

**WIJETUNGA**

v.

**INSURANCE CORPORATION AND ANOTHER**

SUPREME COURT.

SHARVANANDA, A.C.J., COLIN-THOME, J. AND SOZA, J.

S. C. APPLICATION No. 87/82.

NOVEMBER 11 AND 15, 1982.

*Application to the Supreme Court under Article 126 and Article 17 of the Constitution—Fundamental rights of freedom of speech and expression including publication and freedom to join a Trade Union under Article 14 (1) (a) and 14 (1) (d) of the Constitution—Does alleged violation of these rights by the Insurance Corporation amount to infringement by executive or administrative action ?*

The petitioner was an employee of the Insurance Corporation of Sri Lanka and Organising Secretary of the Insurance Employees' Union, a trade union registered under the Trade Union Ordinance. On a decision of the Committee of the Union to launch a poster campaign in order to focus attention on the grievances of the employees the members of the Union including the petitioner had put up posters which the Insurance Corporation alleged were obnoxious and calculated to incite disaffection and indiscipline among its employees and to bring its Chairman into disrepute. Charges were framed against the petitioner for putting up such posters and he was found guilty at a domestic inquiry ; by way of punishment his increments for two years were suspended and he was warned and transferred from the Head Office at Colombo to the Regional Office of the Corporation at Batticaloa. This punishment the petitioner alleged was an infringement of his fundamental rights of freedom of speech and expression including publication and of the freedom to join a trade union guaranteed to him by Article 14 (1) (a) and 14 (1) (d) of the Constitution.

The Insurance Corporation (1st respondent) while justifying the punishment imposed on the petitioner took the preliminary objection that his application was misconceived on the ground that its action did not amount to " executive or administrative action " in respect of which only the jurisdiction vested in the Supreme Court by Article 126 of the Constitution could be invoked by an aggrieved person.

**Held**

(1) Article 126 read with Article 17 entitles a person to apply for relief to the Supreme Court only where his fundamental rights guaranteed by Chapter 3 of the Constitution have been infringed by executive or administrative action of the State. Private conduct abridging fundamental rights does not attract the jurisdiction of the Supreme Court vested in it by Article 126.

(2) In the context of fundamental rights the " State " includes every repository of state power. The expression " executive or administrative action " embraces executive action of the State or its instrumentalities exercising Government functions. When private individuals or groups are endowed by the State with power or functions governmental in nature, they become agencies or instrumentalities of the State subject to the constitutional inhibitions imposed on the State. The decisive question is, what is the involvement of the State in the activity of the party concerned ?

(3) Whether a Corporation should be accorded the status of a department of Government or not depends on its constitution, its powers, duties and activities and must be judged in the light of the following :

- (a) First the incorporation of the Body though not determinative is of some significance as an indication by Parliament of its intention to create a legal entity with a personality of its own, distinct from the State.
- (b) Secondly the degree of control exercised by the Minister on the functioning of the Corporation is a very relevant factor. A complete dependence on him marks it as really a Governmental body, while comparative freedom to pursue its administration is an element negating the intention to constitute it a government agency.
- (c) Third is the degree of dependence of the Corporation on the Government for its financial needs.

The various sections of the Insurance Corporation Act, No. 2 of 1961 conspicuously contain no direct indication that the Corporation is a Department of Government. It carries on a commercial activity. Its powers do not identify it with the Government and in some respects preclude identification with the Government. The object and purpose of the statute was the creation of an autonomous public body carrying on its business activity, free from ministerial control except as to broad lines of policy.

The question whether the Insurance Corporation is a servant of the State ultimately depends on the degree of control which the State through its Ministers can exercise over it in the performance of its duties. Even if the Minister has the power to interfere with it, there is nothing in the statute which makes the acts of administration his as distinct from those of the Corporation ; it is true the Minister appoints its members and the Corporation in the exercise of its powers and the performance of its duties, is subject to the general or special directions of the Minister. But these even when taken together do not outweigh the fact that the Act confers on the Corporation powers which are given to it to be exercised at its own discretion and in its own name.

Whether we apply the functional test or the Government control test, the Insurance Corporation cannot be identified with the Government. It cannot be regarded as its alter ego or organ of the State. Hence its action cannot be designated " executive or administrative action " which alone attracts Articles 17 and 126 of the Constitution.

**Cases referred to**

- (1) *Perera v. University Grants Commission S.C. No. 57/80 S.C. Minutes of 4 8 1980*
- (2) *Narayanasamy v. Krishnamoorthy A.I.R. [1958] Madras 343.*
- (3) *Tamlin v. Hannaford [1950] 1 K.B. 181, 1949 2 All E.R. 327,329.*
- (4) *B.B.C v Johns [1964] 1 All E.R. 923.*
- (5) *Mersey Docks & Harbour Board Trustees v. Gibbs [1966]. L.R. 1 H.L. 93.*
- (6) *Metropolitan Meat Industry Board v. Sheedy [1927] A.C. 890, 905.*
- (7) *Bank Voor Handel v. Administrator of Hungarian Properties [1954] A.C. 584, [1954] 1 All E.R. 969.*
- (8) *Ceylon Bank Employees' Union v. Yatawara [1962] 64 NLR 49*
- (9) *Trendtex Trading Corporation v. Central Bank [1977] 1 All E.R. 881*
- (10) *Dahanayake v. de Silva [1978/79] 1 S.L.R. 41.*
- (11) *Karneshwar Prasad v. State of Bihar AIR [1962] S.C. 1167.*
- (12) *The First National City Bank v. Commissioner of Income Tax, Bombay City AIR [1961] S.C. 812.*
- (13) *Balakotaiah v. Union of India AIR [1958] S.C. 232.*

APPLICATION under Article 126 of the Constitution

*Faz Mustapha with Chula Boange and N. M. Saheed for petitioner.*

*K. Kanag-Iswaran with Miss Kalyani Silva for 1st respondent.*

*Suri Ratnapala, Acting Senior State Counsel, for 2nd respondent.*

November 29, 1982

*Cur. adv. vult.*

**SHARVANANDA, A.C.J.**

This is an application made to this Court by the petitioner who is an employee of the 1st respondent, the Insurance Corporation of Sri Lanka, for relief under Article 126 of the Constitution. He alleges that his fundamental rights of freedom of speech and expression including publication and of his freedom to join a trade union, assured to him by Article 14 (1) (a) and 14 (1) (d) of the Constitution have been infringed by the Insurance Corporation.

The petitioner complains that the Corporation has suspended his increments and has warned him and transferred him to Batticaloa, in breach of his fundamental rights guaranteed to him by Article 14 (1) (a) and/or 14 (1) (d) of the Constitution on the allegations that

he had put up posters in violation of the rules of discipline and code of conduct of the employees of the Corporation, and had also put up obnoxious posters with the intention of bringing into disrepute the Chairman of the Insurance Corporation. The petitioner is the Organising Secretary of the Insurance Employees Union, a trade union registered under the Trade Union Ordinance. He states that the Committee of the Union, in the exercise of their right of trade union activity, had decided to launch a poster campaign in order to focus attention on the grievances of the employees and in pursuance of the said decision of the Trade Union, members of the Union had put up posters.

The 1st respondent, the Insurance Corporation of Sri Lanka, is a Corporation established by the Insurance Corporation Act No.2 of 1961. It is a body corporate having perpetual succession and a common seal and entitled to sue and be sued in its name viz: " The Insurance Corporation of Ceylon ".

The 1st respondent by affidavit filed by its Personal Manager has averred that large posters had been put in the premises of the 1st respondent, carrying slogans which were obnoxious and calculated to incite fellow workers to disaffection and indiscipline and that the petitioner participated in putting up the said posters. He further stated that charges were framed against the petitioner for putting up such posters and the petitioner was found guilty as charged at a domestic inquiry and that the Corporation had, by way of punishment, suspended his increments for a period of two years and transferred him out of the Head Office in Colombo to the Regional Office of the Corporation at Batticaloa.

The 1st respondent has, while justifying the punishment imposed on the petitioner, taken objection, in limine, that the petitioner's application under Article 126 of the Constitution was misconceived, on the ground that its action did not savour of " executive or administrative action " in respect of which only the jurisdiction vested in the Supreme Court by Article 126 of the Constitution could be invoked by an aggrieved person.

Since the objection goes to the root question of the jurisdiction of this Court, it is necessary to examine its validity.

Article 126 read with Article 17 entitles a person to apply to the Supreme Court only in respect of the infringement or imminent infringement by "executive or administrative action" of the fundamental rights to which such person is entitled under the provisions of Chap. 3 of the Constitution. The jurisdiction of the Supreme Court to grant relief against any infringement or imminent infringement of the fundamental rights recognised by Chap. 3 of the Constitution is limited to cases of such infringement by "executive or administrative action". Private conduct abridging individual rights does not attract the jurisdiction of this Court vested in it under Article 126. In this connection I would reiterate what I said in *Perera v. University Grants Commission* (1).

Constitutional guarantees of fundamental rights are directed against the State and its organs. Only infringement or imminent infringement by executive or administrative action of any fundamental right or language right can form the subject matter of a complaint under Article 126 of the Constitution. The wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by the State authority, does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights the "State" includes every repository of State power. The expression "executive or administrative action" embraces executive action of the State or its agencies or instrumentalities exercising Governmental functions. It refers to exertion of State power in all its forms.

Therefore individual invasion of individual rights does not come within the remedial protection afforded by Article 126.

The Constitution protects fundamental rights by imposing restrictions or obligations on the Government. Article 4 (d) of the Constitution enjoins that "the fundamental rights which are by the Constitution declared and recognised, shall be respected, secured and advanced by all organs of Government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided". All organs of Government are mandated to respect the fundamental rights referred to in Chap. 3 of the Constitution and are prohibited from infringing same. Action by the

organs of the Government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126.

The term "executive action" comprehends official actions of all Government Officers. Difficult problems arise when the label is sought to be affixed to the conduct of private individuals with whom Government is somehow "involved", who allegedly exercise Government authority. Delegation of a State function to a party may make the party's action, the action of the Government and thus make the State responsible for such action. The decisive question is what is the involvement of the State, in the activity of the party concerned. When private individuals or groups are endowed by the State with power or functions, governmental in nature, they become agencies or instrumentalities of the State subject to the constitutional inhibitions of the State. The inquiry is whether there is a sufficiently close nexus between the State and the action of the agencies that is challenged, so that the action of the agencies may fairly be treated as that of the State itself. Thus the relevant question is what is the relationship between the particular Corporation whose acts are challenged and the State? Is it a Department of Government, or servant, or instrumentality of the State? Whether the Corporation should be accorded the status of a department of government or not must depend on its Constitution, its powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions. For determining the integral relationship between the State and the Corporation we have to examine the provisions of the statute by which the Corporation has been established. If the statute in terms answers the question, there is no need for further inquiries, but in the absence of such statutory declaration or provision the intention of Parliament has to be gathered from the provisions of the statute constituting the Corporation. These provisions have to be judged in the light of the following:

- (a) First the incorporation of the Body though not determinative is of some significance as an indication of Parliament of its intention to create a legal entity with a personality of its own, distinct from the State.

- (b) Secondly the degree of control exercised by the Minister over the functioning of the Corporation is a very relevant factor. A complete dependence on him marks it, as really a Governmental body, while comparative freedom to pursue its administration is treated as an element negating intention to constitute it a Government agency.
- (c) Third is the degree of dependence of the Corporation on the Government for its financial needs.

Vide—*Narayanasamy v. Krishnamoorthy* (2).

The question whether the Insurance Corporation of Sri Lanka is or is not virtually a department of the State or a servant of the Government would be dependent on the provisions of the Insurance Corporation Act No. 2 of 1961. Hence, we have to analyse them to determine the nature of its functions, the precise degree of control exercised by the Government over it and whether the amount of control establishes the identity of the Corporation as part of the Government.

The preamble to the Act states, inter alia, that it is an Act to provide for the establishment of an Insurance Corporation, for carrying on exclusively the business of life insurance and carrying on in addition insurance business of every other description. Section 2 of the Act provides that the Corporation shall consist of five members appointed by the Minister, one of whom shall be designated, Chairman of the Corporation. Any member of the Corporation may be removed from office by the Minister, if the Minister considers that it is expedient to remove such person from office.

Section 5 provides for the functions of the Corporation. It states that the Corporation shall carry on insurance business of every description, including the business of insuring, inter alia—

- (a) any property of the Crown or of any Corporation the entirety of whose capital is provided by the Government—
- (b) (i) Head of any Government Department or any such Corporation as aforesaid, against any loss caused to such Head in his official capacity or to such Corporation by the fraud of any employee of the Corporation.

- (ii) In respect of any liability which may be incurred by the Crown or such Corporation in consequence of the death of or bodily injury to, any employee of the Corporation.
- (c) The Secretary to the Treasury or the Head of any Government Department on behalf of the Government against any loss which may be insured by the Government as a result of failure of any Government Servant or any Public Servant, employee in the department to repay any loan to him by the Government.

Section 6 enumerates the powers of the Corporation—

- (a) The Corporation has power to acquire and dispose of any movable and immovable property.
- (b) Reinsure with any Insurer any liability arising out of any policy of Insurance issued by the Corporation.
- (c) To accept reinsurance of any liability arising out of any policy of insurance issued by any other insurer.
- (d) To transact such other business as may seem to the Corporation to be capable of being conveniently carried on in connection with the Insurance business carried on by the Corporation and to be conducive directly or indirectly to render profitable the latter business.
- (e) To invest the moneys of the Corporation in such manner as may be determined by the Corporation with the approval of the Minister.
- (f) To establish and maintain a Provident Fund for the persons employed in the Corporation and to make contributions to such fund.
- (g) To do all other things which in the opinion of the Corporation are necessary to facilitate the proper carrying on of its business.
- (h) To borrow money for the purposes of the Corporation in such manner and upon such security as the Corporation may determine with the approval of the Minister.

According to section 7, the Corporation has power to appoint such officers and servants as may be necessary for the purpose of the Corporation, and to exercise disciplinary control of and dismiss

any officer or servant of the Corporation, provided that the Corporation shall not dismiss without the approval of the Minister any officer or servant who has been appointed to the staff of the Corporation from the Public Service.

Section 8 provides that in the exercise of its powers and the performance of its duties the Corporation shall be subject to and act in accordance with such general or special directions as the Minister may issue from time to time.

Section 17 provides that the initial capital of the Corporation shall be twenty million rupees and that the amount of the initial capital shall be paid to the Corporation out of the Consolidated Fund of Ceylon, in such instalments as the Minister of Finance may in consultation with the Minister determine. It also provides that the Corporation could increase its capital with the approval of the Minister.

Section 18 provides that the Corporation shall have its own Fund, into which all the moneys of the Corporation shall be paid and out of which all sums of money required for the discharge of the liabilities of the Corporation shall be paid out.

Section 21 provides that the accounts shall be audited by an auditor appointed by the Permanent Secretary to the Ministry. Section 23 requires the Corporation to transmit the Auditor's Report with the profit and loss account and the balance sheet to which the report relates and a statement of the Corporation's activities, to the Minister, who shall cause copies thereof to be laid before Parliament.

Section 26 provides that the net annual profit of the Corporation for each financial year may be applied to such purposes as may be determined by the Corporation with the approval of the Minister.

Section 27 states that the profits of the Corporation shall be exempt from income tax.

The Insurance Corporation being a Public Corporation within the meaning of "Public Corporation" as defined by Article 170 of the Constitution, its accounts are required by Article 154 to be audited by the Auditor-General.

The totality of the legislation represents the intention and objectives of those who created and moulded the Corporation for the performance of its contemplated function of Insurance. The various sections of the Act conspicuously contain no direct indication that the Corporation is a Department of Government. On the other hand there are very many indications which deny it that status. It carries on a commercial activity. Its very name, has a commercial ring. Its powers do not identify it with the Government and in some respect preclude identification with the Government.

Section 5 which provides for the Corporation insuring the property of the State and of Heads of Government Departments against any loss caused to such Heads in their official capacity or in respect of any liability which may be incurred by the Crown etc., affords an instance of explicit differentiation between the role and personality of the Corporation on the one hand and government on the other. The Corporation carries on business on its own account and not on behalf of the State, even though according to section 33A of the Act, all liabilities of the Corporation, arising out of policies issued by the Corporation are guaranteed by the Government.

It is a matter of significance that the Corporation employs its own servants and officers and exercises disciplinary control over them. Its servants and officers do not belong to the Public Service.

By this legislation Life Insurance became a nationalised business and private enterprise was excluded from this field. Though the Government nationalised the business, it did not desire to conduct the business itself and assume the responsibility for its day-to-day administration. For this purpose Parliament created an autonomous Corporation whilst reserving sufficient power to control and guide its general policy in the Government. The object and purpose of the statute was the creation of an autonomous public body carrying on its business activity free from Ministerial control, except as to broad lines of policy. It was this freedom that was sought to be achieved by the creation of a separate legal entity in the form of a statutory Corporation. The consequence was to remove the Corporation from its character as a Government Department. In these circumstances it cannot be regarded as either a Government Department or a servant or agent of the Government so as to be identified with the Government.

Where the employer is a department of the Government no question of a separate legal entity arises. The question however becomes different when the business is carried on through a separate legal person e.g. Statutory Corporations, because in such a case the employee is a servant of a legal entity other than the Government.

During the 19th century the idea that the traditional functions of the State consisted merely of the maintenance of law and order and administration of justice within its boundaries gave way to what was designated as its secondary non-traditional functions, undertaking of activities which are part of social service, the provision to its citizens of economic security and well being. Though at one time these beneficent activities were treated as though they were unessential functions of the State, in post-war times they have over-shadowed what might be termed purely police functions of the State with the result that the State is now emerging as the potent instrument of national welfare, a transformation from a police to a welfare state entailing a great increase in the departments of government. Attempts to confine the services of the Government to those provided in the 19th century have become out of date. This extension of governmental activity has resulted in the widening of the province of government. Article 27 of the Constitution which embodies a directive principle of State policy reflects this change qualitywise in the concept of State functions. It is in pursuance of this new ideology that Governments have sponsored measures of nationalisation. The object of every measure of nationalisation is to bring a particular undertaking under public control. It would have been easy for the legislature to have brought the ownership of the assets of the nationalised industries within the extended arm of the State and to have created new Government Departments for their administration. But, for good reasons, actual ownership in the nationalised undertakings has not been vested in the State but been vested in public corporations. Under the scheme of commercial nationalisation statutory Corporations have been set up as separate legal entities to run the nationalised industries on commercial basis on their own account and not on behalf of the Government.

The State Industrial Corporations Act No. 49 of 1957 enables the establishment of Corporations with capital provided by the Government for setting up and carrying on industrial undertakings.

on a commercial footing. Each Corporation so founded is a legal person separate from its members and from the Minister. Each of the Corporations is charged with the duty of running its undertaking in an efficient manner so as to balance its income with the outgoing. In every case there is statutory provision bringing each of them under the surveillance of the Government through a responsible Minister who is empowered to give directions of a general character to the Corporation (vide section 31 of the State Industrial Corporations Act).

The keynote therefore of all the modern measures of nationalisation has been indirect control of nationalised Corporations rather than direct control through a government department. The reason for the choice of the national Corporations rather than the Government Department as an instrument for running the national industries may be traced to business expedience guided by private-enterprise motive. The Corporation so established is an independent legal entity having independent legal existence. In that set up it cannot be said to be a department of the State or its agent or organ.

Legislation is not required to empower government to carry on a business. It can do so in the exercise of its executive power. If the Government carries on such business or involves itself to a significant extent in the carrying on of such business that activity can be designated State activity bearing the stamp of executive action. For the purpose of constitutional constraints a distinction however has to be borne in mind between the government itself carrying on business through any of its departments and government delegating the carrying on of such business to a separate independent legal entity. When government carries on business by itself such business activity assumes the nature of executive action but where such business is carried on by an independent legal entity such as a Public Corporation on its own account, free from the operative control of any Minister or State official, such activity cannot be stamped 'executive action'. Article 15 (5) (a) of the Constitution provides that reasonable restrictions on the exercise and operation of the fundamental right to engage in any lawful trade or business could be prescribed in the interests of *"the carrying on by the State, a State agency or a Public Corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or*

otherwise." When Government takes up a business or trade it does that in the exercise of its executive power. But it does not follow that whatever be the instrument or agency through which the government may carry on business or trade, that should be identified with the government. The grouping together of the entities—the State, State agency and Public Corporation, in Article 15 (5) (a) is not by itself sufficient to treat a Public Corporation as an arm of the State or as a State agency. We have to examine the Constitution, powers and attributes of such an establishment to see whether it is a department or agency of the Government. The carrying on of a trade by a Public Corporation does not ipso facto render the commercial function of the Corporation a governmental action. When a business is carried on by a department of the government as in the case of the Marketing Department or the Railway the employees thereof hold under the government and not under any separate juristic entity. The reason is obvious. When the employer is a department of the Government, no question of a separate legal entity arises. The question however becomes different, when the business is carried on through a separate legal person, e.g., statutory corporation, or a company, because in such a case the employee is a servant of a legal entity other than the Government and is not a servant of the State.

Prof. Griffith and Street in their "Principles of Administrative Law" 4th Edition, at page 259–260, discussing the constitutional status of "Public Corporations" observe—"The Courts when called upon to decide whether any public body set up by statute in the last hundred years are agencies of the Crown, have found the statutes themselves singularly unhelpful and have refused to lay down definite criteria. The Court of Appeal decided in *Tamlin v. Hannaford* (3) that the Transport Commission was not the agent of the Crown, and therefore it may be assumed that none of the nationalised industries is an agent of the Crown. (The British Broadcasting Corporation, which is established by Royal Charter, is not entitled to Crown immunities because it is not an agent of the executive government. *B.B.C. v. Johns*, (4). It may be said that there are several criteria which from time to time the Judges have thought relevant. These include :—

Is the body performing a task formerly carried on by private enterprise? (*Mercy Docks & Harbour Board Trustees v. Gibbs* (5) —Per Blackburn, J.) To what extent is it subject to Ministerial

control for example, has it independent discretionary powers? (*Metropolitan Meat Industry Board v. Sheedy* (6) – per Viscount Haldane).

Must it consult a Minister before it acts? Can a Minister give directions?

Is its function one which has historically been regarded as governmental?

Is it incorporated?

Is it subject to government audit?

Is its authority general or local?

Is it a mere domestic body?

Is execution against its property allowed?

The main criterion now seems to be whether the body is performing a function analogous to that performed by the Crown servants and under some degree of control by a Minister of the Crown—*Bank Voor Handel v. Administrator of Hungarian Properties* (7).

In *Bank Voor Handel v. Administrator of Hungarian Properties* (*supra*) the question in issue was the status of the Custodian of Enemy Property, was he a servant of the Crown entitled to tax exemption. Lord Reid in the course of his judgment stated—

“In my judgment the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think immaterial, but the definition in the statute of his rights, duties and obligations is highly important.”

And Lord Asquith at page 991 stated who could for the purpose of the exemption, be considered to be a servant or agent of the Crown—

“The Court will lean against including in any of the exempted categories an aggregation of commercial undertakings brought under some degree of public statutory control; and they will (if the other requirements are satisfied) lean in favour of exemption for persons or bodies who were merely Ministerial instruments of the Crown’s will, lacking in themselves any discretion or initiative.”

In *Metropolitan Meat Industry Board v. Sheedy* (*supra*) – Viscount Haldane said: “Their Lordships agree with the view taken by the learned Judge in the Court below that no more are the appellant Board constituted under the Act of 1915, servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has the power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant body wide powers, which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.”

Thus the question whether the Insurance Corporation is a servant of the State ultimately depends on the degree of control which the State through its Ministers can exercise over it in the performance of its duties. Even if the Minister has the power to interfere with it, there is nothing in the statute which makes the acts of administration his as distinct from that of the Corporation, it is true that the Minister appoints its members and the Corporation, in the exercise of its powers and the performance of its duties, is subject to the general or special directions of the Minister. But these even when taken together, do not outweigh the fact that the Act confers on the Corporation powers, which are given to it to be exercised at its own discretion and in its name.

In *Tamlin v. Hannaford* (*supra*) Denning, L.J., delivering the judgment of the Court of Appeal held that the British Transport Commission which was a Corporation established under the Transport Act of 1947 was not a servant or agent of the Crown.

The basis of his holding was: “When Parliament intends that a new Corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board and the Town and Country Planning Act 1947.... In the absence of such express provision the proper inference in the case at any rate of a commercial corporation is that it acts on its own behalf, even

though it is controlled by a Government Department." Describing the Ministerial control of the Commission he pointed out: "The Minister is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company.... It is the Minister who appoints the directors – the members of the Commission – and fixes their remuneration. They must give him any information he wants, and lest they should not prove amenable to his suggestion as to the policy they should adopt, he is given power to give directions of general nature on matters which appear to him to affect national interest, as to which he is the sole judge and they are then bound to obey. These are great powers, but still we cannot regard the Corporation as being his agent.... In the eye of the law the Corporation is its own master.... It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not Crown property. It is as much bound by acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department, nor do its powers fall within the province of government."

In the *Ceylon Bank Employees Union v. Yatawara* (8) Sansoni, J., following Denning, L.J.'s, above statement of the law, held that the Bank of Ceylon, though all of its ordinary shares had been vested in the Government, by virtue of section 2 of the Finance Act 65 of 1961, was not a government department.

In *Trendtex Trading Corporation v. Central Bank* (9) Lord Denning states that there is no satisfactory test to discover whether a body like the Central Bank of Nigeria was an "alter ego or organ of the Government of Nigeria" except that of looking into the functions and control of the organisation. "I would look through to all the evidence to say whether the organisation was under Government control and exercised governmental functions."

In *Dahanayake v. De Silva* (10) Samarakoon, J., held that the Petroleum Corporation which was established by Act No. 28 of 1961, was an agent of the State. His process of reasoning was as follows: "It is a legal hybrid bred by the Government to enable it to engage in a commercial business – tailor-made to suit its style of business. It is a Government creation clothed with juristic personality so as to give it an aura of independence, but in reality it is just a business house doing only the State's business for and on

behalf of the State. Such a legal entity carrying on monopolistic commercial transactions for the State must necessarily be the Agent of the State ". While observing that petroleum has ceased to be a mere consumer item of private trade and was now the concern of government at both national and international level, he said that the Petroleum Corporation was created for the purpose of providing this essential service. Discussing the control exercised by the Minister over the Corporation he said—

" Most significant is the fact that the Minister has the power to fix prices at which petroleum products shall be sold and also prescribe other conditions of sale (section 66). In short the Corporation does not act like other Corporations who engage in business. Its business is mainly, if not wholly, controlled by the Minister and therefore the State. It does not have the independence in matters of business which is enjoyed by the companies formed under the Companies Ordinance. It is a well known fact that this is a monopoly business acquired by the State which is also compelled to subsidise some part of its business for the welfare of the community " .

Since the provision of petroleum was an essential service and the Minister's control of the Corporation's activity was all pervasive, the Petroleum Corporation was held to be an agent of the State. The character of the Insurance Corporation differs in material respects from that of the Petroleum Corporation. It was not created to perform and does not perform any such essential service to the community as the Petroleum Corporation. It is a legal entity created to carry on a commercial activity, namely, Insurance. It does not purport to carry on this business on behalf of the State and the extent of the control exercised by the Minister over its operation is not so far reaching and is insufficient to make it the servant or agent of the State.

Whether we apply the functional test or the governmental-control test, the Insurance Corporation cannot be identified with the Government. It cannot be regarded as its " alter ego " or organ of the State. Hence its action cannot be designated " executive or administrative action ", which only attracts Articles 17 and 126 of the Constitution.

Counsel for the petitioners referred to the judgment of this Court in *Perera v. The University Grants Commission (supra)* and stated that the University Grants Commission established by the Universities Act No.16 of 1978 had rightly been held to be an

organ or delegate of the Government for the purpose of treating its action in the matter of admission of students to the Universities, as "executive or administrative action" within the meaning of Article 126 of the Constitution. He submitted that by parity of reasoning the Insurance Corporation also should be considered an organ or delegate of the Government. I cannot agree with that submission. The concern and involvement of the State in the activity of the University Commission are far more extensive than in that of the Corporation. Further, a very important governmental function, such as University education, had been delegated to the Commission, with the State bearing the financial burden of running the Universities. The Constitutional status of the University Commission cannot be approximated to that of the Insurance Corporation.

It was contended by counsel that "executive or administrative action" cannot be equated to an act of an organ of Government. In support of the submission reference was made to certain judgments of the Indian Supreme Court reported in A.I.R. 1962, S.C. 1167 (11), A.I.R. 1962, S.C. 812 (12), A.I.R. 1958, S.C. 232, (13). In considering the persuasiveness of these judgments the wide definition of "State" contained in Article 12 of the Indian Constitution has to be borne in mind. The "State" is defined there to include "the Government, Parliament of India and the Government and legislature of each of the States and all local or other authorities within the territory or under the control of Government of India". In the perspective of such a wide definition it can be appreciated that "executive, administration action" will not be confined to actions of the organs of the government. On the basis of the Indian definition of the "State", executive or administrative action" embraces actions of authorities besides the "State" in our Constitution. There is no warrant for importing the Indian concept of "State" action based as it is on their wide definition of "State" into our Constitutional Law.

I uphold the preliminary objection raised by counsel for the 1st respondent. In view of the above conclusion it is not necessary to go into the factual merits of petitioner's complaint.

The application is therefore refused. No order is made as to costs.

COLIN-THOME, J.—I agree

SOZA, J.—I agree.

*Preliminary objection upheld and application dismissed.*