MALRAJ PIYASENA
v
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
UDALAGAMA, J. AND
SOMAWANSA, J.
S.C. (F.R.) APPLICATION NO. 390/2005
27TH JULY 2006

Fundamental Rights – Infringement of Article 126 of the Constitution - Is the Associated Newspapers of Ceylon Ltd. (ANCL), a Limited Liability Company amenable to fundamental rights jurisdiction - Whether the impugned acts of 7th and 8th respondents constitute executive or administrative action – Supreme Court Rules 44(1) C of the Supreme Court Rules (1990).

At the hearing two preliminary objections were raised, namely –

(a) the petitioner cannot invoke the fundamental rights jurisdiction of the Supreme Court, as the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action/actions.

(b) the petitioner has not complied with the Rule 44(1)(C) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Held:

(1) Fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision.

(2) ANCL is an instrumentality or an agency of the State, subject to direct control by the Government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution.

(3) In terms of Rule 44(1)(C), what is necessary is to tender to Court only the documents and affidavits which are available to the petitioner.

There is no compulsion in terms of Rule 44(1)(C) to make, an effort to tender documents, which are not in the possession of the petitioner. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

(4) In terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that fundamental rights guaranteed by the Constitution cannot be 'abridged', 'restricted' or 'denied' and it is evident that it would be the duty of the Supreme Court to ensure that such rights are not abridged, restricted or denied to the People.

It is not possible to restrict the applicability of fundamental rights through mere technicalities.

per Dr. Shirani Bandaranayake, J:
"The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the people. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society."

Cases referred to:

(1) *Thadchanamurthi* v *Attorney-General* FRD(1) 129.
(2) *Velmurugu* v *Attorney-General* (1981) 1 SLR 406.
(3) *Ireland* v *United Kingdom* January 18, 1978 Decisions of the European Court of Human Rights.
(4) *Mariadas* v *Attorney-General and another* FRD Vol. 2, 397.
(5) *Wijetunga* v *Insurance Corporation* (1982) 1 SLR 1.
(6) Gunawardena v Perera (1983) 1 SLR 305.
(7) *Perera* v *University Grants Commission* FRD (1) 103.
(8) *Peter Leo Fernando* v *Attorney-General and others* (1985) 2 SLR 341.
(9) *Rajaratne* v *Air Lanka Ltd.* (1987) SLR 128.
(10) *Leo Samson* v *Air Lanka* (2001) 1SLR 94.
(11) *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Company Ltd.* (2002) 1 SLR 365.
(12) *Som Prakash Rekhi* v *Union of India* AIR (1981) S.C. 212.
(13) *Sukdev Singh* v *Bhagatram* AIR (1975) S.C. 1331.
(14) *Ramana Dayaram Shetty* v *The International Air Port Authority of India* AIR (1979) S.C. 1628.
(15) *Ajay Hasia* v *Khalid Mujib* (1981) AIR S.C. 487.
(16) *Romesh Thappar* v *State of Madras* AIR (1950) SC124.

(17) *Prem Chand Garg* v *Excise Commissioner, U.P.* AIR (1963) S.C. 996.

(18) *B.V.M. Fernando and others* v *Associated Newspapers of Ceylon Ltd.* S.C. (FR) 274/2004.

APPLICATION for infringement of Fundamental Rights.

J.C. Weliamuna for petitioner.

Aravinda Athurupana for 2nd, 3rd, 4th, 5th, 7th and 8th respondents.

Cur.adv.vult.

November 23, 2006

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, an Assistant Manager Security Services (Operations) of the Associated Newspapers of Ceylon Ltd., viz., the 2nd respondent (hereinafter referred to as ANCL) alleged that by the promotion granted to the 7th respondent as manager Operations at ANCL, his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated for which this Court granted leave to proceed.

When this matter was taken up for hearing, learned Counsel for the 2nd to 5th, 7th and 8th respondents (hereinafter referred to as the learned Counsel for the 2nd respondent), took up a preliminary objection stating that ANCL is not amenable to fundamental rights jurisdiction, as ANCL, which is a limited liability Company or its officers is/are not instrumentalities of the State and that the petitioner has not filed any material to show that ANCL falls within the meaning of executive or administrative action in terms of Article 126 of the Constitution.

Accordingly learned Counsel for the 2nd respondent submitted that -

i. the petitioner should have annexed the gazette notification referred to in paragraph 3(b) of the petition to indicate that ANCL has been listed as an institution under the Ministry of Information and Media;

ii. as ANCL is a Company, the petitioner should have filed Form 48 and share certificates to indicate that the State has the majority of the shares in ANCL; and

iii. for the reasons referred to in i and ii above, learned Counsel for the 2nd respondent contended that there was non-compliance with Rule 44(1) (c) of the Supreme Court Rules of 1990.

In the circumstances, it was decided to take up the preliminary objection for consideration and both learned Counsel were so heard.

On a consideration of the preliminary objection raised by the learned Counsel for the 2nd respondent, it is apparent that his objection is based mainly on two grounds; namely

A. the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court; and

B. the petitioner has not complied with the Rule 44(1)(c) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Having stated the objections of the learned Counsel for the 2nd respondent, let me now turn to examine the said objections.

A. Whether the impugned act/s by the 2nd to 8th respondents constitute executive or administrative action

Although Article 126 of the Constitution refers to executive or administrative action, with reference to fundamental rights, the Constitution does not provide any definition to this concept. It would therefore be necessary to analyze the case law in order to consider the definition in this respect. The case law, it is to be noted, clearly indicates a gradual evolution towards broadening the concept, since the early decisions after 1978.

In *Thadchanamurthi* v *Attorney-General*(1) at 129 a very narrow view was taken while considering an infringement of fundamental rights by executive or administrative action, where it was stated that torture inflicted by police officers were unlawful and *ultra vires* of the duties of the police officers and therefore it would not amount to state action. It was also stated that the State would be liable for

the wrongs of its subordinate officials only when an 'administrative practice' had been adopted. A few years later in *Velmurugu* v *Attorney-General*[2] at 406 in the majority view it was held that if liability is to be imputed to the State it must be on the basis of an administrative practice and not on the basis of an authorization, direct or implied, or that those acts were done for the benefit of the State. However, in the minority decision, Sharvananda, J. (as he then was) had taken a broader view in giving a meaning to the phrase 'executive or administrative action' to encompass all actions by State officials. Referring to several judgments of other jurisdictions and especially the decision in *Ireland* v *United Kingdom*[3] Sharvananda, J. (as he then was) stated that,

> "There is no justification for equating 'executive or administrative action' in Article 126 to 'administrative practice' or to acts resulting from administrative practice. 'Practice' denotes 'habitual or systematic performances' and contemplates a series of similar actions. No known or limited constitution of the phrase 'executive or administrative action', which, ordinarily understood, embraces in its sweep all acts of the administration, especially when what is at stake is the subject's Constitutional remedy. In my view, all that is required of a petitioner under Article 126 is that he should satisfy this Court that the act of infringement complained of by him is the action of a State official or repository of State power. Any violation of fundamental rights by public authority, whether it be an isolated individual action or consequent to administrative practice, furnishes, in my view, sufficient basis for an application under Article 126."

This view expressed in 1981 was reiterated by Sharvananda, J., (as he then was) in *Mariadas* v *Attorney-General and another*[4] and in *Wijetunga* v *Insurance Corporation*[5] at 397. The interpretation thus propagated by Sharvananda, J. (as he then was) was again referred to in *Gunawardena* v *Perera*[6] at 305.

In *Perera* v *University Grants Commission*[7] at 103 Sharvananda, J. (as he then was), again referred to the phrase 'executive or administrative action' within the framework of Articles

17 and 126 of the Constitution and stated that,

> "The expression 'executive or administration action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions."

A Divisional Bench of this Court in *Peter Leo Fernando* v *Attorney-General and others*[8] at 341 referred to the interpretation given by Sharvananda, J. (as he then was) to the phrase 'executive or administrative action' in *Velmurugu* v *Attorney-General and others* (*supra*), *Perera* v *University Grants Commission (supra)* and in *Wijetunga* v *Insurance Corporation and another (supra)* and quoted with approval the principle, which had emerged through the aforementioned decisions in giving a meaning to the concept of 'executive or administrative action'. Colin-Thome',J. in his judgment, thus stated that the test to be applied in deciding, whether the action in question is executive or administrative, is to examine the nature of the function and the degree of control that has been exercised.

In *Rajaratne* v *Air Lanka Ltd.*[9] at 128 the question, which arose was as to whether the actions of Air Lanka Ltd., would come within the meaning of 'executive or administrative action'. Atukorale, J. after an exhaustive examination of Sri Lanka and Indian cases, took the view that the expression executive or administrative action in terms of Articles 17 and 126 of the Constitution should be given a broad construction and Air Lanka Ltd., was a Company formed by the government, owned by the government and controlled by the government and these functions render Air Lanka an agent or organ of the government, which is thereby amenable to the fundamental rights guaranteed in terms of Articles 17 and 126 of the Constitution.

The Divisional Bench decision in *Leo Samson* v *Air Lanka*[10] at 94 and the decision in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Company Ltd.*[11] at 365 on the other hand had used different parameters in deciding whether government control is exercised over a respondent Company. Accordingly in *Leo Samson's* case *(supra)*, the Court had applied the 'deep and pervasive control test' whereas in *Jayakody (supra)* the Court after examining the structure of the respondent Hotels Company had

held that although it was carrying on 'commercial functions' it would still be a State agency.

Having said that, let me now turn to examine the position of the application under review.

The petitioner in his petition had stated that the 2nd respondent is in terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No 28 of 1973 (hereinafter referred to as the Law), a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. In such circumstances could it be possible to hold that the action of the 2nd respondent comes within the purview of 'executive or administrative' in terms of Articles 17 and 126 of the Constitution?

It is not disputed that the 2nd respondent falls within the category of a Company. The chief contention of the learned Counsel for the 2nd respondent was that, since the decision of *Leo Samson (supra)*, the necessary requirement in proof of 'executive or administrative action' would be the 'deep and pervasive' test. Learned Counsel further contended that 'neither *Leo Samson's case (supra)* nor *Jayakody's case (supra)* has whittled down the requirement of deep and pervasive state control'.

In *Leo Samson's case (supra)* one of the petitioners had alleged that the termination of his services by the Chief Executive Officer of Sri Lankan Airlines Ltd was violation of Article 12(1) of the Constitution. The other petitioner had alleged, *inter alia*, that 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 that consequent to 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'. This Court held that the 'executive or administrative action' would include executive or administrative action of the State or its agents or instrumentalities. In deciding so Ismail, J. had stated that, it was 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 were vested in the Investor with certain management decisions, being vested exclusively in it.

It is thus clear that the Court had based its decision on a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement and accordingly had held that the Government had lost the 'deep and pervasive' control exercised earlier by it over the Company.

The decision in *Jayakody (supra)*, had considered the rationale of *Leo Samson (supra)* and answered in the negative the question as to whether the judgment in the latter would affect the decision taken in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd. (supra)*. The Court in *Jayakody's case (supra)* took the view that the 2nd respondent in that case is a State agency and therefore its actions are executive or administrative in character. Therefore in *Jayakody (supra)* the Court had taken the view that the test to decide whether an act comes within the purview of executive or administrative action would be to consider whether the party in question is a State agency and to consider whether the State has the effective ownership of such establishment and if so whether such an establishment would come under the category of State Agency.

Therefore it is apparent that whilst *Leo Samson (supra)* had considered the kind of control, which is necessary to come within the framework of executive or administrative action, in *Jayakody (supra)* the Court had examined the character of the establishment in order to decide whether there could be executive or administrative action carried out by such an institution. Accordingly it is apparent that the decision in *Jayakody (supra)* could be clearly distinguished from the decision in *Leo Samson's case (supra)*.

Considering the circumstances and the questions that has arisen in the present application, it is apparent that they are quite similar to the questions, which had been considered in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd. (supra)*. Moreover on such a comparison, and for the reasons aforementioned, it is also apparent that the present application could thus be distinguished from that of the decision of *Leo Samson (supra)*.

The question before this Court therefore is to examine whether ANCL, is a State Agency.

Learned Counsel for the 2nd respondent strenuously contended that ANCL is not an entity controlled by the State, but that it is a Company and its decisions cannot be questioned in terms of Article 126 of the Constitution.

It is however an accepted fact that fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision. In fact this position has been considered by Krishna Iyer,J. in *Som Prakash Rekha* v *Union of India*(12) upholding the views of Mathew, J. in his land mark decision in *Sukhdev Singh* v *Bhagatram*(13) which was adopted by Bhagwati, J. in *Ramana Dayaram Shetty* v *The International Air Port Authority of India*(14).

In *Ramana Shetty's case (supra)*, Bhagwati, J. considering the doctrine of agency propounded by Mathew, J. in *Sukhdev Singh (supra)* stated that,

> "Where a Corporation is wholly controlled by government not only in its policy making, but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government ..."

Upholding the views expressed by Mathew, J. in *Sukhdev Singh (supra)* Bhagwati, J. in the judgement of a Divisional Bench in *Ajay Hasia* v *Khalid Mujib*(15) at 487 clearly stated that,

> "The Government in many of its commercial ventures and public enterprises is resorting more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases, **the true owner is the State, the real operator is the State and the effective controllorate is the State and**

accountability for its actions to the community and the Parliament is of the State." (emphasis added).

In *Ajay Hasia (supra)* the society in question was registered under the Societies Registration Act for the purpose of establishing an Engineering College, which was sponsored, supervised and financially supported by the Government. The Indian Supreme Court held that such a society should be an instrumentality or an agency of the State.

It is therefore evident that careful attention should be given to several factors, which are relevant in considering whether a Company or a Corporation is an agency or an instrumentality of the Government. Having this in mind let me now turn to examine the status of the 2nd respondent.

It is not disputed that ANCL is a creature of a statute as its status was changed by the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973 (as amended). The preamble to this Law clearly states that it is,

> "A Law to change the status of the company carrying on business under the name of the Associated Newspapers of Ceylon Limited, to provide for the redistribution of the shares of such company, and for the reconstitution of the body responsible for the management and administration of the business and affairs of such company...."

Provision has been made in this Law that not less than 75% of the total number of all the shares of the Company to be vested in the Public Trustee on behalf of the Government (section 2(b) of the Law). Moreover, unlike the other Companies, in terms of section 17 of the Law, the Minister is empowered to make regulations for the purpose of giving full force and effect to the principles and provisions of this Law. Section 11 of the Law provides the Minister to revoke or amend the Memorandum and Articles of Association of the Company by regulation published in the Gazette.

It is pertinent to note the provisions made in terms of section 16(1) of the Law read with sections 9 to 12 of the Public Corporations (Financial Control) Act, where the accounts and property of ANCL are to be audited by the Auditor-General.

Considering the aforementioned factors, it is thus clear that ANCL is *prima facie* a statutory body with government control.

Learned Counsel for the petitioner in fact submitted that as averred in paragraph 3(b) of the affidavit of the petition, ANCL is an institution, which functions under the direct purview of the Ministry of Information and Media. The petitioner had thus averred that,

> "..... Moreover, by Order of Her Excellency the President, published in the Government Gazette (Extraordinary) of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

On a consideration of all the aforementioned facts and circumstances, it is evident that ANCL is an instrumentality or an agency of the State, subject to direct control by the government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution. Accordingly could it be said that the impugned acts by ANCL do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court? The answer to this question is clearly in the negative as it is clearly evident from the reasons aforesaid that ANCL is an authority, which falls within the parameters of an instrumentality or agency of the State.

B. Non-compliance with Rule 44(1)c of the Supreme Court Rules of 1990.

Learned Counsel for the 2nd respondent strenuously contended that the petitioner had not complied with Rule 44(1)c in reference to two matters alleged in paragraph 3(b) of his petition. Paragraph 3(b) of the petition as referred to earlier, deals with the legal status of ANCL, where the petitioner had stated that,

> "In terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Act, No. 28 of 1993 (hereinafter ANCL Act), the 2nd respondent Associated Newspapers of Ceylon Limited (hereinafter ANCL) is a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. Further

in terms of section 2(b) of the ANCL Act not less than seventy-five *per centum* of all the shares of the Company shall vest in the Public Trustee on behalf of the Government. Moreover, by Order of Her Excellency the President, published in the Government Gazette Extraordinary of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

Learned Counsel for the 2nd respondent submitted that the petitioner cannot rely on the Law by itself and submit that 75% of the shares of ANCL are held by the Public Trustee as at the date the petitioner had filed his petition.

Learned Counsel for the 2nd respondent further contended that if the petitioner had wanted to rely on share holding position, he should have filed a copy of the Annual Return of ANCL. He also submitted that if the petitioner has not annexed to the petition any such document to indicate that at least 75% of the total shares of ANCL, being vested in the Public Trustee, as at the time of the petition, that would amount to non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

Rule 44 of the Supreme Court Rules of 1990 is contained in Part IV, which deals with the applications under Article 126. Rule 44(1)(c) of the aforesaid Rules is in the following terms:

"tender in support **such petition, such affidavits and documents as are available to him**;" (emphasis added).

It is thus apparent that in terms of Rule 44(1)(c), what is necessary is to tender to Court only the documents and affidavits, which are available to the petitioner. In such circumstances could it be possible for this Court to consider that in terms of Rule 44(1)(c), the petitioner is under an obligation to tender all the relevant documents?

Rule 44(1)(c) clearly specifies that the petitioner has to tender to Court in support of his application, the petition, affidavit and other documents **as are available** to him. Thus Rule 44(1)(c) is emphatic on the point of the types of documents that should be tendered to Court. What it states is that, the petitioner should tender only the documents, which are available to him. In other words, there is **no**

compulsion in terms of Rule 44(1)(c) to make an effort to tender documents, which are not in the possession of the petitioner. What is necessary in terms of Rule 44(1)(c) is to tender all relevant documents to support the petitioner's application, that are available to him at the time of filing the application. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

The basis of this position could be clearly understood by examining the nature of the fundamental rights jurisprudence *vis a vis,* the civil and criminal litigation process.

Article 126 of the Constitution clearly states that the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution. Article 4(d) emphasizes on the exercise of sovereignty through the fundamental rights jurisdiction and states as follows:

> "the fundamental rights, which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; ...."

It is therefore to be noted that in terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that the fundamental rights guaranteed by the Constitution cannot be 'abridged, restricted or denied' and it is evident that it would be the duty of this Court to ensure that such rights are not abridged, restricted or denied to the People.

These rights, which are fundamental in nature, are inalienable as Article 3 of the Constitution clearly states that,

> "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise,"

Fundamental rights are conferred on the People, which are inalienable. Therefore such rights are to be enjoyed by them. The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the People. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society. Unlike an ordinary legal right, which is protected and enforced by the ordinary law, the fundamental rights are guaranteed and protected by the Constitution and they are available only against executive or administrative action. Referring to such fundamental rights, Patanjali Sastri, J.; (as he then was) in *Romesh Thapper v State of Madras*[16] at 124 commented that,

> "This Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

A decade later, in 1963, Gajendragadkar, J.; *Prem Chand Garg v Excise Commissioner, U.P.*[17] emphasized the important position held by the fundamental rights jurisdiction in a democratic system in the following words:

> "The fundamental right to move this Court can, therefore, be appropriately described as the cornerstone of the democratic edifice raised by the Constitution."

In such circumstances it is quite clear that it is not possible to restrict the applicability of fundamental rights through mere technicalities.

Having said that let me now turn to examine the contention of the learned Counsel for the 2nd respondent in his preliminary objection on the ground of non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

The main submission of the learned Counsel for the 2nd respondent is that,

(a) the petitioner had not filed Form 63 of the Companies Act; and

(b) the petitioner had not filed the Gazette Notification to support the submissions referred to in paragraph 3(b) of the petition.

It is not disputed that the petitioner in his petition dated 28.09.2005 referred to the legal status of the 2nd respondent in paragraph 3(b) of the petition, which paragraph was re-produced earlier. That paragraph clearly stated the number of shares that was vested with the Public Trustee and referred to the Gazette Extraordinary of 28.04.2004, where ANCL was listed as an institution under the purview of the Minister of Information and Media.

The Company Secretary of ANCL in her affidavit dated 04.01.2006, denied the averments in paragraph 3(b) and had averred that,

> "I deny the averments in paragraph 3(b) of the said petition except that the provisions of the Associated Newspapers of Ceylon Limited (Special Provisions) Act, No. 28 of 1973 are applicable to the 2nd respondent."

Paragraph 3(b) of the petition, as referred to earlier, speaks of the Law and its provisions, which states that not less than seventy-five *per centum* of its shares being vested in the Public Trustee.

It is thus evident that ANCL had not denied this position and therefore it is apparent that the reference to the Law had been sufficient to justify the proposition propounded by the petitioner.

Considering the fundamental rights jurisdiction exercised by this Court in terms of Rule 44(1)(c) of the Supreme Court Rules of 1990, it has been the practice of this Court to have a liberal approach in entertaining documents. There have been many instances, where parties have moved Court to call for necessary documents. Needless to say that, documents are necessary and vital for the purpose of ascertaining whether there has been a violation of any fundamental rights as the said jurisdiction is exercised and facts are ascertained through affidavits and

documents. It has also to be borne in mind that in terms of Article 126(2) of the Constitution that in order to exercise the fundamental rights jurisdiction, an aggrieved person should apply to this Court by way of petition **within one month** of the alleged infringement. Thus in order to advance the fundamental rights jurisdiction and also to ensure that such jurisdiction is not 'abridged, restricted or denied' to the People, it would be necessary to give a liberal and a purposive construction to Rule 44(1)(c) of the Supreme Court Rules of 1990.

Considering all the aforementioned factors, it is evident that in terms of Rule 44(1)(c), once a petitioner **has pleaded a document** in his petition he would be entitled to submit it '**as is available to him**' and with the permission of Court or move Court to call for such document.

It is also important to note that, it was the responsibility of the 2nd respondent to have disclosed relevant and material facts if they were to deny the averments of the petitioner. If the respondents were to deny the position taken by the petitioner, the onus was on the respondents to produce such material facts and disclose that to this Court. It is however not disputed that the respondents have not produced any material either to deny the contention of the petitioner or to substantiate their position. In such circumstances it would not be correct for the learned Counsel for the 2nd respondent to state that the petitioner had not complied with Rule 44(1)c as he has not filed Form 63 of the Companies Act.

Learned Counsel for the 2nd respondent also contended that the petitioner should have filed the Gazette Extraordinary of 28.04.2004 along with the petition.

As referred to earlier, the question of the aforesaid Gazette notification not being filed by the petitioner came up at the stage of hearing, when preliminary objections were raised by the learned Counsel for the 2nd respondent. Learned Counsel for the petitioner submitted that, at the time of filing the petition, a copy of the said Gazette was not available and stated that a copy would be submitted along with his written submissions. In fact the learned Counsel for the petitioner had filed a copy of the said Gazette, marked X, along with his written submissions.

In these circumstances, the objection by the learned Counsel for the 2nd respondent on the ground of non-compliance of Rule 44(1)(c) of the Supreme Court Rules of 1990 cannot be sustained.

It would be worthy to note before I part with this judgment the submission of the learned Counsel for the petitioner where he stated that, there were several cases filed against ANCL and that this Court had considered those on their merits and none had held that the actions of ANCL are not executive or administrative action in terms of Article 126 of the Constitution. He cited the recent decision by this Court in *B.V.M. Fernando and others* v *Associated Newspapers of Ceylon Limited*[18], where the Court had considered ANCL as an agent of the State.

On a consideration of all the material placed before this Court I hold that the 2nd respondent, namely the Associated Newspapers of Ceylon Ltd., is a State agency and that its actions were therefore executive or administrative in character and that the petitioner had complied with Rule 44(1)(c) of the Supreme Court Rules of 1990.

I according overrule the preliminary objection, with costs in a sum of Rs.10,000/- payable by ANCL (2nd respondent) to the petitioner. This amount to be paid within one month from today.

Since this matter cannot be concluded before this Bench, this will be listed before any Bench for hearing on the merits, on a date next term to be fixed by the Registrar of the Supreme Court.

UDALAGAMA, J. - I agree.

SOMAWANSA, J. - I agree.

Preliminary objection overruled.
Matter set down for Argument.