. It is alleged that Jayasundera caused the sale of shares of Lanka Marine Services Ltd., (LMSL) a wholly owned company of the Ceylon Petroleum Corporation (CPC), which was a profit making, debt free, tax paying company to John Keells Holdings Ltd (JKH – 18th respondent), without prior approval of the Cabinet of Ministers, in a process which was not transparent and was biased in favour of J.K.H. It is also alleged that he did not obtain a valuation of LMSL from the Government Valuer and relied only on a valuation secured at his discretion from a private bank. That, the sale price of approximately Rs. 1.2 billion pales into insignificance considering that profits of LMSL for the 4 years including the year of sale was Rs. 2.45 billion. In addition an illegal State Grant was given to LMSL by the then President of an extent of 8 Acres 2 Roods, 21.44 perches within the Port of Colombo in January 2005, nearly 21/2

years after the sale of shares stating that it was made upon the payment of approximately Rs.1.2 billion by LMSL to the Government, whereas no such money was paid. It is further alleged that in a collateral proceeding JKH obtained tax free status for its investment in LMSL from the Board of Investment (BOI). That, since the applicable Regulation did not cover the Agreement entered into, JKH got the Regulation amended and a fresh Agreement entered into by the BOI. Thus it was alleged that the impugned privatization was lopsided and moved in the reverse direction of public enterprise reform by converting a tax paying Public Enterprise to a tax free private enterprise which claimed a monopoly in the relevant business.

The petitioner also relies on the Central Bank Annual Report of 2004 (P24) which states that the privatization of LMSL has not yielded the expected low prices and competition, requiring further reforms in the sector. The same view is expressed by the notice published on May 2005 (P2), by "Feeder Operators" complaining of high "Bunker Prices" in Colombo.

The petitioner was actively supported by Nihal Amarasekera, the 22nd respondent who succeeded Jayasundera as Chairman, PERC, at a later point of time. It is clear that the bundles of documents produced in the case would not have surfaced if not for the probing scrutiny by Amarasekera. I would not cite the scathing remarks made by him of the impugned transaction since this court would be guided only by the sequence of events, relevant documents and the reasonable inferences that could be drawn from them.

The petitioner is also supported by 3 intervenient petitioners later added as 32nd, 33rd and 34th respondents. The 32nd respondent, Sri Lanka Shipping Co. Ltd., (SLSCC) bid for the shares of LMSL in collaboration with Chemoil Corporation, USA. They allege that the initial bid of JKH was made in collaboration with Fuel and Marine Marketing (FAMM) owned by the Chevron Corporation of USA. That, JKH could have got above the threshold of 70 marks to be short listed, only on the credentials of FAMM, being a market leader in Bunkering. After clearing the initial threshold, the Technical Evaluation Committee (TEC) was notified that FAMM was not pursuing the bid in collaboration with JKH and it is alleged that the

TEC erred in continuing to evaluate the bid on financial capability and business strategy as an individual bid of JKH. It was submitted that with the withdrawal of FAMM, the Committee should have struck off the marks attributed on the credentials of FAMM and removed JKH from the shortlist.

It is further alleged by the petitioner and the 22nd, 32nd, 33rd and 34th respondents that after the bid of JKH was accepted the specimen of the Common User Facility (CUF) Agreement was amended by Jayasundera at the behest of JKH and a new clause 8.2 was included which provided that the Government, Sri Lanka Ports Authority (SLPA) and CPC would ensure that all bunkers would be supplied using the CUF. The catch in this clause is that the CUF is connected to the Storage Tanks located within the property granted to the privatized LMSL and the added clause effectively prevented an alternative supply of bunkers and created a monopoly in LMSL now owned by JKH. After their bid for the purchase of LMSL shares was rejected, the 32nd respondent obtained a licence in terms of section 5 of the Petroleum Products (Special Provisions) Act, No.33 of 2002 to distribute petroleum which included the supply of bunkers. On that license these respondents commenced an off-shore operation of supplying bunkers using ships and a main tanker. LMSL owned by JKH caused SLPA to prevent this operation in terms of the said clause 8.2. There were many rounds of litigation and finally the Court of Appeal struck down the said clause 8.2 as being inconsistent with the provisions of Act, No.33 of 2002.

It is thus seen that the petitioner and the respondents referred above challenge every step of the privatization of LMSL including steps taken after the acceptance of the bid to consolidate the gains of JKH. The gravamen of the allegation is that P. B. Jayasundera, Chairman of PERC and S. Ratnayake, Director, JKH (20th respondent) worked hand in glove to clinch the wrongful benefits to JKH. In sum, the petitioner and 22nd, 32nd, 33rd and 34th respondents adopt the conclusion of the Committee On Public Enterprises (COPE) of Parliament which inquired into the same matter and reported to Parliament as follows:

> *"This transaction had been executed blatantly without Cabinet approval, with several flaws causing loss and*

detriment to the Government, and demonstrating it to be a questionable "fix", and is therefore ab-initio bad in law, null and voild." (Vide: Hansard of 12.01.2007 – P35)

Although I cited the conclusion of the Committee as reported to Parliament, I have to state straightaway that the perspective of the inquiry before this court is different. We have to focus on the applicable law and ascertain whether the impugned executive action was an arbitrary exercise of power, serving a collateral purpose and defeating the object of the law, denying thereby to the petitioner and the People the equal protection of the law under Article 12 of the Constitution. From that perspective the initial focus would be on the Public Enterprises Reform Commission of Sri Lanka Act, No.1 of 1996, purportedly in terms of which Jayasundera as the then chairman of the Commission took the impugned executive action.

A. PUBLIC ENTERPRISES REFORM COMMISSION OF SRI LANKA ACT, NO.1 OF 1996

The Act which sets up the Commission better known by the acronym PERC marks a watershed in the progression of governmental economic policy, from a State owned and controlled, centrally driven economy to a privately owned market driven economy. This process has been characterized at one end of the spectrum, in the extensive nationalization programme especially in the post 1956 era and the establishment of large scale State commercial enterprises to, the divestiture of State ownership and/or control. At one end the process envisaged economic stability and fixed prices and at the other, market buoyancy and competition resulting in the best product reaching the people at the lowest price. At both ends the process has been intended to benefit the People. Hence I would reject the objection raised by the contesting respondents which denies a public interest in the due execution of this Law and also denies a *locus standi* to the petitioner to vindicate such public interest by invoking the jurisdiction of this court in terms of Article 126(1) of the Constitution, as being misconceived and myopic.

The process of divestiture of State ownership which was initially done on an *ad hoc* basis in respect of Enterprises that were

incurring losses was formalized on 01.03.1995 and appropriately described as the Public Enterprise Reform Programme with the establishment of a Special Task Force by the President. The Reform Programme was further enhanced and given the much needed legal dimension when Parliament enacted Act, No. 1 of 1996 cited above establishing the Commission 'PERC'. Thus Public Enterprise Reform which lay in the area of Executive discretion came strictly to the legal domain as being a public process regulated by law. The functions and objects of the PERC are set out fairly and squarely in section 4 of the Act, as follows:-

"The function of the Commission shall be to advise and assist the Government on the reform of public enterprises with the following objects in view:-

(a) fostering and accelerating the economic development of the country;

(b) improving the efficiency and competitiveness of the economy;

(c) upgrading production and services with access to international markets on a competitive basis, by the acquisition of new technology and expertise;

(d) developing and broadbasing the capital market and mobilizing long term private savings;

(e) motivating the private sector;

(f) augmenting the revenues of the Government, so as to enable it to better address the social agenda; (emphasis added)

It is manifest from this provision that the role of the PERC is limited and circumscribed by law to one of advising and assisting the Government in any envisaged reform of a public enterprise including divestiture of State ownership. Since the role of advising and assisting is couched by section 4 in mandatory terms, it necessarily follows that the Government cannot carry out public enterprise reform including divestiture without first receiving the advice and assistance of the PERC.

A further aspect to be noted in the section is that all the objects of the PERC are intended primarily to benefit the People, The public element of the process is further enhanced by the specific duty cast on the PERC by section 5 (1) which reads as follows:

> *"to assist the Government to create public awareness of Government policies and programmes on the reform of public enterprises with a view to developing a commitment by the public, to such policies and programmes."*

Thus public enterprise reform including divestiture could never descend to be a shadowy, slithering process. The Law mandates that it should be a transparent process circumscribed by an abiding public interest in ensuring its legality and propriety. It is on this basis that I reject the objection to a suit in the public interest and the denial of a *locus standi* to the petitioner as being misconceived and myopic. The objection not only ignores the significance of the impugned transaction in the broad canvas of an economic paradigm shift but also ignores the salient aspects of the Law cited above.

I would now move to examine the process of reform relevant to the impugned transaction being the sector commonly referred to as, bunkering.

B. LIBERALIZATION OF BUNKERING

The service of providing marine petroleum fuels to ships that lay in port, in anchorage or off-shore is a shipping related operation generally described as bunkering. Hub ports like Singapore enhanced their capacity to supply bunkers and were generating foreign exchange revenue of phenomenal proportions. It is accepted that the Port of Colombo with its unique and advantageous geographic location close to major West-East Shipping lanes failed to harness the huge potential in this sector. The principal inhibiting factor was cited as the monopoly vested in the Ceylon Petroleum Corporation (CPC) by Act, No.28 of 1961 in the entire sector of the petroleum trade and industry including bunkering. This was one item of the process of nationalization in the post 1956 era, referred to above. Bunkers were supplied by the CPC through its wholly owned subsidiary LMSL using a storage facility of 12 tanks and a network of interconnecting pipelines linked

to the Dolphin Berth and the South Jetty. This network is later described as the Common User Facility (CUF) and is located within the Port of Colombo.

The initial proposal for the liberalization of bunkering is contained in the Cabinet Memorandum of 24.05.2000 presented by the Minister of Shipping. It cites the high prices of bunkers supplied in Colombo and of limited supplies and recommends that the private sector be encouraged to invest and operate bunkering services. The memorandum makes no reference to a sale of shares of LMSL.

The Cabinet considered the memorandum on 22.06.2000 together with observation made by several Ministers and decided to refer the matter to a Committee of Officials for a report thereon. The officials to consist of Secretaries to Ministries of Finance, Shipping, Irrigation and Power and of PERC. The Committee Report dated 01.08.2000 was submitted to the Cabinet with a memorandum of the Minister of Shipping bearing the same date.

The recommendations of the Committee of Officials were as follows:-

"(a) To liberalize the bunkering sector and to permit a limited number of parties to operate bunker services within the territorial waters of Sri Lanka and the Ports of Sri Lanka other than the Port of Colombo;

(b) For PERC to seek offers through an open tender process for the importation and marketing of marine fuel as given in section 3 above, from investors with local equity participation and the necessary technical and financial ability and experience in Bunkering;

(c) The GOSL to charge a licence fee from the selected operators for the use of Sri Lankan territorial waters to carry out their business;

(d) To authorize the Merchant Shipping Division of the Ministry of Shipping and Shipping Development in terms of the Merchant Shipping Act, No.52 of 1971 to regulate and monitor the activities of bunker operators within Sri Lanka's territorial waters;

(e) For PERC to initiate action accordingly and to make further recommendation to the Cabinet regarding the process to be followed."

It is to be noted that the Committee recommended a cautious approach of preserving the monopoly of LMSL within the Port and liberalizing the sector by the grant of 3 licences for the supply of bunkers outside the Port of Colombo. The PERC had to make recommendations regarding this process. It is significant that the Committee which included a Director of PERC did not recommend the sale of shares of LMSL.

The Minister of Shipping in his Memorandum dated 01.08.2000 agreed with the recommendations of the Committee of Officials subject to two observations viz:-

"In the light of this background I will make the following observations on the committee report for consideration of the Cabinet.

(a) Monopoly given to Lanka Marine Services Ltd., (LMSL) should be restricted to one year within which period privatization of LMSL should be completed.

(b) New entrants to the bunkering sector in Sri Lanka should be allowed to sell bunkers within the territorial waters of Sri Lanka which should include the immediate vicinity of the Port of Colombo.

I seek the approval of the Cabinet of Ministers for the recommendation of the Committee of Officials, subject to the observations I have made."

The Cabinet considered the matter on 17.08.2000 and granted approval to the proposals in the memorandum and directed that action be taken by the Minister of Shipping and Shipping Development.

Thus the process of reform in the bunkering sector authorized by the Cabinet was a phased out arrangement. Initially for the PERC to invite offers for supply of bunkers outside the Port of Colombo and licenses being granted to 3 suppliers. To continue with the monopoly of LMSL to supply bunkers within the Port of Colombo for 1 year within which period the privatization of LMSL to be completed. It was envisaged that the competitive process will bring in the necessary expertise to the sector with the service being operated with due compliance with international safety and environmental standards and finally with the completion of the privatization of LMSL the entire sector being liberalized. The

benefits for the Government of Sri Lanka (GOSL) are set out in paragraph 3(d) of the recommendations of the Committee Officials which reads as follows:-

"The benefits to GOSL are expected from the increase in tax revenue through higher income tax from the local companies as well as opportunities for employment generation. In addition, GOSL would charge a license fee, for the use of Sri Lanka's territorial waters."

C. ACTION TAKEN BY THE PERC CHAIRED BY JAYASUNDERA PURPORTEDLY ON THE BASIS OF THE RECOMMENDATIONS OF THE COMMITTEE OFFICIALS AND THE OBSERVATION OF THE MINISTER AS APPROVED BY THE CABINET OF MINISTERS

The petitioner has put in the forefront of his case that any action by the PERC could only have been within the conspectus of the recommendations of the Committee and the observations of the Minister as approved by Cabinet, as set out above. Jayasundera has in paragraph 8 of the affidavit admitted the content of these documents and of the decision of the Cabinet. Hence we have to assume that he knew fully well that the task of PERC was to make a recommendation to the Cabinet on the 3 processes that were envisaged in the following order:-

(i) the process of calling for tenders through an open tender to issue initially 3 licenses for the supply of bunkers within the territorial waters and Ports other than Colombo;

(ii) the process of privatization and the removal of the monopoly given to LMSL within a period of 1 year of the operation of this partly liberalized regime as envisaged in (i) above;

(iii) the operation of the fully liberalized regime of bunkering services after the privatization of LMSL as envisaged in (ii) above;

Admittedly, PERC did not make any recommendation to the Cabinet on any of the matters envisaged above which would have brought about an improved regime of bunkering facilities to service a growth in the shipping sector; higher foreign exchange earnings

and a higher yield of tax revenue. Nor was there any change in the Cabinet decision stated above. Instead, whilst purporting to act under the said Cabinet decision PERC embarked on a course of action devised by itself of which I would now examine.

On 28.10.2001, PERC published a notification inviting proposals from private sector operators to participate in the marine fuel market in Sri Lanka within the territorial waters including the Ports. The notice also stated that there will be no limit in the number of licenses to be issued. I have to make a brief note here that this notification is contrary to the Cabinet decision. The Committee of Officials had recommended that only three licenses should be issued initially and in any event in the first year, services could be provided only outside the Port of Colombo.

More significantly the issue of licenses required a new legal regime which as pleaded in paragraph 6 of the petition by the petitioners is contained in the Petroleum Products (Special Provisions) Act, No.33 of 2002. This averment is admitted by Jayasundera in paragraph 5 of his affidavit. The Act, No.33 of 2002 was passed by Parliament and certified by the Speaker only on 17.12.2002. Hence the notice calling for proposals more than 1 year before the law as enacted was an exercise in futility. It appears that PERC took no action on the proposals received pursuant to the notification referred to above except to forward them to the Ministry of Power and Energy. No recommendation was made by Jayasundera as required in the Cabinet decision as to the process of granting three licences initially to operate bunkering service outside the Port of Colombo.

PERC published another notice on 08.02.2002 inviting Expression of Interests (EOI's) for the purchase of 90% shares in LMSL. EOI's were to be submitted on or before 21.02.2002. The notice stated that it is being published on behalf of the Government of Sri Lanka. It has to be noted that the Cabinet of Ministers did not in the decision referred to above authorize PERC to call for such EOI's. The proposal of the Committee of Officials (including a Director of PERC) was that PERC should make recommendations as to the grant of licenses for providing bunkering service. The observation of the Minister was that the privatization of LMSL

should be completed within 1 year of operation the partly liberalized bunkering services in terms of the licenses that will be issued. It is significant that the Minister's observation quoted by me verbatim in the preceding section does not even refer to any action on the part of the PERC in this regard. The omission is for good reason since the process of privatization of LMSL was to follow the successful implementation of the licensing scheme with private operators supplying bunkers outside the Port of Colombo. Neither the Committee of Officials nor the Minister ever envisaged a situation where LMSL which admittedly had a monopoly is privatized without successfully operational licensing scheme which was essential to pave the way for competition, lowering of price and improved services, being the objective approved by the Cabinet of Ministers. From this perspective the course of action adopted by the PERC of dampening the liberalization process and publishing a notification with an obvious overbreadth, shorn of the necessary legal machinery, which could not have been implemented at the stage and by accelerating the privatization process of LMSL, has to be viewed in a dim light. The action which was contrary to the Cabinet decision had the effect of favouring the would be purchaser of LMSL shares who will continue in effect to have a monopoly of providing bunkering services. The inference is further supported by an amendment to the draft CUF Agreement, agreed to be Jayasundera at the behest of JKH, after the offer of JKH for purchase of LMSL shares was accepted (which would be dealt with at a later stage under the head of "Deviations which was availed of by LMSL then under the control of JKH to stave off competition in the supply of bunkers.

The petitioner and Amarasekera have made several submissions that Jayasundera has acted contrary to the Public Finance Circular No. FIN 358 (4) dated 29.11.199.. which Jayasundera himself had issued for "Enhancing the Effectiveness of the Procurement Procedure ....." by the failure to constitute a Cabinet Approved Tender Board (CATB) for the purpose of making recommendations the Cabinet on the sale of LMSL shares. It was submitted that the Tender Documents viz: the EOI and Request for Proposal (RFP) should have been approved by a CAT and the

TEC. In this instance only a TEC had been appointed and on the sequence of dates it was established that the EOI and RFP had been issued prior to even the appointment of the TEC.

The requirements to appoint a CATB and a TEC a intended to ensure transparency, fairness and honesty the procurement process. Purchase and sale are two aspect of a contractual process which those volumes of guideline and circulars are intended to safeguard. Jayasundera has conveniently sought to explain the failure to appoint a CATB on the basis that it is not a practice to appoint such a Board in respect of the sale of Government shares. If it is so, his practice is contrary to his own circular. Be that as it may, the appointment of CATB would have afforded a mechanism to redress the bitter grievances such as those voiced by the 32nd respondent, as to a lack of transparency and of unfavourable treatment. Furthermore, it would have ensured that the Cabinet was apprised of the process of evaluation of bids and a decision being made by the Cabinet as to the manner in which the sale should be effected, without Jayasundera on his own accord purporting to "clinch the deal" with JKH.

Furthermore, if the tender documentation was prepared by a TEC and CATB, incorrect statements such as the seriously wrong statement contained in paragraph 4.4.1 of the RFP would have been avoided. In respect of the land in question this paragraph states that CPC presently holds freehold title to this land and has obtained Cabinet approval to transfer the land to LMSL. This statement is incorrect in its entirety. The petitioner has established that the land in question in extent 8 acres 2 roods and 21.4 perches is in fact a part of the Port of Colombo in terms of Order made by the Minister in terms of section 2(3) of the Sri Lanka Ports Authority Act, No.51 of 1979. The aspect of the land will be dealt with morefully at a later stage.

I conclude on the foregoing reasoning that the steps taken by Jayasundera and PERC towards effecting a sale of shares of LMSL is not in any way mandated by the decision of the Cabinet of Ministers and is manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular issued by Jayasundera himself.

Jayasundera has sought to explain the action taken by him in paragraph 10(d) of his affidavit as follows:

> *"as provided for in section 5 (t) of the Public Enterprises Reform Commission Act, No.1 of 1996, PERC was acting as the agent of the Government and as such was empowered to follow appropriate procedures in carrying out the task of liberalizing the bunkering trade;"*

Section 5(t) of the PERC Act relied on by him reads follows:

> *"to act as the agent of the Government, in Sri Lanka or abroad, for the purposes of any matter or transaction, if so authorized"* (emphasis added)

He seems to be implying that he took steps for the sale of LMSL without prior authority of the Cabinet "in carrying out the task of liberalizing the bunkering trade". It is correct as noted above that the Cabinet of Ministers decided that PERC should make proposals for liberalizing the bunkering trade by issuing licenses to the private sector. Jayasundera as revealed in the preceding analysis in fact put this process of 'liberalizing' in cold storage and moved at express speed in the opposite direction of privatizing LMSL with the monopoly intact. In that respect he has acted contrary to section 5(t) relied on by him by failing to act in the manner he was authorized to do and by engaging in a process which was diametrically opposed to the policy as laid down in the Cabinet decision.

D. VALUATION OF LMSL SHARES

Valuation of LMSL had been done by the Chief Valuer as at 02.07.93. Jayasundera wrote to the Chief Valuer on 06.02.2002 requesting an updated version of the valuation. The Chief Valuer replied him by letter dated 07.05.2002 stating that the valuation of assets is almost complete and can be finalised within a week and that the business valuation was not started since his officers are entitled to an incentive payment as approved by the Cabinet. He requested Jayasundera to confirm the payment as approved by the Cabinet. Significantly, Jayasundera did not reply this letter. Instead, by letter dated 15.05.2002 a business valuation of LMSL was requested from the DFCC Bank to be given before 28.05.2002. A

sum of Rs. 750,000/- plus GST and NSL were paid by Jayasundera to DFCC Bank without demur. A question immediately arises as to how a public officer who was reluctant to pay an incentive allowance to another public officer could be so generous to a private bank. The only reason given by Jayasundera for not pursing the matter with the Chief Valuer is that "it would not have been feasible to have expected a business valuation to be done by the Chief Valuer within a short period of time" (paragraph 12k of his affidavit). Even the DFCC bank appears to have been rushed through by PERC to furnish the valuation. Question looms large as to whose deadline Jayasundera was trying to keep. The Cabinet had not even authorized PERC to make a recommendation as to the sale of LMSL shares. The only matter on which the Cabinet had authorized action was the liberalization of the bunkering service in the area outside the Colombo Port, which had been effectively put into cold storage by PERC as demonstrated above. Hence his hasty action was certainly not based on a lawful exercise of executive power in terms of the PERC Act and was contrary to the decision of the Cabinet of Ministers.

Even assuming that Jayasundera wanted to make an unsolicited recommendation to the Cabinet as regards the sale of LMSL shares, the proper course would have been to secure a valuation from the Chief Valuer which had been previously requested and would have been ready within a week in regard to the assets of LMSL. He avoided getting this valuation by refraining from making a commitment to pay the Chief Valuer the incentive allowance which the latter was entitled to in terms of Cabinet decision. Having successfully stalled that process, he selected a private bank on his own and paid the full fee that was sought. This is completely contrary to the basic tenets of public sector procurement. The business valuation he sought was conceived by him alone. Based on the business value given by the DFCC, Jayasundera fixed floor price for bids of 90% of LMSL shares at Rs. 1.2 Million. The severe criticism of the valuation and the floor price fixed is based on the financial performance of LMSL within 4 years of the privatization. According to the Annual Report profits of LMSL for the year 2005/2006 (figures being as follows:

2002/2003	-	508,735,000
2003/2004	-	267,802,000
2004/2005	-	575,035,000
2005/2006	-	1,106,992,000
		2,458,564,00)

Thus, it is pointed out by the petitioner and Amarasekera that within 4 years more than double the amount that had been spent on the purchase of shares was recovered by way of profits from the business of LMSL. That alone gives credence to the criticism of petitioner and of Amarasekera that the basis of valuation and the process of sale was seriously flawed.

The method used by DFCC was the discount of future cash flow projected to a period of 15 years. Amarasekera in his submissions demonstrated that this is an erroneous basis of valuation considering the nature of the business activity, especially if the high component of real estate (more than 8 Acres of land in the Port of Colombo) is to be taken into account. Real estate could never be valued in the manner it was sought to be done. The valuation of real estate could have come from the assets value done by the Chief Valuer which Jayasundera carefully avoided obtaining. The aspect of significance is that LMSL would continue to enjoy a monopoly in the bunkering sector due to the delay in the process of liberalization which has been dealt with exhaustively in the preceding section of the judgment. Jayasundera in fact paved the way for the continuation of the monopoly by adding clause 8.2 to the CUF Agreement after the offer of JKH was accepted.

The petitioner in paragraph 22 of the petition quoted paragraph 12 of the Report of the Committee on Public Enterprises (COPE) which highlights both matters referred above. The said paragraph 12 quoted in the petition is as follows:

> *"Consequently, being confronted with the above monopoly clause, DFCC Bank reneged on their "business valuation" of LMSL of Rs. 1,200,000,000/- and confirmed in writing that on the basis of a "monopoly" their "business valuation" is Rs. 2,400,000,000/-, confirming that had they been required to give*

a "net assets valuation" they would have engaged the services of a professional real estate valuer for the land 8A. 2R. 21,44P."

The representative of the DFCC who filed an affidavit in Court has refrained from giving any specific answer to the averment in paragraph 22 of the petition. In the circumstances it is unnecessary to consider the written submissions tendered on behalf of the DFCC seeking to justify the valuation. Jayasundera's conduct in the matter of obtaining the valuation is basically not authorized by the Cabinet, is characterized by inexplicable haste; erratic; apparently designed to suit his own objectives; contrary to all accepted procedures and furthest removed from a lawful exercise of power under the PERC Act of tendering well considered advice and a recommendation to the Cabinet.

E. EVALUATION BY THE TEC AND THE SHORTLISTING OF BIDDERS

A 'TEC' was appointed by C. Ratwatte, the then Secretary to the Treasury entirely on the recommendation of Jayasundera. A characteristic feature of the entire process is that Ratwatte has approved and signed every paper that had been put to him by Jayasundera, promptly and without any question being raised.

The TEC met on 8th and 27th March 2002 to review the 17 EOI's submitted. A two tiered marking scheme was adopted. 60 marks being attributed to financial capability on the basis of net assets of the bidders and 40 marks were attributed to experience in bunkering and other credentials in that sector. Bidders receiving over 70 marks were short listed to submit proposals.

JKH submitted the EOI in collaboration with Fuel and Maritime Marketing (FAMM) owned by the Chevron Corporation of the USA. The 32nd Added respondent being a party that was rejected submitted a bid in collaboration with the Chemoil Corporation of the USA. Both EOIs were short listed – together with 4 others. The case of the 32nd Added respondent is that JKH would have received the full 60 marks for financial capability but since JKH did not have experience in the bunkering sector, it could not have cleared the threshold of 70 marks if not for the collaboration of FAMM which was undoubtedly a market leader in the sector. The

TEC met on 06.06.2002 to review the proposals of the six short listed bidders. On that day it is recorded by the TEC that FAMM would not bid for the shares along with JKH but may enter into a technical consultancy agreement. The submission is that at that stage JKH should have been removed from the shortlist since it would have necessarily fallen below the threshold of 70 marks. The 32nd Added respondent alleges discriminatory treatment since the TEC continued to evaluate the bid of JKH as an individual bid whereas its bid was rejected on the basis that the collaborator Chemoil Corporation sought a monopoly for 8 years, since a monopoly was not possible within the terms that were offered. Submission of the 32nd Added respondent is borne out by the summary of the EOI's being Annex 1 to the TEC Report. The EOI of JKH is summarized with FAMM as the lead collaborator. Item 10 reads as follows:

Name:	FAMM/John Keells Holdings Ltd.,			
Submission of Information:	Form	A	-	Yes
	Form	B	-	Yes
Principal business activity:	Marketing of fuel oil & marine lubricants			
Access to refinery:	Yes			
Tanker company:	Yes			

Location of bunkering operations: Americas, Europe, UAE, Asia, incl. Singapore, Thailand.

According to the mark sheet annexed FAMM/JKH combination got the maximum marks of 100 on the formidable credentials of FAMM in the bunkering sector highlighted in the evaluation cited above. Admittedly JKH on its own could not have laid claim to any of those credentials.

The criticism of the petitioner and Amarasekera as to the failure of Jayasundera to get a CATB appointed gathers strength, since there was no other body other than Jayasundera himself to check on the work of the TEC. The following passage of the Report of the TEC show that it has been guided entirely by Jayasundera:

"The TEC met on 6th June 2002, to review the proposals received in terms of the RFP by the due date of 28 May 2002, to shortlist the parties who would be allowed to place financial bids on the Colombo Stock Exchange."

The entirety of the envisaged process of shortlisted parties being allowed to place financial bids on the Colombo Stock Exchange was obviously devised and followed by Jayasundera on his own as the later events reveal, since the matter of sale of shares had not even been placed before the Cabinet as at that stage and there was admittedly no CATB.

The criticism of the 32nd Added respondent that JKH only made use of the credentials of FAMM to clear the initial threshold and that collaboration with FAMM, was never genuinely intended gains strength from a document that emerges from an entirely different quarter. The petitioner has at a later stage in the case obtained documents marked P36 and P37 from the BOI as to an application for investment relief submitted by Ratnayake on behalf of JKH. On 20.03.2002 being 7 days before the meeting of the TEC referred to above in which the EOI's were reviewed, Ratnayake submitted an application in terms of section 17 of the BOI Law for tax relief in respect of a "new investment'. In column 1(a) of the application form as to "Particulars of Collaborators" only the name of John Keells Holdings and the address at 130 Glennie Street, Colombo 2 is specified. Significantly, there is no reference to any other collaborator or to any foreign investment. More, significantly the particulars of the proposed investment carries all the details of LMSL without the name. The address of the place where the investment is going to be made is given as 69 Walls Lane, Colombo 15, which is the address of LMSL. The extent of the land required for the investment is given as 8 Acres 2 Roods 21.4 Perches being precisely the extent of the land within the Port of Colombo which features so significantly in the case. 12 Tanks, 40 years old being the facilities used by LMSL are also included. The application made by Ratnayake on behalf of JKH is premised on a suppression of the truth, in that it is nowhere stated that what was intended is an acquisition of the business of LMSL. It is falsely made out to be a new investment to qualify for investment relief. The omission to refer to the collaboration of FAMM, which was most significant from

the perspective of the BOI, clearly establishes the allegation of the 32nd Added respondent that the inclusion of FAMM in the EOI submitted at the same time was only a passing show to get past the threshold of 70 marks.

Another aspect to be considered is the basis on which Ratnayake of JKH was so confident that its EOI containing the misrepresentation of collaboration with FAMM, would clear all the hurdles and be able to "clinch the deal" including the land of 8 Acres, before the EOI was even shortlisted. Was it optimistic guesswork? Or, as alleged by the petitioner and Amarasekera, the entire deal was arranged between Jayasundera and Ratnayake? The subsequent events will shed light as to which alternative is more probable.

To continue the narrative of events with regard to the BOI application. By letter dated 11.07.2002 the BOI notified JKH that the application for investment relief has been approved and that there will be no income tax for a period of 3 years. Thereafter income tax would be 10% for the 4th and 5th year and 15% thereafter. The irony of the process as pointed out by Amarasekera is that LMSL owned by the Ceylon Petroleum Corporation was a tax paying enterprise. In the year 2000/2001 it made a profit of Rs. 318 Million and paid Rs. 163 Million as income tax. The criticism of Amarasekera that a profit making tax paying public enterprise became a tax free private enterprise as a result of the impugned exercise is well established. Whereas the object of the process of liberalization according to the Cabinet Memorandum which approved was to increase the volume of bunkering and thereby and increase the revenue yield to the State.

The date of the BOI letter granting tax exemption being 11.07.2002 may have some significance since on the very next day – 12.07.2002, Jayasundera rushed a letter to Ratnayake that the JKH bid was accepted and that "it is proposed to conclude the transaction". Ratnayake replied on the same day 12.07.2002 stating that they are willing to conclude the transaction. There is indeed, amazing speed, in concluding a transaction as to the sale of a public asset which also included 8 Acres of land in the Port of Colombo. All this was done when the proposed process of sale had not been even considered

by the Cabinet. The Cabinet considered the process, a month later on 14.08.2002.

To conclude the narrative of events as regards the BOI approval, although approval was granted by letter dated 11.07.2002, it would not have in effect given tax relief to JKH since only a new investment as opposed to an acquisition of an existing business would qualify for such relief. The applicable Regulation was thereafter amended by Gazette bearing No. 1256/22 dated 01.10.2002 to include an investment formed by an acquisition of assets of an existing enterprise. The amendment is "tailor made" to fit the acquisition of assets of LMSL by JKH. Which inference is fully supported by the prompt letter dated 04.10.2002 sent by Ratnayake to BOI requesting an amendment of the Agreement that had already been entered into on the basis of the amendment to the Regulation. All the amendments to the Agreement suggested by Ratnayake were incorporated by BOI ensuring the tax relief referred to above for the investment. This process to say the least makes a mockery of the Rule of Law and the equal protection of the law. If the law can be bent and amended to suit an individual purpose and to confer a benefit to any party that was not due under the existing law, the hallowed principle of equality before the law, will be denuded of its essential and abiding meaning.

I have to now revert to the events leading to the acceptance of the bid and consideration of the deviations that favour JKH as alleged by the petitioner and Ratnayake.

F. EVENTS LEADING TO THE ACCEPTANCE OF THE BID AND THE ALLEGED DEVIATIONS THAT FAVOUR JKH

A Pre Bid Conference was convened by Jayasundera on 30.04.2002 and held at the PERC office. Representatives of the CPC, SLPA, Colombo Stock Exchange and of parties who submitted EOI's were present. It is clear that the meeting was convened well before the report of the TEC was completed. The TEC Report is undated but it refers to a meeting on 06.06.2002. It appears that without finalizing the report and signing it, the parties who were shortlisted were notified that they could submit proposals on the basis of the RFP furnished by PERC. The absence of any guidelines laid down by the Cabinet and of a CATB appears to have

enabled Jayasundera to devise a procedure of his choice being a course of action far removed from the power vested in the PERC under the law referred to above being to advise and assist the Government. Be that as it may when parties come for the Pre Bid Conference no one knew of the basis on which the EOI's were evaluated for thee plain reason that there was no Report of TEC as at that date.

The minutes of the conference have been recorded and circulated amongst all parties present. Whatever be the regularity of the procedure adopted, what was notified to the parties have a degree of sanctity and parties would necessarily have been guided by it in making their proposals. Three matters arise for consideration in view of the specific allegations that have been made of subsequent deviations that favour JKH. These matters are as follows:

DEVIATION (i)

Paragraph 1 of the minutes specifically states that LMSL will not have a monopoly on the import and sale of bunkers subsequent to the sale of LMSL shares. Paragraph 1.5 states that the present CPA Act provides for the Minister to authorize the import and sale of bunkers;

Thus the clear message given to the bidders is that after the sale the monopoly will be dismantled with licenses being granted to others.

I have demonstrated above that the Cabinet had directed the reverse of the process, being a partial dismantling of the monopoly and a sale of LMSL shares within 1 year thereof.

Further, it is clear from the sequence of events set out above under the head of "Liberalization of Bunkering" that the PERC headed by Jayasundera did not take steps towards liberalization as required by the Cabinet and on the contrary the process was effectively put in cold storage. Hence Jayasundera who knew fully well that PERC had not taken steps to even recommend a liberalized regime to the Cabinet and at the least for sometime to come there would be no competition in the sector, failed to apprise the bidders of the true picture and conveyed an incorrect

impression. Whereas, if in effect the monopoly was going to continue for a limited period of time the bidders may have had a basis to enhance their bids. Hence Jayasundera's action was adverse to the interests of the State in securing a better price. He failed to take into account the specific decision of the Cabinet that the monopoly would at the least would continue to the Port of Colombo for one year.

The more serious allegation against Jayasundera on that account is that after the JKH bid was accepted he agreed to a suggestion of Ratnayake made in letter dated 31.07.2002 that provision be included in the draft CUF Agreement which had been issued with the RFP, that all bunkers handled and transported within the Port of Colombo will have use the Common User Facility (CUF). Accordingly the CUF was amended including as clause 8.2, the assurance sought by Ratnayake as an undertaking of the Government and SLPA. The lay out of the Pipeline Network shows that the Bunkering Jetty (South Jetty) and the Dolphin Berth are linked to the tanks used by LMSL. Hence the requirement in clause 8.2 would necessarily result in any party supplying bunkers in the Port of Colombo having to use of tanks of LMSL. There is merit in the submission of the Added 32nd respondent that since different grades of fuel are used in supplying bunkers the other competitors would thereby be necessarily precluded from supplying bunkers in the Port of Colombo. LMSL under the management of JKH got the SLPA to enforce clause 8.2 against the Added 32nd respondent when the latter on the basis of a license granted in terms of the Petroleum Products (Special Provisions) Act No. 63 of 2002 began an off-shore operation to supply bunkers. LMSL sought injunctive relief from Court to restrain this operation and followed up by filing a writ application in the Court of Appeal. Finally, the Court of Appeal held that the said clause 8.2 was invalid as being inconsistent with Act No. 53 of 2002. President's Counsel for the 18 to 21 respondents (LMSL/JKH and Directors) submitted that nothing flows from the inclusion of 8.2 and that there was no monopoly after the privatization in view of the judgments of the respective courts. I find it difficult to agree with the submission. What is drawn in issue in this case is the executive action of including clause 8.2. The fact that judicial action set right the wrongful executive action cannot be availed of by the party who secured the wrongful executive action

in its favour and went to the extent of enforcing the wrongful executive action in Court.

At the pre bid meeting Jayasundera clearly indicated that there would be no monopoly and that other licenses would be issued. He acted contrary to the proclaimed position in two ways. Firstly he refrained from acting on the specific decision of the Cabinet made on the recommendation of the Committee of Officials including a Director of PERC, that PERC should make recommendations as to the issuance of licenses to liberalize the bunkering trade. Thereby he brought about a situation of a defacto monopoly by dampening the competitive regime which the Cabinet envisaged. Secondly, he readily and without any consultation agreed to the inclusion of clause 8.2 in the CUF departing from the draft previously issued, being a provision obviously intended to install a monopoly. Jayasundera's function under the PERC Law cited above was only to advise and assist the Government and not to commit the Government to an undertaking which is completely contrary to the previous decision of the Cabinet.

Jayasundera has in paragraph 18 (d) of his affidavit admitted the subsequent inclusion clause 8.2 and seeks to justify his action on the basis that it was done.

"in order to maintain a level playing field among all bunker operators."

I have to observe in respect of this quaint defence that his perception of a "level playing field" appears to be one with a single player. He indirectly assured to the continuance of the monopoly, being a course completely contrary to the position set up in the forefront of the Pre Bid Conference.

As regards the role of JKH in respect of the admitted 'Deviation' by including clause 8.2, the overall submission of President's Counsel is that its action was entirely *bona fide* and the award was made since it was the only bidder who furnished the undertaking to pay 10% of the bid price. That, it is not the burden of JKH as the buyer to satisfy itself whether Jayasundera was duly empowered or authorized to enter into the impugned transaction and / or to make Deviations in the manner he has done. The gravamen of the submission is that the transaction is a sale and JKH made a

request for the inclusion of clause 8.2 in furtherance of its commercial interests and Jayasundera who had ostensible authority agreed to it and that the transaction cannot be impleaded on this account. Counsel thereby supports the plea of *bona fides* with the legality of the executive action in issue.

The argument seems to be that when there is a yielding hand there is nothing illegal to take something more. I possibly cannot accept either of the propositions of Counsel.

JKH knew fully well that this was not a mere sale, but a sale of shares owned by a Public Corporation in an extremely lucrative venture. That, transparency and action being taken according to law should necessarily underpin the validity of the transaction. The declared basis at the Pre Bid Conference attended by Ratnayake representing JKH was that there will be no monopoly after the sale and that other suppliers of bunkers would be issued licenses. This premise would necessarily have inhibited bidders from quoting a higher price. In any event the object of the Cabinet was not to secure a higher price by preserving the monopoly. It was, as noted above is to enhance competition, to lower bunker prices, improve facilities and thereby increase the revenue yield to the State. Having come in on this openly declared premise, no sooner the bid was accepted by Jayasundera, Ratnayake moved quickly to get the former committed to an inclusion of clause 8.2. The obvious purpose of getting clause 8.2 included was to drive away competitors as manifested by the subsequent conduct of JKH of procuring the SLPA to take action against the 32nd respondent and thereafter by directly instituting legal proceedings against the latter. Hence I cannot agree with the submission of *bona fides.*

The next aspect to be considered is the authority of Jayasundera to make the Deviation in question. Although the issue is dealt with here, the reasoning would apply in respect of all aspects of the impugned transaction.

The question whether a public officer can act in excess of his statutory authority and enter into any agreement or arrangement and whether such agreement or arrangement would be binding on the State on a plea based on the ostensible authority of the public officer has been fully considered and settled more than half a

century ago. It appears that with the passage of time the basic proposition of law in this regard has been forgotten. In the case of *Attorney - General* v *A. D. de Silva*(1) the Privy Council considered the question whether in a situation where the Principal Collector of Customs sold certain articles of the State without any statutory or actual authority, the contract could be enforced against the State on the the basis that the officer had ostensible authority. The following dicta of the Privy Council appropriately deal with the proposition – now advanced by Counsel offf JKH.

> *"Next comes the question whether the Principal Collector of Customs had ostensible authority, such as would bind the Crown, to enter into the contract sued on. All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists. Their Lordships think therefore that nothing done by the Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Principal Collector had the right to enter into a contract to sell the goods which are the subject matter of this action." (emphasis added)*

Later in the Judgement (at p. 537) Their Lordship dealt with a situation where a public officer is acting in terms of a statute and observed that the authority would then be "rigidly fixed" by the limits of the statute. That a "representation" by the Public officer would be binding on the State only if there is a specific provision to that effect in the Statute and the reading in, of such a provision by way of interpretation would be an undue extension of a Statute.

The question of the resultant hardship to a purchaser in a sale, purportedly effected by a public officer has been specifically examined by Their Lordships as follows:

> *"It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has authority to enter into*

the sale is placed upon him. This undoubtedly is true. But where as in the case of the Customs Ordinance the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. This is illustrated in the case under consideration. The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual."

The final sentence of the passage is relevant to the examination of the issue from the perspective of Public Law at a later stage in the judgment.

The judgment in A. D. de Silva's case was followed by the Supreme Court in the case of *Rowlands* v *Attorney-General*[2]. In that case the Court considered the question whether the principle of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance. The Court held as follows (at page 410.)

"Now in the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual. There is clear authority to this effect in American law but there would appear to be a dearth of authority in English law. In our law however there is now clear authority to this effect."

The Supreme Court cited the preceding dicta in *A. D. de Silva's* case as the authority for this proposition.

The Court also observed that in a contract involving a larger sum of money the authority to bind the State lay in the Cabinet as a whole (p. 405) and not on a single member who acts on his own responsibility. That the Minister should have got approval of the Cabinet or gone "before the House" (Parliament).

A useful observation has also been made at page 409 as follows:

"... It is well recognized that although there are no legal restrictions on the contents of Government contracts, the Government generally contracts only on the basis of certain fixed standard terms and conditions...."

This is also relevant to the Public Law perspective as evolved in subsequent decisions of this Court referred to later.

For the reasons stated above I cannot accept the submission of Counsel for JKH (18th to 20th respondents) based on bona fides. It is clear that these respondents got an advantage over other competitors through the yielding hand of Jayasundera. The ostensible authority of Jayasundera cannot be a shield for these respondents to safeguard what they secured in an illegal, arbitrary and biased exercise of executive power.

DEVIATION (ii)

The next Deviation alleged is in respect of the land in extent 8 Acres 2 Roods 21.44 perches being an area generally referred to as the "Bloemendhal Oil Depot" I have noted above under the head of "Action Taken By PERC" that the statement contained in paragraph 4.4.1 of the RFP that the CPC presently holds freedhold title to the land and has obtained Cabinet approval to transfer it to LMSL, is incorrect. The land in fact comes within the limits of Port of Colombo, as specified in the Order dated 24.03.1986 made by the then Minister of National Security in terms of section 2(3) of the Sri Lanka Ports Authority Act No. 51 of 1979. The Petitioner has produced the Gazette containing the order marked P33 the contents of which are not disputed.

If the petitioner could have laid hand on this order, the officials of PERC could with reasonable diligence have done so. All parties submitting proposals were specifically required to carry out their own due diligence without relying on the representations in RFP. Hence JKH cannot rely on the incorrect statement contained in paragraph 4.4.1 of the RFP. Be that as it may it is common ground that LMSL being a Company did not own this property and had no legal claim to it whatsoever.

Paragraph 5 of the minutes of Pre-bid Conference reads as follows:

"The time frame for the transfer of assets to LMSL from CPC:

a. All movables – prior to closing date

b. Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMS:

The petitioner has quoted this section of the minute verbatim in paragraph 25(c) of the petition and Jayasundera had to answer as to what he intended notify the bidders by 07.05.2002 as to the terms of the transfer and the payment to be made. As noted above, by this date the Cabinet has not even been notified of any sale of LMSL shares let alone a transfer of 8 Acres of land within the Port of Colombo. The Cabinet had not authorized Jayasundera of PERC to do anything in this regard. A question looms large as to the basis on which Jayasundera intended to give this vital information regarding the land within 7 days. Jayasundera has stated in paragraph 27(b) and (c) of his affidavit which reads as follows:

"(b) The transfer of title of the said land was not to be free of "valuable consideration" because the value of the said land was taken into account in arriving at the business valuation of LMSL.

(c) the issue of transferring title of the said land was discussed at the Pre-Bid conference since matters such as the manner of transfer, the instrument to be executed etc., had to be finalized."

In respect of what he has stated in paragraph (b) above it is to be noted that he did not inform the bidders that the value of the land has been taken into account in arriving at the business valuation of LMSL. On the other hand he could not have possibly given this information since the business valuation was requested from the DFCC by him only on 15.05.2002, and the valuation report is dated 10.06.2002, whereas the pre-bid conference was on 30.04.2002.

In paragraph 71 of his affidavit Ratnayaka has stated that a pre bid clarification letter dated 10.05.2002 was issued to all bidders by PERC in which it was expressly stated that there will be no additional payment to be made with regard to the transfer of the

land. He has produced this letter marked Z18. It is significant that although Ratnayake has stated that all bidders were thus notified, Z18 is addressed only to him by name. It is not in the format in which the minutes of the Pre bid Conference were communicated which contained all the names of those who attended the conference. The letter Z18 is typed on the PERC letter head has been signed by the Director General. It merely states "... please find attached additional clarification sought at the Pre-bid Conference." The attached sheet of paper is not even on a letter head of PERC. It does not contain any list of names of persons who attended the Conference. The document which contains only typed script without any writing or even a signature is titled;

"Pre Bid Conference further clarification"

I do not wish to burden this Judgment by reproducing its contents but suffice it to state that it contains important price sensitive information. Significantly paragraph 5 which relates to the land reads as follows:

> *"CPC will transfer title of the property at Bloemendhal Road within the period of one year. There will be no additional payments to be made to CPC in this regard. CPC will transfer title of the movable assets including the barges prior to the sale of LMSL."*

Although the covering letter has been signed by the Director General it is clear that it has been sent on Jayasundera's instructions because he has subsequently acted on this representation that there would be no separate payment for the 8 Acre land within the Port of Colombo. Jayasundera had no mandate whatsoever from the Cabinet or anyone else to make an astounding representation that title to 8 Acres of State land would be transferred without any payment, in such a casual manner, on a sheet of paper that does not bear even a signature. When State land is bequeathed on a Grant or Lease at a nominal price or gratituously, it is described as a "special grant or lease." Section 6(1) of the State Lands Ordinance empowers the President to make such a special grant or lease only for any "charitable, educational, philanthropic, religious or scientific purpose." Even the power reposed in the President would now be subject to the 13th

Amendment to the Constitution (referred to later). Thus Jayasundera making this representation was arrogating to himself a power that even the President did not have. Even assuming wrongly that the land belonged to the CPC, such representation should have been made at the Pre-bid Conference which was attended by the Chief Legal Officer of the CPC. It is clear that Jayasundera did not seek instructions from the CPC after the Pre Bid Conference on 30.04.2002 and before the date of Z18 being 10.05.2002.

I have to now revert briefly to certain matters dealt with previously under the heading of "Valuation of LMSL". The Chief Valuer who was requested to do a valuation wrote to Jayasundera on 07.05.2002 stating that the assets valuation was nearly ready and requested confirmation of the incentive payment authorized by the Cabinet for the business valuation. It was noted in the preceding analysis that Jayasundera effectively prevented the Chief Valuer from submitting a valuation by not making a commitment to make the incentive payment. Having thus stalled the Chief Valuer he caused Z18 to be sent to JKH on 10.05.2002 stating that there would be no separate payment for the land. Thereafter, on 15.05.2002 he requested the business valuation from DFCC Bank. Thus it is clear that the business valuation by DFCC Bank is a contrivance adopted by Jayasundera to avoid a separate assets valuation and a business valuation being done by the Chief Valuer.

I would now deal with the documented sequence of events only from the perspective of the land. After having made a award in favour of JKH in an exchange of letters dated 12.07.2002 between Jayasundera and Ratnayake, well before the matter was even considered by the Cabinet, the PERC set about in getting the relevant agreements ready for signature. The Agreements were executed on 20.08.2002 one day prior to the decision of the Cabinet being confirmed. They are:

i) CUF Agreement [P19 (a)]

ii) The Share Sales and Purchase Agreement [P19(c)]

iii) A notarial Agreement to transfer the Land (P27)

Jayasundera and the Director General of PERC have signed as witnesses for all State parties to the Agreements. The Secretary to the Treasury has signed on behalf of the Government of Sri Lanka. The CPC is described as the Vendor and the SLPA is only a party to the CUF Agreement. Jayasundera has admitted that these Agreements were prepared by PERC in anticipation of the Cabinet decision. What is significant from the aspect now being considered is the notarially executed Agreement to transfer the land. Clearly this kind of Agreement was neither referred to in the RFP nor at the Pre-bid Conference. It appears to flow from the exclusive communication to JKH (Z18) referred to earlier. The proposal to the Cabinet referred to later does not make any reference to the Government being a party to an Agreement to transfer land.

Jayasundera in his affidavit (paragraph 27(g) and (k) takes responsibility for this Agreement and adduces four reasons to justify his action. They are

a) that the "land was to form part of the assets of LMSL";

b) the value of the land was taken into account in arriving at the business value of LMSL;

c) that there was no necessity to obtain specific approval of the Cabinet since that was "implicit" in the Cabinet Memorandum that was approved;

d) that Agreement No.538 (P27) was entered into "in order to give effect to the undertaking to transfer title of the said land"

An examination of the reasons given by Jayasundera in the context of the documented sequence of events demonstrates that they centre around his own role in this regard. The statement that land "was to form part of the assets" is a nebulous statement. Land is immovable property with clearly defined legal means of acquiring ownership. The question is whether at the material time land was in law an asset of LMSL. Admittedly it was not. It has been a part of the Port of Colombo. The incorrect statement in paragraph 4.4.1 of RFP that CPC holds freehold title to the land and obtained Cabinet approval to transfer the land to LMSL referred to above, was only in the imagination of Jayasundera and the PERC.