

VASUDEVA NANAYAKKARA
v
CHOKSY AND OTHERS
(JOHN KEELLS CASE)

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

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

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

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

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

Held

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

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

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

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

- (3) The Cabinet had not even authorized the PERC to make reconsideration as to the sale of LMSL shares. The only matter on which the Cabinet had authorized action was the liberalization of the bunkering service in the area outside the Colombo Port, which had been effectually put into cold storage by PERC. This action is not based on a lawful exercise of Executive power in terms of the PERC Act and was contrary to the decision of the Cabinet of Ministers.
- (4) All ostensible authority involves a representation by the principal as to the extent of that agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" of the principal. No public officer unless he possess some special power, can hold not on behalf the state that he or some other public officer has the right to enter into a contract in respect of the property of the state when in fact no such right exists.
- (5) The 13th Amendment provided for the exercise of legislative and executive power within a province in respect of matters in the provincial land list on a system akin to the Westminster model of government. The power reposed in the President in terms of Article 33 (d) read with section 2 of the State Lands Ordinance is circumscribed by the provisions of "Appendix II" in item 18.

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

- (6) The rule of law postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness of prerogative or wide discretionary authority on the part of the government.
- (7) The principle enunciated in Articles 3 and 4 of the Constitution is that the respective organs of government, the legislature, the executive and the judiciary are reposed power as custodians for the time being to be exercised for the people. The resources of the state are the resources of the people and the organs of state are guardians to whom the people have committed the care and preservation of these resources.

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

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

Held further

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

Per Sarath N. Silva C.J.

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

Per Sarath N. Silva C.J.

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

Per Sarath N. Silva C.J.

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

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

Cases referred to:-

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

M. A. Sumanthiran with Viran Corea for petitioner

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

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

Viraj Premasinghe for 10th respondent

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

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

22nd respondent – Nihal Sri Amarasekera in person.

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

July 21, 2008.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) fostering and accelerating the economic development of the country;*
- (b) improving the efficiency and competitiveness of the economy;*
- (c) upgrading production and services with access to international markets on a competitive basis, by the acquisition of new technology and expertise;*
- (d) developing and broadbasing the capital market and mobilizing long term private savings;*
- (e) motivating the private sector;*
- (f) augmenting the revenues of the Government, so as to enable it to better address the social agenda; (emphasis added)*

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

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

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

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

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

B. LIBERALIZATION OF BUNKERING

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

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

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

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

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

- (a) To liberalize the bunkering sector and to permit a limited number of parties to operate bunker services within the territorial waters of Sri Lanka and the Ports of Sri Lanka other than the Port of Colombo;*
- (b) For PERC to seek offers through an open tender process for the importation and marketing of marine fuel as given in section 3 above, from investors with local equity participation and the necessary technical and financial ability and experience in Bunkering;*
- (c) The GOSL to charge a licence fee from the selected operators for the use of Sri Lankan territorial waters to carry out their business;*
- (d) To authorize the Merchant Shipping Division of the Ministry of Shipping and Shipping Development in terms of the Merchant Shipping Act, No.52 of 1971 to regulate and monitor the activities of bunker operators within Sri Lanka's territorial waters;*
- (e) For PERC to initiate action accordingly and to make further recommendation to the Cabinet regarding the process to be followed.**

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

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

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

- (a) Monopoly given to Lanka Marine Services Ltd., (LMSL) should be restricted to one year within which period privatization of LMSL should be completed.*
- (b) New entrants to the bunkering sector in Sri Lanka should be allowed to sell bunkers within the territorial waters of Sri Lanka which should include the immediate vicinity of the Port of Colombo.*

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

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

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

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

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

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

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

- (i) the process of calling for tenders through an open tender to issue initially 3 licenses for the supply of bunkers within the territorial waters and Ports other than Colombo;
- (ii) the process of privatization and the removal of the monopoly given to LMSL within a period of 1 year of the operation of this partly liberalized regime as envisaged in (i) above;
- (iii) the operation of the fully liberalized regime of bunkering services after the privatization of LMSL as envisaged in (ii) above;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. VALUATION OF LMSL SHARES

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

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

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

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

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

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

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

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

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

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

E. EVALUATION BY THE TEC AND THE SHORTLISTING OF BIDDERS

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

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

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

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

Name: FAMM/John Keells Holdings Ltd.,

Submission of Information:	Form A	-	Yes
	Form B	-	Yes

Principal business activity: Marketing of fuel oil & marine lubricants

Access to refinery: Yes

Tanker company: Yes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEVIATION (i)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEVIATION (ii)

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

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

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

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

- a. All movables – prior to closing date*
- b. Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMSL:*

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

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

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

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

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

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

"Pre Bid Conference further clarification"

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

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

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

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

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

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

- i) CUF Agreement [P19 (a)]
- ii) The Share Sales and Purchase Agreement [P19(c)]
- iii) A notarial Agreement to transfer the Land (P27)

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

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

- a) that the "land was to form part of the assets of LMSL";
- b) the value of the land was taken into account in arriving at the business value of LMSL;
- c) that there was no necessity to obtain specific approval of the Cabinet since that was "implicit" in the Cabinet Memorandum that was approved;
- d) that Agreement No.538 (P27) was entered into "in order to give effect to the undertaking to transfer title of the said land"

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

However, since the bidders were put on "due diligence" to ascertain the truth of the statement in the RFP and since no commitment in this regard being made at the Pre Bid Conference as revealed in the preceding analysis, nothing would have turned only on this incorrect statement. The turning point was the communication that no additional payment will be due in respect of the land. Jayasundera had no authority whatsoever to make such a communication. Having given this assurance, Jayasundera avoided getting a separate assets and business valuations from the Chief Valuer and opted to get only a business valuation from the DFCC Bank. The Bank has quite correctly admitted before the Committee in Parliament that if a net asset valuation was requested they would have engaged the services of real estate valuer.

It is seen from the Report that the valuation of land has been done in a most cursory manner. Land has been referred to only as an item of "Residual value" with an "assumed present value." Acting on this bare statement and having carefully avoided getting a net assets valuation, Jayasundera now takes shelter for actions on the basis that the value of the land has been taken into account in the business valuation whereas he has without any authority and illegally given a prior assurance that no additional payment need be made for the land, before even the business valuation was requested.

In the Agreement to transfer P27 although the CPC is described as the Vendor, it is clear from the terms and conditions of the Agreement itself that the CPC has no title to the land. Hence the Government is brought in with an obligation to ensure the transfer of the land without any payment to JKH. The Agreement is so biased in favour of the JKH that it even includes a clause that the land should be transferred free and all associated costs should be borne by the CPC since the sale of 90% shares of LMSL to JKH was "structured" on such basis. It is significant that this "structuring" was only done in the unauthorized communication made by Jayasundera as evidenced by document Z18 and thereby an illegal obligation was cast on the Government of Sri Lanka to "ensure" the transfer of 8 Acres 2 Roods 21.44 perches of land that comes within the declared limits of the Port of Colombo free of any charge whatsoever, to JKH. The transfer has to be done within 1 year and

to add insult to injury LMSL (now owned by JKH) is entitled to enforce this Agreement by an "order for specific performance."

The alienation and disposition of the State land is a matter regulated in every step by law, and finally governed by the Constitution and cannot possibly be the subject matter of such an outrageous legal fiction as contained in the Agreement which was admittedly prepared by Jayasundera and the PERC.

JKH/LMSL pursued their "rights" under the Agreement P27 and the Government was compelled to seek extensions of the period of 1 year granted to "ensure" the transfer of the land. There were accordingly 4 amendments to the Agreement. Finally the then President made a Grant under the Public Seal of the Republic in respect of the land to LMSL under the State Lands Ordinance. The Grant P30 states that it is made in consideration of Rs. 1,199,362,500/= paid to the Republic by LMSL. It is common ground that this statement is incorrect. In fact no money was paid by LMSL to the Government. The amount is the sum as that paid on 06.09.2002 by JKH to CPC for the purchase of shares of LMSL. Hence the grant is bad in law solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents. In normal circumstances a false statement as to a payment to the Government could not be made since, it has to be verified by the Treasury. But regrettably, that check is not there since by now the same Jayasundera who was responsible for the creation of the fiction in favour of the JKH that there would be no additional payment in respect of the land, is now ensconced as the Secretary to the Treasury.

The validity of the Grant P30 has also to be examined in the light of the provisions of the 13th Amendment to the Constitution.

The 13th Amendment to the Constitution certified on 14.11.1987 provided for the establishment of Provincial Councils. Article 154 G(1) introduced by the Amendment vests legislative power in respect of the matters set out in List 1 of the Ninth Schedule (the Provincial Council List) in Provincial Councils. Article 154C vests the executive power within a Province extending to the matters in List I in the Governor to be exercised in terms of Article 154F(1) on

the advice of the Board of Ministers is collectively responsible and answerable to the Provincial Council. Thus it is seen that the 13th Amendment provides for the exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the "Westminster" model of Government. Item 18 of the Provincial Council List which relates to the subject of land reads as follows:

"Land - Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II:

Appendix II referred to in item 18 reads as follows:

"Land and Land Settlement"

"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter.

Subject as aforesaid, land shall be a Provincial Council subject, subject to the following special provisions:-

1. State land -

1.1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject;

1.2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land in accordance with the laws and statutes governing the matter.

1.3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

It is seen that the power reposed in the President in terms of Article 33 (d) of the Constitution read with section 2 of the State Lands Ordinance to make grants and dispositions of State Lands is circumscribed by the provisions of "Appendix II" cited above.

"Appendix II" in my view establishes an interactive legal regime in respect of State Land within a Province. Whilst the ultimate power of alienation and of making a disposition remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.

A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor, the Board of Ministers being responsible in this regard to the Provincial Council.

Another aspect to be considered in regard to the facts of this case is the implication of paragraph 1.1 of Appendix II. The land in question comes within the limits of the Port of Colombo in terms of the order P33, made in terms of the Sri Lanka Ports Authority Act. Ports and Harbours being a Reserved subject in terms of paragraph 1.1 above the land may be used by the Government in accordance with the provisions of the Sri Lanka Ports Authority Act. Hence when the Order P33 is subsisting it would not be lawful to alienate the land in the manner it was purported to be done in favour of LMSL.

To sum up the findings as to the alleged "Deviation" in respect of land, I hold that the Petitioner has established not only that the deviation favours JKH denying to others the equal protection of the law but also that the alienation of the extent of 8 Acres 2 Roods 21.44 perches located within the defined limits of the Port of Colombo is invalid due to the –

- a) incorrect statement in the Grant that it is made in consideration of the payment of Rs. 1,100,362,500/-.
- b) the Grant was made without the advice of the Provincial Council as required in terms of paragraph 1:3 of Appendix II of List 1 in the Ninth Schedule to the Constitution.

- c) The land comes within the defined limits of the Port of Colombo in terms and can only be used by the Government in accordance with the Sri Lanka Ports Authority Act.*

I would now deal with the third deviation that is alleged to have favoured JKH.

DEVIATION (iii)

In paragraph 24 of the petition it is alleged that although Jayasundera stated at the Pre Bid Conference that the Government would not take over any pending litigation against LMSL in clause 3.5(d) of the Share Sale and Purchase Agreement (P19(c)) entered into with JKH there is provision that any liability arising pursuant to the claim made by Oxford Jay International (Pte) Ltd., would be the responsibility of the Government.

Jayasundera has denied this allegation and stated in paragraph 27 of his affidavit that a decision was made later that an exception should be made in respect of the large amount claimed in the Oxford Jay case. Ratnayake has also denied the allegation and stated that the exception in respect of Oxford Jay case was made at a meeting of shortlisted bidders held on 24.05.2002 (vide: para 85 of the affidavit). This is confirmed by letter bearing the same day Z22 annexed to his affidavit. This is also confirmed by a copy of a letter to the same effect sent to another shortlisted bidder produced by the Petitioner himself. Hence I hold that although Jayasundera's authority to make such a concession is questionable it has in fact been made at a meeting of the shortlisted bidders at the PERC office.

G. ACCEPTANCE OF THE BID OF JKH

The undated report of the TEC had been signed presumably after the meeting on 06.06.2002. The report recommends that 6 shortlisted bidders be allowed to place financial binds on the Colombo Stock Exchange for the shares of LMSL "subject to Cabinet approval". The DFCC Bank valuation report stating a valuation for 90% of the shares in the range of Rs. 1.016 billion to Rs. 1.286 billion is dated 10.6.2002. Considering that Jayasundera and the PERC had not been authorized by the Cabinet to make even a recommendation as to the privatization of LMSL, if it was

intended to give unsolicited advice to the Cabinet, this was the appropriate stage for the matter to have been referred to the Cabinet. Instead Jayasundera appears to have taken two parallel courses of action.

Firstly, a Cabinet Memorandum dated 20.6.2002 was submitted by the 2nd respondent being the then Minister of Power and Energy. It is clear from its contents that it has been prepared on the basis of information furnished by the PERC. There is a specific reference to the shortlisting of bidders and the valuation by the DFCC Bank. Significantly, it does not refer to a valuation requested from the Chief Valuer which was not pursued. The more importantly the Memorandum makes no reference whatsoever to the previous decision of the Cabinet as regards liberalizing of the bunkering sector. Since PERC is obviously responsible for the preparation of the memorandum, the omission to refer to the previous policy decision has to be attributed to the PERC. It is manifest that the 2nd Respondent who has not filed any objections in Court, has merely adopted a draft submitted by PERC without any examination of its content.

Be that as it may if the matter was submitted to the Cabinet as alleged by the petitioner no further action could have been taken by the PERC whose sole function was to advise and assist the Government, until a decision was made in this regard by the Cabinet.

The observation made by the former President in the Memorandum dated 07.08.2002 (p14) reveals that the Memorandum of the 2nd Respondent had been circulated only on 06.08.2002. Hence there appears to have been no urgency in dealing with the matter in the Cabinet and a decision in respect of the memorandum was made only on 14.08.2002 and confirmed on 21.08.2002.

The decision states that action should be taken on the matter by the Ministry of Power and Energy.

The second course of action taken by PERC was that while its proposal was pending before the Cabinet, to finalise the sale of shares. It is clear that Jayasundera viewed the process pending before the Cabinet as a mere formality. And, acting entirely in

excess of the power vested in the PERC by Act No. 1 of 1996, he called for bids from the shortlisted parties. Thus the shortlisting done by the TEC in the faulty process referred above which favoured JKH become a *fait accompli*. Further, the valuation done by the DFCC Bank which was obtained entirely on the decision of Jayasundera after carefully avoiding a valuation being done by the Chief Valuer became a *fait accompli*. Jayasundera then, acting on his own fixed the floor price at Rs. 1.2 billion and required the bidders to furnish a bid bond for 10% of the floor price to be eligible to bid at the Stock Exchange for 90% of shares of LMSL. The terminal date for the bid bond was fixed by Jayasundera as being 10.07.2002. As at that date the Cabinet memorandum of the Minister being the 2nd Respondent had not even been circulated amongst the members of the Cabinet. But, there was a flurry of activity on the part of Jayasundera and the PERC which the Petitioner has pleaded by producing contemporaneous accounts of these events published in the Daily News Papers of 10.07.2002, 13.07.2002 and 24.07.2002 produced marked P17.

I would now advert to the events as reported in P17 that are not denied by Jayasundera. On 08.07.2008 Jayasundera had informed the bidders that they should enter into a Memorandum of Understanding (MOU) with the CPC Unions. The bidders protested to this requirement and it appears that due to the exposure in the Newspapers the bidders were summoned for a meeting at the PERC office on 10.07.2002 at 12.30 p.m. and informed that there would be no requirement to enter into such a MOU with the Unions. The complaint of the bidders published in the Newspapers is that they had time only from 1.00 p.m. to 2.00 p.m. on the 10th to furnish the bid bonds and that those with foreign collaborators could not get necessary instructions within the limited space of time. JKH was the only bidder to place the bid bond.

Jayasundera has on his own fixed the sale for bidding at the Stock Exchange for 12.07.2002 and since JKH was the only bidder to have furnished the bid bond, he decided that it was not necessary to go ahead with the bidding process and notified by letter bearing date 12.07.2002 itself to S. Ratnayake of JKH(P15(a)) that "it is proposed to conclude the transaction and signing the Agreements by July 24th 2002". Ratnayake by

letter addressed to Jayasundera bearing the same date 12.07.2002 (P15) stated that JKH is willing to conclude the transaction as set out in Jayasundera's letter.

When looking at the two letters bearing the same date one gets the impression that Jayasundera and Ratnayake sat across the table and exchanged them. Counsel for JKH submitted that they were exchanged by FAX. Jayasundera's FAX letter bears time 4.45 p.m. and Ratnayake's Fax the time 5.30. The documents have not been produced by JKH and I have noted the times based only on submissions. Whatever be the travails of other bidders, the timing fitted well to Ratnayake's affairs since according to document P37 (subsequently obtained by the petitioner from the BOI) by letter dated 11.07.2002 the BOI informed JKH that the application for tax relief in this regard has been allowed I have already under the heading "E" dealt with the false and illegal manner in which JKH secured the tax relief.

Having promptly and without reservation agreed to close the transaction by letter P16, Ratnayake continued to secure more concessions from Jayasundera as noted above by sending letter P18(a) which included the concession as to the amendment of the CUF by incorporating clause 8.2 on the basis of which JKH sought to stave off competitors as revealed in "Deviation "F" above.

It is seen from document P15(a) that Jayasundera stated that the Agreements would be signed by July 24, 2002, well before the Cabinet memorandum being circulated. He admits that PERC got all the Agreements ready pending a decision of the Cabinet. I have set out in "F" that the Agreements are heavily biased or favour JKH and have cast responsibilities on the Government of Sri Lanka that are not even referred to in the Cabinet Memorandum. Impatience of Jayasundera appears to have given way and the Agreements were in fact signed on 20.09.2002, 1 day before the Cabinet minutes were confirmed. Ironically, the decision of the Cabinet is for action to be taken by the Minister of Power and Energy and not by Jayasundera and the PERC.

Based on the preceding analysis contained in sections "A to G" I would summarise the findings as follows:

1. Lanka Marine Services Ltd. (LMSL) was a wholly owned company of the Ceylon Petroleum Corporation (CPC) which had the monopoly of supplying marine fuel (bunkers) with a well developed facility within the Port of Colombo consisting of 12 Tanks and a network of pipes connected to the "South Jetty" and the "Dolphin Berth."
2. the supply of bunkers is a lucrative business and in the year 2000/2001 LMSL made a profit of Rs. 318 million and paid Rs. 163 million as income tax;
3. that due to the unique location of the Port of Colombo the supply of bunkers could have been improved and expanded resulting in a vast economic advantage to the State.
4. that liberalization of bunkering was proposed to the Cabinet by the Minister of Shipping on 24.05.2000 and in view of concerns expressed by several Ministers the proposal was referred to a Committee of Officials including a Director of the Public Enterprise Reform Commission (PERC);
5. the Cabinet approved a careful strategy of liberalization addressing all concerns such as marine pollution and authorized PERC to recommend a process of granting 3 licenses to private sector operators to provide bunkers outside the Port of Colombo. LMSL to continue for 1 year with a monopoly in the Port of Colombo and to be privatized in a situation where the trade is fully liberalized;
6. the PERC chaired by P.B. Jayasundera failed to take action to recommend a process for the granting of 3 licenses and instead devised and carried out without any authority of Cabinet a process of the sale of 90% shares of LMSL;
7. Jayasundera nominated three persons to be on the Technical Evaluation Committee (TEC) and the then Secretary Ministry of Finance appointed three persons. But Jayasundera failed to get a Cabinet Approved Tender Board (CATB) or a Negotiating Committee (CANC) constituted. Thereby he avoided submitting this matter to the Cabinet and reserved for himself the final authority of deciding on all matters.

8. the documents clearly establish that all impugned decisions have been made entirely by Jayasundera at his discretion.
9. that the PERC Act No. 1 of 1996 empowers the Commission of which Jayasundera was Chairman only to advise and assist the Government in the matter of public enterprise reform and to act on any matter or transaction only if authorized by the Government.
10. that Jayasundera failed to take action as authorized by the Government to liberate the trade in bunkering and took action without any authorization of Government to embark on a process of selling of shares of LMSL whilst the monopoly was yet in effect operative thereby benefitting the would be purchaser of the LMSL shares.
11. that Jayasundera avoided getting a valuation of LMSL from the Chief Valuer and instead on his own without any authorization of Government secured a valuation from the DFCC Bank and took all action for the sale of shares of LMSL based entirely on that valuation.
12. that TEC erred in shortlisting the bid submitted by Fuel and Marine (FAMM being a market leader in bunkering) in collaborating with John Keells Holdings (JKH) after it was indicated that FAMM would not continue with their joint bid.
13. that JKH had made a false representation of collaboration with FAMM for the purpose of securing the 70 marks to be shortlisted. This falsity is established by a contemporaneous application made by JKH to the Board of Investment (BOI) for investment relief in which no reference is made to any foreign collaborator.
14. that JKH had an assurance that it would succeed in securing a sale of shares in its favour even before the bid contrary a misrepresentation referred above was accepted, since it made an application to the BOI well before the bidding process, on a false basis that the application is in respect of a new investment whereas the particulars in the application are referable to the business of LMSL. The Tax relief granted to KJH was not permissible under the existing Regulations

and JKH got an amendment tailor made for its purpose and secured the tax exemption. This resulted in the LMSL which was a tax paying company when owned by the CPC becoming a tax free Company when sold to JKH;

15. That Jayasundera made certain significant deviations from that stated at the Pre bid Conference that favoured JKH in particular after the bid was accepted Jayasundera agreed to the inclusion of a clause in the CUF Agreement on the basis of which LMSL owned by JKH attempted to stave off competition in the supply of bunkers by others who subsequently obtained licenses from the Minister. The clause agreed to by Jayasundera was struck down by the Court of Appeal as being illegal;
16. Jayasundera made an unauthorised and illegal representation that the land in extent 8 Acres 2 Roods 21.44 perches within the port of Colombo would be transferred to the purchaser of LMSL shares without any additional payment. Although he seeks to justify this representation on the basis that the value of the land has been taken into account in the business valuation of LMSL, on the sequence of events it is established that the representation was made by Jayasundera even before he requested a business valuation from the DFCC Bank;
17. that Jayasundera pursued the unauthorised and illegal representation as to the land by causing a Notarial Agreement to be entered in terms of which the Government of Sri Lanka is obliged to ensure the transfer of the land without payment to LMSL and the expenditure connected with the transfer has to be met by the CPC;
18. that the Grant of the said land given by the President to LMSL 2½ years later is illegal since it is contrary to the provisions of the 13th Amendment to the Constitution and in any event it contains an incorrect statement that the grant as made in consideration of the payment of Rs.1,197,362,500/- by LMSL whereas no money whatsoever was paid by LMSL.

19. that Jayasundera rushed through the bidding process by giving misleading information to bidders and purported to conclude the transaction with an exchange of letters with Ratnayake on 12.07.2002 at the time when the Proposal of the Minister in charge of the subject had not even been circulated amongst the members of the Cabinet.

On the basis of the aforesaid findings I hold that the entire process of the sale of shares of Lanka Marine Services Ltd., to John Keells Holdings has been done without lawful authority. P.B. Jayasundera being the 8th respondent and the then Chairman of the Public Enterprise Reform Commission, from the very commencement of the process, has acted outside the authority, of the applicable law being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He had not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased in favour of JKH.

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

I have to now consider the foregoing findings in relation to the alleged infringement of the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution.

Three well established aspects of our Constitutional Law have to be stated in this regard. They are:

- i) That the Rule of Law is the basis of our Constitution as affirmatively laid down in the decision of this Court in *Visvalingam v Liyanage*⁽³⁾ and *Premachandra v Jayawickrema*⁽⁴⁾ and consistently followed in several subsequent decisions. The Rule of Law "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative or wide discretionary authority on the part of the Government" (vide: Law of the Constitution

by A. Dicey – page 202). In the picturesque language of the famous British Chief Justice Lord Coke whose dicta and writings contributed to the early growth of English Constitutional Law, the principle of legality which underpins the Rule of Law assures that the powers of Government will be exercised in accordance with "the golden, and straight metwand of law" as opposed to the "uncertain and crooked cord of discretion",

- ii) that as firmly laid down in the Determination of the Divisional Bench of Seven Judges of this Court in regard to the constitutionality of the proposed 19th Amendment to the Constitution (2002 3 SLR page 85) the principle enunciated in Articles 3 and 4 of our Constitution is that the respective organs of Government, the Legislature, the Executive and the Judiciary are reposed power as custodians for the time being to be exercised for the People. In *Bulankulame and others v Secretary, Ministry of Industrial Development*⁽⁵⁾ this Court observed that the resources of the State are the "resources of the People" and the organs of State are "guardians to whom the people have committed the care and preservation" of these resources (at p. 253). That, there is a "confident expectation (trust) that the Executive will act in accordance with the law and accountably in the best interests of the people of Sri Lanka (page 258);
- iii) That there is a "positive component in the right to equality" guaranteed by Article 12(1) of the Constitution as decided in *Senarath v Chandrika Bandaranayake Kumaratunga*⁽⁶⁾ and where the Executive being the custodian of the People's power act *ultra vires* and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court.

For the reasons stated above I hold that the petitioner has a sufficient *locus standi* to institute these proceedings in the public interest and has established an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution in respect of the sale of 90% shares of Lanka Marine Services Ltd.; being a

company wholly owned by a State Corporation – the Ceylon Petroleum Corporation. That the impugned transaction and the granting of benefits to John Keells Holdings Ltd.; has been an arbitrary exercise of executive power primarily on the part of the 8th respondent P.B. Jayasundera who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission.

The defence of time bar pleaded by the respondent must necessarily fail since the impugned transfer was not conducted according to obtain material documents from sources that were not accessible to him. This is borne out by the fact that material documents P31 and P37 on which significant findings have been made were obtained from the Board of Investments after the applications was filed.

Accordingly, I overrule the objections based on *locus standi* and time bar and grant to the petitioner the relief sought in prayer (b) of the petition that there has been an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution by executive or administrative action.

Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12(1) would result in a restoration of the status *quo ante*. However, since the jurisdiction vested in this Court in terms of Article 126(4) of the Constitution is to grant relief or to make directions as it may seem just and equitable, it is open to the Court to ascertain whether the implications of the impugned executive action are severable. On a careful survey of the findings I am of the view, that the Presidential Grant of the land 8 Acres 2 Roods 21.44 Perches which is within the declared limits of the Port of Colombo; the grant of investment relief by the Board of Investments to Lanka Marine Services Ltd., resulting *inter alia* in relief from the payment of taxes that are due and, the entering into of the Common Users Facility Agreement with the Sri Lanka Ports Authority are severable from the sale of shares. Accordingly, I allow the relief prayed for in prayer (g), (h) and (i) of the prayer to the petition and declare the Presidential Grant marked P31 as null and void. The 18th, 19th, 20th and 21st respondents will vacate the land within one month from today and restore possession to Sri Lanka Ports Authority. The Common User Facility Agreement dated

20.08.2002 (P19(a)) is declared null and void and the Sri Lanka Ports Authority may enter into fresh Agreements for the use of facilities within the Port on equal terms with all parties licensed to supply bunkers.

All agreements entered into between the Board of Investment and Lanka Marine Services Ltd., are declared null and void and the Commissioner General of Inland Revenue is directed to recover all taxes due on the basis that such Agreements have not been in force.

In view of the foregoing orders I do not consider it necessary or just and equitable to make an order as regards the sale of shares *per se*.

The findings in the judgment demonstrate that the action of P.B. Jayasundera, 8th respondent has not only been arbitrary and *ultra vires* but also biased in favour of John Keells Holdings Ltd., The allegation of the petitioner that he worked in collusion with S. Ratnayake of John Keells to secure illegal advantages to the latter, adverse to the public interest is established. Accordingly I direct the 8th respondent pay a sum of Rs. 500,000/- as compensation to the State.

The 18th to 21st respondents will pay the petitioner a sum of Rs. 250,000/- as costs.

The Registrar is directed to send a copy of this judgment to the Commissioner General of Inland Revenue who is not a party to these proceedings to take action as directed above.

All parties to the proceedings will take necessary action on the basis of the findings stated above.

AMARATUNGA, J. – I agree.

BALAPATABENDI, J. – I agree.

Application allowed.