JAYAKODY

v.

SRI LANKA INSURANCE AND
ROBINSON HOTEL CO. LTD AND OTHERS

SUPREME COURT
FERNANDO, J.
WADUGODAPITIYA, J. AND
GUNASEKERA, J.
SC APPLICATION NO. 769/98
01ST MARCH, 2001

Fundamental rights - "Executive or administrative action" - Meaning of "state agency" - Whether acts of agents of "state agencies" may infringe fundamental rights - Articles 12(1) and 126 of the Constitution.

The petitioner, an employee of Robinson Club Bentota Ltd. (the 2nd respondent) complained that he had been suspended from his service by the Company by a letter signed by the 11th and 12th respondents as "Chief Accountant" and "General Manager" respectively, on account of an alleged fraud, in violation of his rights under Article 12(1) of the Constitution. A preliminary objection was taken that the application should be dismissed *in limine* as the impugned act did not constitute "executive or administrative action".

The 2nd respondent Company (a hotel enterprise) and the 1st respondent company were registered pursuant to a joint venture agreement between the Sri Lanka Insurance Corporation Ltd. (SLIC), the successor to the Insurance Corporation of Sri Lanka (ICSL) which was a public Corporation and Robinson Hotel GMBH ("Robinson"), a Corporation registered in Germany. All the shares of the SLIC are held by the Secretary to the Treasury, for and on behalf of the State and its Chairman and Directors are appointed by the State. In respect of the 1st and 2nd respondent companies ICSL was to have 80% of the issued share capital. Out of a total of five Directors, ICSL was entitled to nominate (with the approval of the relevant Minister) four Directors in the case of the 1st respondent and three Directors in the case of the 2nd respondent.

The joint venture agreement further provided that the 1st respondent would, by a lease agreement, lease the hotel to the 2nd respondent for 20 years and that the 2nd respondent would by a Management Agreement entrust the management of the hotel to Robinson. In terms of the

Management Agreement (though not formally signed) "management" included the hiring and discharge of employees.

Held :

The 2nd respondent is a State agency; that the petitioner's suspension was by the 2nd respondent and therefore, "executive or administrative action" in character; that Robinson was an agent of the 2nd respondent; and even on the assumption that suspension was by Robinson, the act of Robinson was in law the act of the 2nd respondent on the principles of the law of agency, and was, therefore, "executive and administrative" in character.

Per Fernando, J.

> "The State may set up a Corporation which it (in substance) owns and controls; that Corporation may set up a limited liability company which it (in substance) owns and controls; the company in turn may set up another company or other entity . . . and so on. But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities - every link in that chain - are State agencies" *Samson v. Sri Lanka Airlines Ltd.* SC 791/98 and SC. 798/98 SCM 11. 01. 2001 (D.B.) distinguished.

Cases referred to :

1. *Samson v. Sri Lankan Airlines Ltd.* SC 791/98 and SC 798/98 SCM 11. 01. 2001 (D.B.)
2. *Hewamallikage v. People's Bank* S.C. 291/93 SCM 14. 10. 1994
3. *Carson Cumberbatch & Co. v. Nandasena* (1973) 77 NLR 73
4. *Rajaratne v. Air Lanka* (1987) 2 SRI LR 128

APPLICATION for relief for infringement of fundamental rights (Preliminary objections)

Manohara de Silva for petitioner.

E.D. Wickremanayake with *U.A. Najeem* for 1st, 2nd, 3rd, 5th, 7th, and 9th, to 12th respondents.

K. Sripavan, Deputy Solicitor-General for 4th, 6th, 8th and 13th respondents.

Cur. adv. vult.

July 13, 2001.
FERNANDO, J.

The Petitioner alleges that his suspension from service was in violation of his fundamental right under Article 12(1). He was granted leave to proceed. At the commencement of the hearing a preliminary objection was taken that the application should be dismissed *in limine* as the impugned act did not constitute "executive or administrative action".

FACTS

The following facts are not disputed. The Sri Lanka Insurance Corporation Ltd. ("SLIC") is a private limited liability Company, being the successor to the Insurance Corporation of Sri Lanka ("ICSL"), which was a public Corporation; all the shares of SLIC are held by the Secretary to the Treasury, for and on behalf of the State; and its Chairman and Directors are appointed by the State. Robinson Hotels GMBH & Co. KG ("Robinson") is a Corporation registered in Germany. ICSL and Robinson entered into a Joint Venture Agreement dated 19. 03. 80 for the purpose of establishing "a holiday club type hotel" ("the Hotel") at Bentota. That Agreement provided for the incorporation of two private limited liability companies in Sri Lanka: the "Sri Lanka Insurance and Robinson Hotel Co. Ltd." (the 1st Respondent) for the purpose of building, owning, furnishing and equipping the Hotel, and the "Robinson Club Bentota Ltd." (the 2nd Respondent) for the purpose of operating the Hotel. In respect of both companies, ICSL was to have 80% of the issued share capital. Out of a total five Directors, the ICSL was entitled to nominate (with the approval of the relevant Minister) four Directors in the case of the 1st Respondent, and three in the case of the 2nd Respondent.

The 3rd Respondent is the Chairman, and the 5th to 9th Respondents are the Directors of SLIC. The 3rd Respondent is the Chairman, and the 5th, 7th and 9th Respondents are the Directors, of the 1st and 2nd Respondent companies, of which the 10th Respondent is an alternate Director.

The Joint Venture Agreement further provided that the 1st Respondent would, by a Lease Agreement, lease the Hotel to the 2nd Respondent for 20 years, and that the 2nd Respondent would, by a Management Agreement, entrust the management of the Hotel to Robinson. The Respondents produced a copy of the Joint Venture Agreement, to which was annexed a draft Management Agreement, which did not appear to have been signed. The original Joint Venture Agreement was later submitted for our perusal, and it then became clear that the Management Agreement was never signed. The draft included the following:

> "(The 2nd Respondent) hereby appoints ROBINSON as Manager of the Club Hotel and authorises ROBINSON to manage (the) affairs of the Club Hotel in accordance with the terms and conditions agreed below . . . (The 2nd Respondent) hereby authorises ROBINSON to undertake and conclude all the legal transactions necessary in this Agreement for and on behalf of (the 2nd Respondent) . . . (and) agrees to give any specific authority and power . . . as shall be necessary . . . to enable ROBINSON to complete all such legal contracts and enter into any agreement with any person for the purpose of carrying out the duties entrusted to ROBINSON . . .
>
> (The 2nd Respondent) will not directly encroach upon the day to day management of the Club Hotel or interfere into any matter of usual and ordinary operation and take part in its management only in the manner stipulated expressly under the terms of this Agreement . . ." (Article 1)
>
> "Throughout the Management Period (the 2nd Respondent) shall entrust to ROBINSON the exclusive management of the Club Hotel and ROBINSON shall discharge full responsibilities to the Board for the management of (the 2nd Respondent's) Club Hotel . . .
>
> Subject to the terms of this Agreement ROBINSON shall have absolute control and discretion in the management

of the Club Hotel. The control and discretion by ROBINSON shall include the use of the Club Hotel for all customary purposes, terms of admittance, charges for rooms and commercial space, entertainment and amusement, food and beverages, labour policies (including wage rates, **the hiring and discharging of employees**), and all phases of promotion and publicity relating to the Club Hotel within the general terms of the approved annual budget . . .

In the course of its management ROBINSON's particular duties shall be (a) to **select and provide the necessary staff and personnel** for the conduct of the hotel business, to conclude the contracts of employment, staff and personnel in case of necessity . . ." (Article 11) (emphasis added throughout)

Although that Agreement was never signed, it is likely - and I will assume - that the 2nd Respondent and Robinson acted on the basis set out in that Agreement.

PRELIMINARY OBJECTION

In the written submissions filed on behalf of the 1st to 3rd, 5th, 7th and 9th to 12th Respondents (whom I will refer to as "the first set of Respondents") it was contended :

"It is an admitted fact that **the Petitioner was employed by ROBINSON** and he was suspended by P5 which is signed by the 11th and 12th Respondents who were the Chief Accountant and the General Manager respectively **of the 2nd Respondent** . . .

. . . the suspension of the Petitioner's employment cannot be treated as an 'executive or an administrative' action . . . since ROBINSON is responsible for the day to day management of the Hotel including hiring and discharging of the Petitioner in terms of the Management Agreement. . . . although the Petitioner's suspension was communicated to him by the letter head of the 2nd

Respondent, **factually the said suspension was effected by ROBINSON in the course of its management decision**. Therefore this decision cannot be termed as 'executive or administrative action' since the 2nd Respondent did not participate at all in taking such a decision. Further ROBINSON is neither an agency nor an instrumentality of the State . . ."

On behalf of the other Respondents, too, it was claimed :

". . . the said termination (suspension ?) of employment of the Petitioner **by the aforesaid management company namely Robinson Hotels GMBH & Co. KG**, cannot constitute executive and administrative action . . ."

Both sets of Respondents relied on the decisions of a bench of five judges in *Samson v. Sri Lankan Airlines Ltd.*[1].

WHOSE EMPLOYEE WAS THE PETITIONER ?

It is necessary to determine whether the Petitioner was an employee of the 2nd Respondent or of Robinson.

The Management Agreement provides that Robinson may engage and nominate the "Hotel Manager" subject to the prior approval of the 2nd Respondent; and that his annual salary (and other benefits such as airfares, free accommodation, etc, for himself and his family) is to be charged to the 2nd Respondent (Article VII). Article XII provides that Robinson shall be responsible for "all travelling and other expenses incurred by **its** executives and experts except all costs incurred at the Club Hotel itself"; and that Robinson may charge the 2nd Respondent "with the real staff costs . . . of those **Robinson employees** that replace an **employee of the Club Hotel** for a limited or unlimited period".

Clearly, there were two categories of employees: "Robinson employees", whose remuneration had to be borne by Robinson; and "employees of the Club Hotel", whom the 2nd Respondent

had to remunerate and the latter included the "Hotel Manager" (presumably, this meant the General Manager).

It is admitted that the 11th and 12th Respondents were the Chief Accountant and the General Manager, respectively, **of the 2nd Respondent**. They cannot therefore be regarded as employees of Robinson.

As for the Petitioner, he averred that "in January 1996 he joined **the 2nd Respondent Company** and holds the post of Cost Controller"; that on 9. 11. 98 he was served with a letter dated 6. 11. 98 informing him of his suspension from service on account of an alleged fraud; and that no preliminary investigation had been held. That letter is on a printed letter head, which has in small type "Robinson Club Bentota Ltd." both at the top and the bottom, and in large type "Robinson Club Bentota" on top. It is addressed to the Petitioner as "Cost Controller"; and is (admittedly) signed by the 11th and 12th Respondents as "Chief Accountant" and "General Manager" respectively.

In the statement of objections filed on behalf of the first set of Respondents, and in the sole supporting affidavit of the 11th Respondent, reference was made to the Petitioner's employment **in the 2nd Respondent**; that the Petitioner was offered employment by the expatriate former Chief Accountant of the Hotel and was assigned as an assistant to the Chief Accountant; that the Petitioner was involved in the Accounts Department of **of the 2nd Respondent**; that the Petitioner's balance salary for November 1998 was available **with the 2nd Respondent** for collection; and that the 11th and 12th Respondents took the impugned decision. There was no suggestion that Robinson employed the Petitioner, or that the 11th and 12th Respondents were acting on the instructions of, or on behalf of, Robinson.

Among the documents produced by the 11th Respondent were two letters, dated 27. 2. 96 and 11. 3. 96, allegedly sent

by the "Personnel Manager" to the Petitioner reminding him to submit the originals of his certificates. These were on a printed form, headed "Robinson Club Bentota". Those two letters and the letter of suspension made no reference whatsoever to "Robinson Hotels GMBH & Co. KG", or to the Petitioner being a **Robinson** employee.

Article 11 which empowered Robinson "to select and provide the necessary staff", is capable of two interpretations: that the selected persons would thereupon become **Robinson's** employees, OR that they would become employees of **the 2nd Respondent**; or perhaps it gave Robinson an option. Whatever the correct interpretation of Article 11, there is not a scrap of evidence which suggests that the Petitioner was in fact engaged as a Robinson employee; or that Robinson (or its agents, representatives, or employees) took any part in the decision to suspend the Petitioner.

I hold that, whatever the process by which he was selected, the Petitioner was throughout an employee of the 2nd Respondent, and not of Robinson. Likewise, the 11th and 12th Respondents were also employees - high-ranking employees - of the 2nd Respondent; and it is not suggested that they had no disciplinary authority over the Petitioner. They signed the letter of suspension as Chief Accountant and General Manager **of the 2nd Respondent**. The suspension was in law the act of the 2nd Respondent, for which the 2nd Respondent alone is liable.

Bowstead (*Law of Agency*, 15th ed) refers to two relevant principles recognized by the Law of Agency :

> "An agent may be appointed for the purpose of executing any deed, or doing any other act on behalf of the principal, which the principal might himself execute, make or do; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the

principal personally, the exercise or performance of which requires a discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute, to do in person." (Article 6)

"In the absence of other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether named or unnamed, he is not liable to the third party on it. Nor can he sue the third party on it." (Article 104)

IS THE 2ND RESPONDENT A STATE AGENCY?

The 2nd Respondent was owned, as to 80%, by the State - through the ICSL and its successor SLIC; and it was likewise controlled by the State, which was assured of a majority on the Board - through nominee directors of ICSL and SLIC, appointed with the approval of the Minister. The chain of ownership and control may extend indefinitely : e. g. the State may set up a corporation which it (in substance) owns and controls; that corporation may set up a limited liability company which it (in substance) owns and controls; and that company in turn may set up another company or other entity . . . and so on. But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities - every link in that chain - are State agencies.

I hold that the 2nd Respondent is a State agency. Even if it was performing purely commercial functions, it would nevertheless be a State agency, albeit a State agency performing commercial functions.

It is pertinent to mention that according to the 11th Respondent's affidavit the Petitioner was suspended because of alleged irregularities in regard to the encashment of foreign currency under a permit issued by the Central Bank to the 2nd Respondent.

IS APPOINTMENT, DISCIPLINARY CONTROL ETC OF EMPLOYEES OF STATE AND STATE AGENCIES EXECUTIVE OR ADMINISTRATIVE ACTION?

The jurisdiction of this Court under Article 126 is confined to "executive or administrative" action. What did the Constitution contemplate by that phrase? Did it intend to include appointment, transfer, dismissal, and disciplinary control?

The answer to that question is given by Article 55(5). That was the very provision which sought to restrict judicial review of orders and decisions in regard to the appointment (etc) of public officers. However, the ouster of jurisdiction was expressly made subject to the fundamental rights jurisdiction of this Court under Article 126. If such appointment (etc) did not constitute "executive or administrative action", that reservation would have been meaningless. That reservation has meaning **only** if such appointment (etc) **is** "executive or administrative action". Article 55(5) confirms that the Constitution so intended.

I must stress that Article 55(5) preserves the jurisdiction of this Court in respect of **all** public officers - regardless of the nature of their functions. It cannot be said in relation to a public officer that his **functions** relate to commercial or business activities, and that therefore his **appointment** (or his transfer, dismissal or disciplinary control) is not "executive or administrative action".

So much for public officers. What about employees of State corporations, agencies and instrumentalities - employees who are not regarded as falling within the Constitutional definition of "public officers"? It is pertinent to cite the observations of Ismail, J. In *Samson v. Sri Lankan Airlines*, where he referred with approval to an Indian Supreme Court decision (dealing with the definition of "the State" as including "other authorities under the control of the Government of India") :

". . . if agencies and instrumentalities of the State were not held to be "other authorities", it would be the easiest thing for the government to assign to a plurality of corporations almost every State business or economic activity **and thereby cheat the people of the fundamental rights guaranteed to them.**"

The power of appointment (etc) of employees of the State is intrinsically executive or administrative in nature. Thus in *Hewamallikage v. People's Bank*,[2], I held (with Amerasinghe, J. and Goonewardene, J. agreeing) that "making an appointment is an act which is intrinsically administrative in nature". If the State decides to carry on, **directly**, some function, business or economic activity, the person employed for that purpose would enjoy the protection of the fundamental rights jurisdiction of this Court, whatever the nature of that function or activity: because their **appointment** (etc) would be "executive or administrative action". If the State decides instead to carry on that same function, business or activity **indirectly**, through a State corporation or agency, it could hardly be said that the appointment (etc) of the employees needed would not be "executive or administrative action" : that would be to cheat such employees of their fundamental rights. I hold that the appointment, transfer, dismissal, and disciplinary control of employees of the State and State agencies constitute "executive or administrative action" within the meaning of Article 126.

WHAT IF ROBINSON HAD SUSPENDED THE PETITIONER?

The Respondents claimed that it was Robinson which employed, and thereafter suspended, the Petitioner. Relying on the undisputed fact that Robinson was not a State agency, they contended that the suspension was therefore not "executive or administrative" action (citing *Samson v. Sri Lankan Airlines Ltd.*).

It is necessary to clarify the status of Robinson *vis-a-vis* the 2nd Respondent. The effect of the Management Agreement

was to confer *authority* on Robinson to *manage* the Hotel, on behalf of the 2nd Respondent, on agreed terms and conditions. Accordingly, Robinson was no more than the 2nd Respondent's agent. Furthermore, there was no agreement that Hotel staff would automatically become Robinson employees. Indeed, insofar as the Petitioner is concerned, the facts demonstrate that he was an employee of the 2nd Respondent. Even if Robinson had been involved in the selection of the Petitioner (as to which there is no evidence), the contractual relationship of employer and employee was only between the 2nd Respondent and the Petitioner (cf. *Carson Cumberbatch & Co. v. Nandasena*,[3].)

The impugned letter of suspension was not issued by Robinson, but by the 11th and 12th Respondents. Even if I were to assume that they acted on the instructions of Robinson (as to which, too, there is no evidence), and that therefore the suspension was by Robinson, nevertheless Robinson was no more than the 2nd Respondent's agent, and the principles of the Law of Agency (cited above) would apply : Robinson's act was in law the act of the 2nd Respondent.

Had the 2nd Respondent **directly** suspended the Petitioner, that would have constituted "executive or administrative" action. If the 2nd Respondent had suspended the Petitioner, **indirectly**, i. e. by acting through an admittedly "private" agent, would the suspension cease to be "executive or administrative" - although it was still, in law, the act of the 2nd Respondent? I think not. I hold that action in relation to the appointment, transfer, dismissal and disciplinary control of the 2nd Respondent's employees was "executive or administrative" action - and it made no difference whether such action was taken by the 2nd Respondent itself directly, or indirectly through its officers, agents and servants. The liabilities which direct action would attract, could not be evaded by resorting to indirect action.

It is relevant to illustrate the grave consequences of holding otherwise. A State department may engage a private agency to provide security services, or the Police may contract with a detective agency to conduct investigations into offences, or a State corporation may employ a managing agent to recruit staff. If such agencies arrest, torture or detain citizens, or deny equal treatment to them, contrary to Articles 11, 12 or 13 can the State or State corporation claim that those are not its own acts, but are the acts of a private body and therefore not "executive or administrative"? The State, and State corporations and agencies must necessarily act through officers and agents, and the acts of such officers and agents are the acts of the State, for which it is liable. As Bowstead says (p 16) :

> "the ruling notion of agency law may be said to be that the acts of a person (the agent) authorised or to be treated as authorised by another are in certain circumstances to be treated as having the same legal effect as if they had been done by that other (the principal). This is sometimes expressed by the idea that the agent's acts *are* those of the principal : *qui facit per alium facit per se.*"

That is true both in the sphere of contract and public law.

I hold that even if Robinson had suspended, or directed the suspension of the Petitioner, such suspension would be the act of the 2nd Respondent, and therefore "executive or administrative" action.

Does the judgment in **Samson v. Sri Lankan Airlines Ltd.** affect that question? That judgment dealt with two applications. The petitioner Samson :

> "sought a declaration that the letter dated 17. 11. 98 of the Chief Executive Officer **of Sri Lankan Airlines Limited**

terminating his services is null and void and that it is in violation of his fundamental right to equality under Article 12(1)." (emphasis added)

The petitioner in the other case made a similar complaint about a transfer order dated 23. 11. 98.

The Court upheld the preliminary objection taken by Sri Lankan Airlines that "the impugned acts of its management . . . do not constitute "executive or administrative action".

The background to that case may be summarized thus. Air Lanka Ltd. had been held, in *Rajaratne v. Air Lanka,*[4] to be a State agency or instrumentality. It was not suggested that that decision was wrong. In 1998 changes were effected in regard to the ownership and management of the Company, by means of a share sale agreement and a shareholders' agreement, between the Government of Sri Lanka, the Company, and Emirates, an airline company incorporated in the Emirate of Dubai. The Government retained a majority shareholding as well as a majority on the Board of Directors, while Emirates became the holder of 26% of the issued share capital. (In 1999, Air Lanka changed its name to Sri Lankan Airlines Ltd.)

Ismail, J. held that in consequence of these changes the Government had ceased to have effective control of the Board of Directors, and that :

"the management, power, control, authority over and responsibility for the business and affairs of the Company is vested with Emirates **for the implementation of an approved business plan** . . . and certain management decisions (are) vested exclusively in (Emirates) . . . " (emphasis added)

He held that the decisions complained of in that case "(remained) that of Emirates and the Government has no

control over the Board of Directors even if such decisions need the prior consent of the Board"; that Emirates was not a Government agency or instrumentality; that the Government had lost the "deep and pervasive" control exercised by it over the Company earlier; and that the action taken by Sri Lankan Airlines cannot now be designated "executive or administrative action".

It is clear that in both cases the petitioners were employees of Sri Lankan Airlines Ltd. There is no suggestion that they were ever employees of Emirates. The Company having appointed Emirates as the managers of the business and affairs of the Company, Emirates probably did have the power to dismiss, transfer, and exercise disciplinary control over the employees of the Company. But the judgment did not consider whether Emirates was acting as the agent of the Company and whether its acts (in regard to dismissal, etc,) were the acts of the Company. If the Company itself had dismissed one petitioner, and transferred the other, clearly the Company's actions would have been "executive or administrative". The fact that, instead of doing so directly, the Company did so indirectly through its agent made no difference. When this aspect of the matter arose in the course of the oral argument in the present case, my brother Gunasekera, J. (Who was one of the members of the bench in *Samson's case*) observed that that aspect of the matter had not been brought to their attention in the course of the oral arguments in that case.

I must add, further, that (as the judgment states) the petitioner Samson had been dismissed by the "Chief Executive Officer **of Sri Lankan Airlines Limited**". In fact, therefore, dismissal was **not** by Emirates or its officers or employees. The act of the Chief Executive Officer of the Company was the act of the Company.

In *Samson v. Sri Lankan Airlines Ltd.* the Court did not have the occasion to consider whether Emirates was merely

the agent of the Company (having regard to the Memorandum and Articles of Association, and the relevant Shareholders Agreement), and that decision is in any event distinguishable.

ORDER

I hold that the 2nd Respondent is a State agency; that the exercise by the 2nd Respondent of the power of appointment, transfer, dismissal and disciplinary control of its employees involved "executive or administrative action"; that the Petitioner was an employee of the 2nd Respondent; that his suspension was by officers of the 2nd Respondent; that their act was in law the act of the 2nd Respondent, and therefore "executive or administrative" in character; that Robinson was an agent of the 2nd Respondent; and that even on the assumption that suspension was by Robinson (or its officers), the act of Robinson was in law the act of the 2nd Respondent, and was therefore "executive or administrative" in character.

I therefore overrule the preliminary objection, with costs in a sum of Rs 5,000 payable by the 2nd Respondent to the Petitioner.

The matter will be resumed, for hearing on the merits, on a date next term to be fixed by the Registrar.

WADUGODAPITIYA, J. - I agree.

GUNASEKERA, J. - I agree.

Preliminary objection overruled.