

LEO SAMSON

v.

SRI LANKAN AIRLINES LTD AND OTHERS

SUPREME COURT

S.N. SILVA, CJ.

P.R.P. PERERA, J.

BANDARANAYAKE, J.

GUNASEKERA, J. AND

ISMAIL, J.

SC (FR) APPLICATION NO. 791/98 AND

SC (FR) APPLICATION NO. 797/98

6TH SEPTEMBER AND 13TH NOVEMBER, 2000

Fundamental rights - Rights of employees of Sri Lankan Airlines Ltd - Termination of services - Posting of an officer as Manager, Kuwait - Shareholders Agreement between the Government and Emirates Airlines - Whether in view of the agreement and amended Articles of Association of Air Lanka, the impugned acts constitute "executive or administrative action" - Article 12(1) of the Constitution.

The petitioner in Application No. 791/98 alleged that the termination of his services by letter dated 17. 11. 98 addressed to him by the Chief Executive Officer of Sri Lankan Airlines Ltd (3rd respondent) is violative of Article 12(1) of the Constitution. The petitioner in Application No. 797/98 alleged that inter alia, his being posted as Manager, Kuwait is violative of Article 12(1) of the Constitution.

A preliminary objection was raised on behalf of Sri Lankan Airlines (the 1st respondent) that consequent upon the Shareholders Agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka the impugned acts do not constitute "executive or administrative action." The petitioners cannot therefore invoke the fundamental rights jurisdiction of the court. By the said Agreement, Emirates agreed to purchase 40% of the shares of Air Lanka. However, it acquired only 26% of shares.

Air Lanka was subsequently renamed Sri Lankan Airways.

According to the amended Memorandum and Articles of Association, the business of the Company was to be conducted by a Board of Directors having 7 members, 4 of whom are approved by the Government, the balance 3 are appointed by Emirates (the Investor) which number

includes the Managing Director. The Investor was placed in charge of the management of the business of the Company. It was submitted on behalf of the 1st respondent that the impugned decisions remain that of the Investor and the Government has no control over the Board of Directors even if such decisions need the prior consent of the Board.

Held :

(1) "Executive or administrative action" (within the meaning of Chapter III of the Constitution) would include executive or administrative action of the State or its agents or instrumentalities.

(2) *Per* Ismail, J.

"It is clear from the provisions of the Memorandum and Articles of Association and the Shareholders Agreement that the management, power, control and authority over the business of the Company is vested in the Investor and with certain management decisions being vested exclusively in it."

(3) *Per* Ismail, J.

"Applying the test of government agency or instrumentality, it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement . . . that the Government has lost the "deep and pervasive" control exercised by it over the Company earlier. The action taken by Sri Lankan Airlines cannot now be designated "executive or administrative action."

Cases referred to :

1. *Perera v. University Grants Commission* FRD VOL(1) 103; (1978-80) 1 Sri L R 128
2. *Wijetunga v. Insurance Corporation of Sri Lanka* (1982) 1 Sri L R 1
3. *Rajasthan State Electricity Board, Jaipur v. Mohan Lal* AIR (1967) SC 1857
4. *Sukhdev Singh v. Bhagatran* AIR (1975) SC 1331
5. *R.D. Shetty v. International Airport Authority* AIR (1979) SC 1682
6. *Ajay Hasia v. Khalid Mujib* AIR 1981 SC 487
7. *Som Prakash v. Union of India* AIR 1981 SC 212
8. *Rajaratne v. Air Lanka Limited* (1987) 2 Sri L R 128 at 146
9. *Wijeratne v. The People's Bank* (1984) 1 Sri L R 1

PRELIMINARY objection to an application for relief for infringement of fundamental rights.

S.C. NO 791/98

Faisz Musthapha, P.C. with *Dr. Jayampathy Wickramaratne* and *Sanjeeewa Jayawardena* for petitioner.

Romesh de Silva, P.C. with *Palitha Kumarasinghe, Hiran de Alwis* and *Sugath Caldera* for 1st respondent.

U. Egalahewa State Counsel for Attorney-General.

S.C. NO 797/98

D.S. Wijesinghe, P.C. with *Sanjeeewa Jayawardena* and *Ms. Priyadharshini Dias* for petitioner.

Romesh de Silva, P.C. with *Palitha Kumarasinghe, Hiran de Alwis* and *Sugath Caldera* for 1st, 3rd, 5th, 7th and 8th respondents.

U. Egalahewa State Counsel for Attorney-General.

Cur. adv. vult.

January 11, 2001.

ISMAL, J.

The petitioner in SC (FR) Application No . 791/98 has 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) of the Constitution.

The petitioner in SC (FR) Application 797/98 has sought, inter alia, a declaration that his promotion to Grade MII be ante-dated to take effect from May 1995 instead of April 98; that he be reverted to his substantive post as Route Manager, Middle East and Asia, and that his posting as Manager, Kuwait, referred to in the directive dated 23. 11. 98, be

declared null and void and that his fundamental right to equality guaranteed to him under Article 12(1) of the Constitution has been violated;

These two Applications were taken up together in view of the preliminary objection raised on behalf of Sri Lankan Airlines Limited that the impugned acts of its management, referred to in the respective petitions, do not constitute 'executive or administrative action' and that the petitioners cannot therefore invoke the fundamental rights jurisdiction of this court.

The jurisdiction of the Supreme Court to grant relief against any infringement or imminent infringement of fundamental rights recognized by Chapter 111 of the Constitution is restricted to cases of such interference by executive or administrative action. The expression 'executive or administrative' action has not been defined. However, the trend of our decisions has been to construe it as being equivalent to actions of the government or of an organ or instrument of the government. In *Perera v. University Grants Commission*⁽¹⁾, it was observed that the expression executive or administrative action would include "executive or administrative action of the State or its agencies or instrumentalities".

It was pointed out in *Wijetunga v. Insurance Corporation of Sri Lanka*⁽²⁾, that Article 4(d) of the Constitution mandated all organs of the Government to respect, secure and advance the fundamental rights enshrined in it and that "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." While there can be no doubt that the expression would include official acts of all government departments and its officers, a problem could be envisaged when the acts of entities other than that of the government are being questioned.

In India the meaning of "other authorities" which fall within the definition of State in Article 12, which reads as follows, has been considered in several cases.

"In this Part, unless the context otherwise requires, 'the State' includes (i) the Government and Parliament of India. (ii) the Government and the legislature of each State and (iii)(a) all local or other authorities within the territory of India. (b) all local or other authorities under the control of the Government of India."

The majority judgment in *Rajasthan State Electricity Board, Jaipur v. Mohan Lal*⁽³⁾, adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law".

Ray C.J. adopted this in his judgment in *Sukhdev Singh v. Bhagatram*⁽⁴⁾. Mathew, J. observed, in a concurring judgment, that the concept of 'State' has changed radically in recent years. He said:

"the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State."

This doctrine of agency and state instrumentality was adopted in *R.D. Shetty v. International Airport Authority*⁽⁵⁾. Bhagwati, J. said;

“While accepting the test laid down in *Rajasthan Electricity Board v. Mohan Lal*(supra) and followed by Ray C.J. in *Sukhdev Singh v. Bhagatram*(supra), we would, for reasons already discussed, prefer to adopt the test of Governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority falls within the definition of ‘State.’ If a statutory corporation, body or other authority is an instrumentality or agency of Government, it would be an ‘authority’ and therefore ‘State’ within the meaning of that expression in Article 12.”

In *Ajay Hasia v. Khalid Mujib*⁽⁶⁾, Bhagwati, J. while affirming the broader test of agency and state instrumentality formulated by Mathew, J. in *Sukhdev*'s case added that if agencies or instrumentalities of the government 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. Bhagwati, J. then formulated the relevant tests for determining whether a corporation was an agency or instrumentality of the government adding that they were not limited in their application to a corporation created by statute but that it was equally applicable to a company or a society. According to him the factors that could be taken into account as being relevant in determining whether a corporation is an agency or instrumentality of the government are whether the entire share capital is being held by the government; whether the financial assistance being provided by the State is to the extent that it meets almost the entire expenditure of the undertaking; whether the corporation enjoys a state conferred or a state protected monopoly status and whether there is a deep and pervasive government control of the corporation.

In *Som Prakash v. Union of India*⁽⁷⁾, Krishna Iyer, J. delivering the judgment of the majority stated:

“A study of Sukdhev’s case(*supra*) . . . yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief funding source, (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by the Government and made over to a new body, and (v) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criteria although it may be an indicium.”

After a review of the Indian authorities referred to above, Atukorale, J. in *Rajaratne v. Air Lanka Limited*⁽⁸⁾, was inclined to adopt the test of governmental agency or instrumentality and was of the view that it was a more rational and meaningful test. He stated that the expression ‘executive or administrative’ action in Article 17 and 126 of our Constitution should be given a broad and not a restrictive construction. He took into account the following matters as being relevant in respect of Air Lanka Ltd, when considering a similar objection in April 1987 and concluded that its acts fell within the ambit of the expression ‘executive or administrative action’.

- (i) The subscribers to the Memorandum of Association consisted of 7 persons of whom 4 were individuals and the other three were Corporations. Three of the individuals were those who held the offices of the Secretary to the Cabinet, the Secretary to the Ministry of Finance and Planning and the Secretary to the Treasury. The three Corporations consisted of the Bank of Ceylon, the People’s Bank and the Ceylon Shipping Corporation which are semi-government organizations.
- (ii) The Board of Directors was enjoined to ensure that in the disposal or allotment of the shares the total holding of shares in the capital of the company by or on behalf of the

Government shall not be at any time less than 60% of the issued capital for the time being.

- (iii) On the basis of the Government holding of 60% of the issued capital, it was entitled to nominate a majority of Directors and the business of the company was managed by the state.
- (iv) More than 90% of the issued share capital was held directly by the Government whilst the Peoples's Bank and Bank of Ceylon held virtually the balance.
- (v) Air transport services was earlier a function that was carried on by the Government under the name of Air Ceylon through the Department of Civil Aviation.

He found that the cumulative effect of these factors and features rendered Air Lanka an agent or organ of the government and its actions were therefore designated as 'executive or administrative action'. Atukorale, J. concluded;

"All the above circumstances enumerated by me show that Air Lanka is no ordinary company. It has been brought into existence by the Government, financed almost wholly by the Government and managed and controlled by the Government through its nominee directors. It has been so created for the purpose of carrying out functions of great public importance which was once carried out by the Government"

Air Lanka was incorporated on 11. 01. 79 under the Companies Ordinance as a limited liability company and was owned solely by the Government. However, since 30. 03. 98 there has been a change in this position after the Government entered into a Share Sale and Purchase Agreement consequent to which 40% of its shares were to be sold to Emirates, a company incorporated in the Emirate of Dubai, which operates the international airline of the United Arab

Emirates. However, at present the Emirates holds only 26% of the shares of Air Lanka Limited.

The Government also entered into a Shareholders Agreement on 30. 03. 98 with Air Lanka Limited and the purchaser Emirates (Investor) for an initial period of ten years. In terms of the said Agreement, 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. Section 2.2.1 of the Agreement further provides that in matters over which the Investor exercises such power, control and authority, the Investor shall not be required to refer such matters to or seek the approval at a General Meeting of the company or the Board of Directors and that such matters shall be validly conducted without such reference or consent. It was also stipulated that for the avoidance of doubt, such power, control and authority is vested in the Investor notwithstanding its status as minority shareholder in the Company.

Air Lanka Limited changed its name to Sri Lankan Airlines Limited and it was so incorporated on 09. 05. 99.

The Memorandum and Articles of Association, as amended, provide for the business of the Company to be conducted by the Board of Directors, which consists of seven Directors, four of whom are to be appointed by the Government and three exclusively by the Investor. The Board appoints the Managing Director and a Finance Director as nominated by the Investor from among the nominee Directors appointed by the Investor. The Managing Director manages the business of the Company and is in turn accountable to the Board for its management. The senior management of the Company reports to him and he has to keep the Chairman informed and shall take his advice into consideration.

The quorum necessary for the transaction of the business of the Board is for any four Directors to be present in person.

of whom at least two must be Nominee Directors appointed by the Investor and at least two appointed by the Government. No decision can be taken at any General Meeting unless a quorum is present and it should include at least one authorized representative of the Investor. Thus the Government has no control over the Board as the decisions of the Board have to be taken by both the representatives of the Government and the Investor, both voting in favour of such decision.

It is clear from the provisions of the Memorandum and Articles of Association and the Shareholders Agreement that the management, power, control and authority over the business of the Company is vested in the Investor and with certain management decisions being vested exclusively in it. Although the written consent of the Board of Directors is necessary for certain decisions, it has been pointed out that the decisions complained of in these cases do not come within the matters stipulated in the clause needing the prior consent of the Board. Such decisions remain that of the Investor and the Government has no control over the Board of Directors even if such decisions need the prior consent of the Board.

The following observations of Sharvananda, C.J. in *Wijeratne v. The People's Bank*⁽⁹⁾, can be appropriately considered in resolving the question as to whether Sri Lankan Airlines is an agency of the state or its instrumentality.

“When a corporation is wholly controlled not only in its policy making but also in the execution of its functions it would be an instrumentality or agency of the State. On the other hand, where the Directors of the Corporation, though appointed by the government with a direction to carry out governmental policies, are otherwise free from the fetters of governmental control in the discharge of their functions, the corporation cannot be treated as instrumentality or agency of the State. It is not possible to formulate an all inclusive or exhaustive test to determine whether a particular corporation is acting as an instrumentality or

agency of the government for its action to be labelled executive or administrative action. Mere finding of some control would not be determinative of the question. The existence of deep and pervasive State control may afford an indication that a corporation is a State agency.”

Applying the test of government agency or instrumentality, it is clear upon a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement referred to above that the Government has lost the “deep and pervasive” control exercised by it over the Company earlier. The action taken by Sri Lankan Airlines cannot now be designated ‘executive or administrative action’. I therefore uphold the preliminary objection and hold that this Court has no jurisdiction to entertain the Applications of the petitioners. Both Applications are accordingly dismissed without costs.

S. N. SILVA, C.J. - I agree.

P. R. P. PERERA, J. - I agree.

DR. S. A. BANDARANAYAKE, J. - I agree.

D. P. S. GUNASEKERA, J. - I agree.

*Preliminary objection upheld.
Applications dismissed.*