

**RAJARATNE**  
v.  
**AIR LANKA LTD. AND OTHERS**

SUPREME COURT.

ATUKORALE, J., SENEVIRATNE, J. AND H. A. G. DE SILVA, J.

S.C. APPLICATION No. 63/86.

SEPTEMBER 16, 19 AND OCTOBER 1, 2, 3 AND 20, 1986.

*Fundamental Rights—Articles 12(1), 17 and 126 of the Constitution—Equality-Discrimination.*

**(Held—Seneviratne, J. dissenting):**

Although the petitioner was better qualified and more eligible for appointment as a Flight Engineer than one Wijesinghe the latter was appointed to the post. This amounted to discrimination.

The written test set for the petitioner was intended to belittle the petitioner's qualifications while the written test set for Wijesinghe was one tailor-made to suit his special aptitudes. This amounted to differential treatment and a denial of equality of opportunity.

Air Lanka being brought into existence for carrying out a function of great public importance once carried out by the government through a statutory corporation, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors is an agency or instrumentality of the government. In reality Air Lanka is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by the company for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in the Constitution, be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of the factors and features is to render Air Lanka an agent or organ of the government. Its action can therefore be properly designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. The petitioner has established that he is entitled to relief under Article 126(4).

**Cases referred to:**

- (1) *Perera v. University Grants Commission—(1980) Vol. 1 FRD 103.*
- (2) *Wijetunga v. Insurance Corporation of Sri Lanka—[1982] 1 Sri LR 1.*
- (3) *Wijeratne v. The People's Bank—[1984] 1 Sri LR 1.*
- (4) *Ramana Dayaram Shetty v. International Airport Authority of India—AIR 1979 SC 1682.*

- (5) *Ariyapala Guneratne v. The People's Bank*—[1986] 1 Sri LR 338.
- (6) *Roberts v. Ratnayake*—[1986] 2 Sri LR 36.
- (7) *Rajasthan State Electricity Board, Jaipur v. Mohanlal*—AIR 1967 SC 1857.
- (8) *Sukhdev Singh v. Bhagatram*—AIR 1975 SC 1331.
- (9) *Ajay Hasia v. Khalid Mujub Schravardi*—AIR 1981 SC 487.
- (10) *Som Prakash Rekhi v. Union of India*—AIR 1981 SC 212.
- (11) *Sabhajit Tewari v. Union of India*—AIR 1975 SC 1329.
- (12) *Praga Tools Corporation v. C. V. Immanuel*—AIR 1969 SC 1306.
- (13) *Chandrasena and Two Others v. National Paper Corporation*—[1982] 1 Sri LR 19.
- (14) *Kerr v. Enoch Pratt Free Library*—(1945) 326 U.S. 721.
- (15) *Marsh v. Alabama*—(1946) U.S. 501.
- (16) *Heavy Engineering Mazdoor Union v. State of Bihar*—AIR 1970 SC 82.
- (17) *Gamini Samarasinghe v. Bank of Ceylon and Another*—(1980) Vol. 1 FRD 165.
- (18) *Gunasena Thenabadu v. University of Colombo and Others*—(1979) Vol. 1 FRD 63.

APPLICATION for infringement of Fundamental Rights.

*R. K. W. Goonesekera* with *S. Nandadeva* for the petitioner.

*H. L. de Silva, P.C.* with *S. L. Gunasekera* for 1, 2 and 3 respondents.

*Cur. adv. vult.*

April 3, 1987.

### ATUKORALE, J.

The petitioner was enrolled as a student in the Flight Engineer's Department, Institute of Technology, Northrop University in California, U.S.A. a premier institution providing aeronautical services approved by the Federal Aviation Agency, U.S.A.. He successfully completed the curriculum for the Boeing 727 Flight Engineer, Turbojet Rating, at the said University and was, in September 1983, awarded a certificate to this effect -P2. He was certified by the Federal Aviation Administration as having been found to be properly qualified to exercise the privileges of a Flight Engineer for Turbojet Powered (Boeing 727) aircraft -P4. In March 1984 he applied for and obtained a Flight Engineer's licence from the Department of Civil Aviation, Sri Lanka, with a Boeing 727 rating -P5. In February and again in March of the same year he applied to the 1st respondent (Air Lanka Ltd. hereinafter referred to as Air Lanka) for the position of a Flight Engineer—R9 and R10 respectively. He was interviewed but since at that time Air Lanka was concentrating on recruiting Second Officers

rather than Engineers, it was decided to review his application with the next batch of recruits. This is so expressly stated by the 2nd respondent—the Chairman and Managing Director of Air Lanka—in his letter, P11, of 28.03.1986. Then in September 1985 he re-applied for the same position. He was requested to be present for a written technical test. When he presented himself for the test, he found that he had been subjected to the same Cadet Pilot's examination as the other candidates, all of whom had applied for the post of Cadet Pilot and not Flight Engineer. He protested. He was then re-summoned to sit for a written technical test for the post of Flight Engineer which was compiled by the 3rd respondent, the Chief Flight Engineer of Air Lanka. He sat for this test on 13.1.1986. According to him, he received no official intimation of the results in consequence of which he wrote letter P10 dated 10.3.1986 to the 2nd respondent complaining, inter alia, of the unfairness of the examination that had been set by the 3rd respondent. The 2nd respondent by his letter P11 aforementioned replied that the petitioner had fared poorly at both examinations and that Air Lanka could not offer him employment.

In his application to this court he complains that he has been subjected to unequal treatment in breach of the fundamental right guaranteed by Article 12(1) of the Constitution and invokes the jurisdiction of this court under Article 126(1) thereof on the basis that such infringement was by virtue of executive or administrative action. The relief he claims is an award of damages in a sum of Rs. 1,000,000/— (One Million) for failure to recruit him in 1984 and/or 1986.

The petitioner's complaint of unjust discrimination, as presented to us at the hearing, revolves on the appointment of one Aruna Wijesinghe to the post of a Cadet Flight Engineer in Air Lanka in August 1984. It is founded on the allegation that different standards or different criteria have been adopted by Air Lanka in respect of himself and Wijesinghe in regard to recruitment for the same post, namely, that of Cadet Flight Engineer in Air Lanka. The particulars furnished by Wijesinghe in his application (Y) dated 10.7.1984 (which, incidentally, also is titled as being for the post of Flight Engineer) shows that he had been employed at Air Lanka since 11.5.1980 as an Apprentice Aircraft Maintenance Engineer. He had, inter alia, successfully completed all the basic courses for Apprentice Aircraft Maintenance Engineers conducted by Singapore Airlines, all relevant Department of Civil Aviation (Singapore) basic papers for

Licensed Aircraft Maintenance Engineers (Airframe and Engine Categories) conducted by the DCA (Singapore) and the Civil Aviation Authority (U.K.) basic technical examination for Flight Engineers Licence (including Air Law and Weight and Balance). In so far as the last technical examination is concerned, Y1 indicates that he had passed Part 1 of the examination at two sittings in August 1983 and May 1984. There is, however, nothing to show that he had completed Part 11 which required him to pass a CA 1180 Type Rating Flight Test and to satisfy the Practical Engineering requirements of 100 hours practical experience on the type required on his Flight Engineer's Licence in the 12 months preceding the issue of the Licence. The work experience gained by him, according to his application (Y) was in respect of Boeing 747 Maintenance at Singapore Airlines Maintenance Hangar. He had also worked on L1011 aircraft in Colombo and possessed, according to him, an excellent knowledge of Boeing 747 systems and their operation. At the most Wijesinghe was thus a qualified Apprentice Aircraft Maintenance Engineer – a Ground Engineer. He, however, did not possess a Flight Engineer's Licence nor had he undergone the basic training course similar to that completed by the petitioner in respect of Flight Engineers. I might add that in response to an inquiry made by the Manager, Flight Operations of Air Lanka after the filing of this application it transpired that the petitioner had completed 35 hours experience in a Boeing 727 simulator and only 1.3 flying hours.

In analysing the facts and circumstances relied on by the petitioner as constituting unjust discrimination, it is necessary to refer to certain other relevant matters. It is conceded by the 3rd respondent that the petitioner was, in view of documents P2, P2A, P3, P4 and P5, possessed of the basic qualifications of a Flight Engineer of a Boeing 727 aircraft, although his experience did not qualify him to operate solo as a Flight Engineer even on such a plane in any reputed airline. It is also not in dispute that Air Lanka at the relevant time did not operate such planes but only Boeing 747, Lockheed 1011 and Boeing 737 aircraft, Flight Engineers being required only for the first two types of aircraft. It is further in evidence that although the petitioner's qualifications did not entitle him to operate as a Flight Engineer on any of the aircraft of Air Lanka, he could, nevertheless, have qualified to do so on the successful completion of a course of training (called transitional or conversion training) pertaining to Boeing 747 and/or Lockheed 1011 aircraft. According to the 3rd respondent this training would have been of about 6 months' duration including a short period

of training in Hongkong or Singapore. According to the petitioner, however, this would not have taken more than 2 months in view of his qualifications. It is also not denied that the applications made by the petitioner to Air Lanka, although titled as being for the post of Flight Engineer, were treated and considered by Air Lanka as being for the post of Cadet Flight Engineer, just as much as Wijesinghe's application, also titled as being for the post of Flight Engineer, was treated and considered by Air Lanka as being for the post of a Cadet Flight Engineer, to which he was subsequently appointed. It is also conceded that at or about the time that Wijesinghe was recruited as a Cadet Flight Engineer, that is, in August 1984, it was known to Air Lanka that the petitioner was himself seeking the same post and that his applications made in February and March 1984 were still pending. On a consideration of the above facts and circumstances it appears to me that on the occasion that Wijesinghe was tested and appointed, the application of the petitioner was not even considered by Air Lanka. The petitioner's application was thus not considered in relation to and simultaneously with that of Wijesinghe's in spite of the fact that prima facie the petitioner was better qualified and more eligible for appointment than Wijesinghe. Learned President's Counsel for the respondents submitted that Wijesinghe was appointed as a Cadet Flight Engineer for the specific purpose of filling the vacancy created by the resignation of one Victor Hatarasinghe on 7th August 1984 who had been recruited by Air Lanka as one of the 8 Cadet Pilots, all of whom completed their ground school training and cockpit procedure training course successfully in Sri Lanka and for whom Lockheed 1011 Simulators had been reserved in Hong Kong for the purpose of imparting to them their Simulator training. Victor Hatarasinghe left the services of Air Lanka after completing his ground school and cockpit procedure training but before the commencement of his Simulator training. Since by then Wijesinghe had, it was submitted, successfully completed a course of ground school training relating to Lockheed 1011 aircraft (the course being one for Aircraft Maintenance Engineers and as such a more detailed and comprehensive course than that designed for Cadet Pilots and Cadet Flight Engineers) he was considered for appointment as a Cadet Flight Engineer and was subjected to a written examination consisting of 4 papers, in all of which he fared excellently obtaining over 82% in each paper. Wijesinghe was therefore, it was urged, appointed a Cadet Flight Engineer to fill the vacancy left by Victor Hatarasinghe. The petitioner, it was contended on behalf of the respondents, could not have been

even considered for appointment to the said vacancy for the reason that Air Lanka required a Cadet Second Officer or a Cadet Flight Engineer who could take the place of the said Hatarasinghe on the Simulator training course for which the petitioner was not qualified whilst Wijesinghe was.

I do not think there is much merit in this contention of learned President's Counsel. Wijesinghe was essentially a Ground Engineer. He did not possess even the basic qualifications of a Flight Engineer. On the contrary the petitioner was possessed of a Flight Engineer's licence although with a Boeing 727 rating. He himself had successfully completed the ground school training course designed for Flight Engineers although, perhaps, it may have been less detailed and less comprehensive than that prescribed for Maintenance Engineers. He had also completed 35 hours' experience in a Boeing 727 Simulator. Wijesinghe had no such experience at all in any type of Simulator. It would thus appear that even for the specific purpose of filling Hatarasinghe's vacancy, the petitioner was equally, if not more, eligible for consideration than Wijesinghe. The failure of the respondents to even entertain his application at that stage was therefore not one founded upon any relevant or rational ground and was discriminatory of him. The arbitrary manner in which Air Lanka has acted in the matter of selecting a candidate to fill the vacancy created by Hatarasinghe's resignation has resulted in a denial of equality to the petitioner which is violative of Article 12(1) of the Constitution. Further it is apparent that although the petitioner had made application in March 1984 and was assured that his application will be reviewed with the next batch of recruits, yet he was not summoned for any test until he re-applied in September 1985, in consequence of which he was asked to sit for a test held for the recruitment of Cadet Pilots, a post for which he had never applied nor was qualified to apply. Upon protesting at having been required to sit for such a test, he was set an examination which purportedly appertained solely to the knowledge that should be possessed by an applicant for the post of a Cadet Flight Engineer but which materially differed both in nature and content from the one set for Wijesinghe for a similar post. This in itself was unfair and discriminatory of petitioner and supports the submission of learned counsel for the petitioner that this last test was intended to belittle the petitioner's qualifications whilst the written test set for Wijesinghe was one that had been tailor-made to suit his special aptitudes. The petitioner has thus been treated differentially from and has been denied equality of opportunity with Wijesinghe. Such action

on the part of Air Lanka, assuming it to be executive or administrative action, is constitutionally impermissible as it is violative of the fundamental right guaranteed by Article 12(1) and becomes justiciable in this Court by virtue of Article 126.

The sole and exclusive jurisdiction vested in this Court by Article 126 of the Constitution to hear and determine questions relating to the infringement (actual or threatened) of fundamental rights enshrined in Chapter 111 is confined to those that arise out of executive or administrative action. In so far as fundamental rights are concerned, it is only infringement or imminent infringement by executive or administrative action which falls to be justiciable in this Court under Article 126. The question therefore arises as to what is meant by the expression 'executive or administrative action.' Our Constitution contains no definition of this expression. The trend of our decisions, however, has been to construe this expression as being equivalent to action of the Government or of an organ or instrument of the Government. In *Perera v. University Grants Commission* (S.C. Appl. No. 57/80-S.C. Mins. of 4.9.1980: Fundamental Rights Decisions of the Supreme Court, Vol. 1, p. 103 (1)) it was observed that constitutional guarantees of fundamental rights are directed against the State and its organs and that the expression 'executive or administrative action' would embrace executive or administrative action of the State or of its organs or instrumentalities. The University Grants Commission established by the University Act, No. 16 of 1978, was held by this Court to be an organ or instrumentality of the Government since the Act had assigned to the Commission certain functions pertaining to University education which were held to be important governmental functions. Hence its action in the matter of admission of students to the Universities under it was held to constitute executive or administrative action. In *Wijetunga v. Insurance Corporation of Sri Lanka* (2) it was pointed out that Article 4 (d) of the Constitution mandated all organs of the Government to respect and advance the fundamental rights enshrined in Chapter 111 and that "action by the organs of the Government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126." After a consideration of the several provisions of the Insurance Corporation Act, No. 2 of 1961, relating in particular to the constitution of the Insurance Corporation, the nature of its powers, duties and functions, the degree of Ministerial control over it and its financial resources, the Court took the view that whether the functional test or the governmental control test is applied, the

Corporation could not be identified with the Government or be regarded as its 'alter ego' or an organ of the State. The disciplinary action taken by it against some of its employees was therefore held not to constitute executive or administrative action. In *Wijeratne v. The People's Bank* (3) Sharvananda, J. observed that "the cardinal question as to whether the People's Bank is properly to be regarded as merely an instrument subservient to the State or in truth is a commercial bank not identifiable with the State has to be decided by looking into the function and control of the bank." Stating that there were several factors to be considered in determining whether a corporation is an agency or instrumentality of the Government, he cited with approval the following passage from the judgment of Bhagwathi J. in *Ramana v. International Airport Authority of India* (4) which set out some of the relevant factors, namely, "whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance, whether there is any other form of assistance given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State-protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions." Sharvananda, J. held that on the material before him the major role of the People's Bank was in the commercial sphere; that it was a commercial bank; that there was no nexus between the State and its banking activities; that the State was not involved in the Commercial activities of the bank and that such commercial activity of the bank did not qualify as State action. He therefore held that the action of the bank in re-organising its security services, being a part of its commercial activities, did not amount to executive or administrative action. In *Ariyapala Guneratne v. The People's Bank* (5) the question before this Court was whether a declaratory action could be maintained against the People's Bank for a violation of the fundamental right guaranteed by Article 18 (1) (f) of the Republican Constitution of 1972, which did not contain any provision corresponding to Article 126 of the present Constitution enabling a person aggrieved by executive or administrative action to seek redress directly in this Court. In determining whether the Bank constituted the State within the meaning of S.18(1) of the 1972 Constitution, Wanasundera, J. examined the corresponding provisions in Article 19 of the Indian Constitution, the definition of 'the State'



contained in Article 12 thereof and certain Indian decisions and observed that the Indian courts have progressively extended the concept of 'the State' to embrace almost every institution performing public functions and that State action as interpreted by Indian courts comprehended a much wider meaning than that connoted by the expression 'executive or administrative action' in Article 126. After pointing out that numerous provisions of the People's Bank Act, No. 29 of 1961, indicated a close nexus of the Bank with the Government and also Government control of the Bank, Wanasundera, J. distinguished *Wijeratne's case (supra)* and held that the People's Bank constituted the State or the Government within the meaning of S. 18 of the 1972 Constitution in so far as the matter in issue before him was concerned. He also added that in his view even under our present Constitution the concept of State was a wider concept than the expression 'executive or administrative action.' In *Roberts v. Ratnayake* (6) one matter that arose for consideration was whether a Municipal Council established under the Municipal Councils Ordinance (Chap. 252) was an organ or agency of the Government. Tambiah, J. had no hesitation in holding that a Municipal Council performed governmental functions and its action would therefore constitute executive or administrative action within Article 126. L. H. de Alwis, J. held that a Municipal Council was an organ or instrument of the State both on the functional as well as the governmental control test. We were also referred to several Indian decisions which have to be viewed in the light of the definition of 'the State' contained in Article 12 (Part III) of the Indian Constitution which runs as follows:

"In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

In *Rajasthan State Electricity Board, Jaipur v. Mohan Lal* (7) the question arose whether the Rajasthan Electricity Board was an authority within the meaning of the expression 'other authorities' in Article 12. The Electricity Act empowered the Board, *inter alia*, to give directions the disobedience of which was punishable as a criminal offence. It also invested the Board with extensive powers of control over electricity undertakings. The judgment of the majority (delivered by Bhagwati, J.) held that the expression 'other authorities' included all statutory authorities on whom powers are conferred by law and that

the conferment of a power on a statutory authority to give binding directions the disobedience of which entailed penal consequences was important as being indicative that the authority was 'the state'. The circumstance that the Board carried on an activity in the nature of trade or commerce would not indicate that it should be excluded from the ambit of 'the state'. In his concurring judgment Shah, J. held that the power of the Board to make rules and regulations and to enforce compliance with them was in substance the exercise of the sovereign power of the State delegated to the Board and that therefore the Board fell within the meaning of 'the State' as defined in the Article.

In *Sukhdev Singh v. Bhagatram* (8) the Court considered whether the Oil and Natural Gas Commission, the Life Insurance Corporation and the Industrial Finance Corporation (all statutory corporations) were authorities within the meaning of Article 12. Ray, C.J. in the course of his leading judgment commented that in the *Rajasthan Electricity Board case (supra)* "it was said that the power to give directions, the disobedience of which must be punishable as a criminal offence would furnish one of the reasons for characterising the body as an authority within the meaning of Article 12. The power to make rules or regulations and to administer or enforce them would be one of the elements of authorities contemplated in Article 12." Upon an analysis of the provisions of the statutes creating the three corporations and adopting the test aforementioned, the learned Chief Justice held that they were authorities within the meaning of Article 12. Applying this same test Mathew, J. in a separate judgment held that the Oil and Natural Gas Commission was an authority within the meaning of the expression 'other authorities' and therefore State. In so far as the other two corporations were concerned which, according to him, had no such statutory powers, he stated that the question whether a corporation set up by statute to carry on a business of public importance or which is fundamental to the life of the people is 'State' had to be decided on other considerations. After discussing several American and Indian decisions and examining the relevant provisions of the Life Insurance Corporation Act and the Industrial Finance Corporation Act, which established the Life Insurance Corporation and the Industrial Finance Corporation respectively, and which revealed that the Central Government had contributed to their original capital, that a part of their profits went to it, that they carried on businesses of great public importance, that they enjoyed total or virtual monopolies in their respective business fields and that the

Central Government exercised control over matters of policies, the learned Judge held that the two corporations were agencies or instrumentalities of the 'State' and were therefore 'State' within the meaning of Article 12.

In *Ramana Dayaram Shetty v. The International Airport Authority of India (supra)* the question as to what are the 'other authorities' referred to in Article 12 came up for consideration again. The Court (per Bhagwati, J.) referred to the decision in the *Rajasthan Electricity Board case (supra)* and said:

"The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression 'other authorities', if it has been invested with statutory power to issue binding directions to third parties the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C.J., in *Sukhdev v. Bhagat Ram (AIR 1975 SC 1331) (supra)*. Mathew, J., however, in the same case, propounded a broader test, namely, whether the statutory corporation or other body or authority, claimed to fall within the definition of 'State', is an instrumentality or agency of Government: if it is, it would fall within the meaning of the expression 'other authorities' and would be 'State'. Whilst accepting the test laid down in *Rajasthan Electricity Board v. Mohan Lal (AIR 1967 SC 1857) (supra)* and followed by Ray, C.J., in *Sukhdev v. Bhagat Ram (supra)*, we would, for reasons already discussed, prefer to adopt the test of governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority falls within the definition of 'State'. If a statutory corporation, body or other authority is an instrumentality or agency of Government, it would be an 'authority' and therefore 'State' within the meaning of that expression in Article 12."

After examining the relevant provisions of the International Airport Authority Act, 1971, relating to the establishment of the International Airport Authority of India by the Central Government, the composition of its membership, the power of the Central Government to appoint and remove the membership, the vesting in the Authority of certain properties and assets of the Central Government and of certain debts, obligations and liabilities incurred by the Central Government, the capital provided by the Central Government, the obligation of the

Authority to pay, after deducting certain charges, the balance of its annual net profits to the Central Government, the requirement to have its accounts audited by the Auditor-General and to forward the audit report to the Central Government for the purpose of placing the same before both Houses of Parliament, the provision that its officers and employees are deemed to be public officers enjoying immunity from suit, prosecution and other legal proceedings for anything done in good faith in pursuance of the Act or any rule or regulation thereunder, the power of the Central Government of temporarily divesting the Authority in certain circumstances of its management and of superceding the Authority, the power of the Central Government to give written directions from time to time on matters of policy which are binding on the Authority, the power given to the Authority of making regulations prescribing, *inter alia*, that a contravention of the same would entail penal consequences, the provision in the Act for transferring the entire department of the Central Government pertaining to the administration of airports and air navigation services to the Authority, the Court inferred that the Authority was an instrumentality or agency of the Central Government and therefore 'other authority' falling within the definition of 'the State' both on the narrow view taken by the majority in *Sukhdev's case (supra)* as also on the broader view taken therein by Mathew, J., which latter view the Court adopted as being a more satisfactory test.

In *Ajay Hasia v. Khalid Mujib (9)* the Court whilst affirming the view taken by Mathew, J. in *Sukhdev Singh's case (supra)* that the Government acting through the instrumentality or agency of corporations should be subject to the same constitutional limitations as the Government acting through the instrumentality or agency of natural persons, approved of the tests laid down in the *International Airport Authority of India case (supra)* for determining whether a corporation established by statute or incorporated under a law such as, for example under the Companies Act, is an instrumentality or agency of the Government. The Court (per Bhagwati, J.) summarised these tests as follows:

- (1) whether the entire share capital of the corporation is held by the Government. If so, it would go a long way to indicate that the corporation is an instrumentality or agency of the Government.
- (2) whether the financial assistance provided by the State is so much as to meet almost the entire expenditure of the corporation. If so, it would be indicative of the corporation being impregnated with governmental character.

- (3) whether the corporation enjoys monopoly status which is State conferred or State protected. If so, it would be a very relevant factor to be taken into consideration as being indicative that corporation is an instrumentality or agency of the Government;
- (4) whether there exists deep and pervasive State control of the corporation which would afford an indication that the corporation is a State agency or instrumentality;
- (5) whether the corporation performs functions of public importance and which are closely related to governmental functions; and
- (6) whether the corporation is one to which a department of Government has been transferred. If so, it would strongly support the inference that the corporation is an instrumentality or agency of the Government.

All the above circumstances are relevant for the purpose of determining whether a particular corporation is or is not an instrumentality or agency of the Government. Having expressed his complete approval of the formulation of the above tests in the *International Airport Authority case (supra)*, Bhagwati, J. said:

"We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company, or a company formed under the Companies Act, 1956, or it may be a society registered under the Societies Registration Act, 1860, or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12."

Having regard to the Memorandum of Association and the rules of the society made thereunder, the Court concluded that the Society registered under the Jammu and Kashmir Registration of Societies Act, 1898, which established and managed the Regional Engineering College, Srinagar, was an instrumentality or agency of the State. In reaching this conclusion the court took into consideration the fact that the society's composition was dominated by representatives appointed by the Central Government as well as certain State Governments with the approval of the Central Government; that the Central and State Governments provided the entire monies required for running the colleges; that other monies could be received by the society only with the approval of the Central and State Governments; that the rules of the society required prior approval of such Governments; that accounts of the society had to be submitted to them for their scrutiny and satisfaction; that the State Government had the power to appoint a person to review the working and progress of the society; that the State Government was empowered to give directions and take such action as it may consider necessary in consequence of such person's report which the society and the college was obliged to comply with; that the society was not competent to dispose of any of its immovable property without the approval of both Governments; that the Board of Governors in charge of the general superintendence, direction and control of the affairs of the society and of its income and property was largely controlled by nominees of both Governments. All these factors disclosed that both Governments had a deep and pervasive control of the working of the society, which was merely a 'projection' of the Central and State Governments. The society was therefore held to be an instrumentality or agency of the Central and State Governments.

In *Som Prakash v. Union of India (10)* the Burmah Shell Oil Storage Ltd. was statutorily taken over by the Central Government by virtue of the provisions of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. The Central Government then by notification, made in terms of the Act, vested the Undertaking in the 2nd respondent, a government company registered as a company under the Indian Companies Act. The question that arose was whether a writ will lie under Article 32 of the Indian Constitution against the 2nd respondent which was neither a government department nor a statutory corporation but just a company registered under the Companies Act.

After adverting to certain passages in the judgment of Mathew, J. in *Sukhdev's Case (supra)*, Krishna Iyer, J. delivering the judgment of the majority, stated:

"There is nothing in these observations to confine the concept of State to statutory corporations. Nay, the tests are common to any agency or instrumentality, the key factor being the brooding presence of the State behind the operations of the body, statutory or other.

A study of *Sukhdev's case, (supra)* (1975 3 SCR 619: AIR 1975 SC 1331) (a Constitutional Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are (1) financial resources of the State being the chief funding source, (2) functional character being governmental in essence, (3) plenary control residing in Government, (4) prior history of the same activity having been carried on by the Government and made over to the new body and (5) some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium."

Stating that the *Airport Authority of India case (supra)* was consistently and correctly decided and applying the criteria propounded therein on a cumulative basis, Krishna Iyer, J. held that the 2nd respondent which was clothed with certain rights and duties by virtue of the provisions of certain sections in the *Burmah Shell (Acquisition of Undertakings in India) Act, 1976*, was an instrumentality of the Central Government and an 'authority' and therefore 'state' within the meaning of Article 12 and a writ will lie against it under Article 32. From a perusal of the recent Indian decisions cited above it would be clear that the test formulated by Mathew, J. in *Sukhdev Singh's case (supra)*, namely, whether the corporation is an agency or instrumentality of the Government, has been accepted and adopted as the most reliable test for determining whether it is 'State' for the purposes of Part III of the Indian Constitution. If the corporate body is an instrumentality or agency of the Government then Part III will trammel its operations and actions. To ascertain whether it is an instrumentality or agency of the Government the cumulative effect of all the relevant factors have to be evaluated.

Learned counsel for the petitioner invited us to adopt this test of governmental agency or instrumentality propounded in the recent Indian decisions aforementioned as being a more rational and realistic test for determining whether the acts of a corporation, created by or under a statute, constitute executive or administrative action for the purpose of amenability to constitutional jurisdiction under Article 126. He pointed out that whilst this test has not been expressly considered in any of our decisions, its validity and cogency appear to be reflected in the decision of this court in *Wijeratne v. People's Bank (supra)*. Learned President's Counsel for the 1st to the 3rd respondents submitted that in determining the question whether a legal entity or body of persons with a *distinct legal personality and an existence separate from the Government* is amenable to the special jurisdiction under Article 126, the constitutionally correct approach would be to ascertain whether in the discharge of its functions or duties or in the exercise of its powers such entity or body has been endowed by law with any of the special powers, rights, privileges or immunities which are ordinarily attached to or enjoyed by the State. The presence of such special characteristics in such a legal entity or body, not merely in its organisational structure but also in the very modes of action, would it was submitted, render a citizen, in so far as its acts are concerned, to the same degree of vulnerability in respect of his fundamental rights as to acts of the State itself. Accordingly the necessity would arise for the protection of Court to safeguard these fundamental rights against the acts of such an entity or body for which purpose the citizen is granted a special remedy under Article 12. Learned President's Counsel therefore contended that the inquiry must be directed to ascertaining whether the legal persona shares with the State any of the attributes arising out of the latter's sovereign status thereby distinguishing it from any other legal entity or body engaged in a similar undertaking. The possession of any such unique characteristics or attributes by a legal persona would impress its acts with the character of 'executive or administrative action' within the contemplation of Article 126. Learned President's Counsel submitted that this was the decisive test for determining whether a legal entity or body is within the sphere of State agencies engaging in executive or administrative action. The other tests would not be appropriate. He maintained that Air Lanka did not possess or enjoy any special power conferred on it by law enabling it to alter the legal rights of others by its unilateral action such as, for instance, the power of compulsory acquisition or quasi judicial powers. Nor did it have any special privileges granted to it by law such



as, for instance, a right of franchise or monopoly in a field of activity which would otherwise be within the area of private enterprise or an exclusive right or monopoly of the State. Nor did it enjoy any special immunity such as immunity from taxes or rates or other impositions by the State not enjoyed by others engaged in the same activity. He also stressed that Air Lanka had no power to make regulations or by-laws affecting persons generally other than those transacting business with it and capable of enforcement through legal proceedings. It was not subject to Parliamentary control in regard to its accounts through the Auditor-General. Nor was it subject to control by the executive by virtue of a statutory provision to issue general or special directions vested in the Minister in charge of the subject of aviation. Learned President's Counsel submitted that in so far as the 'control test' was concerned, what was relevant was the existence of de jure control and not mere de facto control. Judged by the de jure control test Air Lanka was, he submitted, a fully autonomous body and its action did not constitute executive or administrative action. The de jure control test is the most important criterion and is itself a decisive test and had to be distinguished from de facto control exercised by extra legal modes. He further stressed that there were no features in Air Lanka's organisational structure which reveal any integral connection with the State, for instance, its designation as the agent of the State like the Monetary Board of the Central Bank. The very existence and origin of Air Lanka, it was pointed out, was not the outcome of State action. It is not a creature of the statute deriving therefrom its very constitution, powers, duties and functions but was set up by agreement in accordance with the provisions of the Companies Ordinance and as such was not an agency of the State. Learned President's Counsel, whilst maintaining that Indian decisions though helpful should be viewed with caution in view of the fact that the Indian definition of 'State' embraces the entire gamut of State action and not merely executive or administrative action, placed reliance on the dissenting judgment of Alagiriswami J. in *Sukhdev Singh's case* (above) and certain decisions referred to therein, e.g., *Sabhajit Tewari v. Union of India* (11) and *Praga Tools Corporation v. C. V. Immanuel* (12). These later decisions have all been examined fully and distinguished both in *Ajay Hasia's case* as well as *Som Prakash's case* and I do not think it necessary for me to burden this judgment by referring to them. The burden of learned President's Counsel argument can therefore be summarised as follows: If the legal entity against whom the complaint of infringement of fundamental rights is made is shown to be charged

with duties of a public nature and for that purpose such entity is conferred special rights, privileges or immunities, which are ordinarily not characteristic of a person or entity engaged in the same activity, and these characteristics have been conferred on the entity through legislative action of the State, then the act complained of may properly be described as executive or administrative action for the purposes of Article 126. The most practical and useful approach, according to him, is to ascertain whether the infringement has been caused by a body which is endowed by law with some part of the coercive power or special privileges enjoyed by the State. This approach has found no approval in the recent decisions of the Indian courts above-mentioned, which have consistently adopted the broader view taken by Mathew J. in *Sukhdev Singh's case*. "The concept of State has undergone drastic changes in recent years. Today state cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation"—per Mathew J. in *Sukhdev Singh's case*. Learned President's Counsel was not able to cite any local decision in support of the sovereign power test advanced by him.

The expression 'executive or administrative action' has not been defined in our Constitution. It excludes the exercise of the special jurisdiction of this court under Article 126 in respect of the acts of the legislature or the judiciary. Article 4 of the Constitution mandates that the fundamental rights enshrined in Part III 'shall be respected, secured and advanced by all the organs of the government.' An examination of our decisions indicate that this expression embraces actions not only of the government itself but also of organs, instrumentalities or agencies of the government. The government may act through the agency of its officers. It may also act through the agency of juridical persons set up by the State by, under or in accordance with a statute. The demands and obligations of the modern welfare State have resulted in an alarming increase in the magnitude and range of governmental activity. For the purpose of ensuring and achieving the rapid development of the whole country by means of public economic activity the government is called upon to embark on a multitude of commercial and industrial undertakings. In fact a stage has now been reached when it has become difficult to distinguish between governmental and non-governmental functions. This distinction is now virtually non-existent. The rigid and tardy procedures commonly associated with governmental departments and the red tapism inherent in such slow motion procedures have

compelled the government to resort to the device of public corporations to carry on these numerous commercial and industrial undertakings, which require professional skills of a highly specialised and technical nature. But by resorting to this device of the corporate entity the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance. In the circumstances I am of the opinion that the expression 'executive or administrative action' in Articles 17 and 126 of the Constitution should be given a broad and not a restrictive construction. I am therefore inclined to adopt the test of governmental agency or instrumentality propounded in the later decisions of the Indian courts as being a more rational and meaningful test than the sovereign power test relied upon by learned President's Counsel. On the application of the former test it would follow that, although the presence of any sovereign characteristics or features in the corporate body would be strongly indicative of it being an organ or agency or instrumentality of the government, yet the absence of any such characteristics or features would not by itself deprive the body of such character if it exhibits other indicative indicia enumerated in the later Indian decisions.

Having reached this conclusion I shall now proceed to examine whether Air Lanka exhibits any factors or indicia which would show that it is an organ or agency of the government always bearing in mind the matters urged by learned President's Counsel to the contrary. Air Lanka is a company incorporated under the provisions of the Companies Ordinance (Cap. 145)—vide R7. The subscribers to the Memorandum of Association (R8) consist of 7 persons of whom 4 are individuals and the other 3 are corporations. Three of the individuals are those who at the time held the offices of the Secretary of the Cabinet, the Secretary to the Ministry of Finance and Planning and the Secretary to the Treasury, all of whom in their official capacities represented the Government. The 3 corporations are the Bank of Ceylon, the Ceylon Shipping Corporation and the People's Bank, which are semi-government organisations. According to the Memorandum of Association the primary object for which Air Lanka was established is to carry on the business of a local and international airline and to operate air transport services for passengers and cargo in the Republic of Sri Lanka or any part of the world and/or to and from the Republic of Sri Lanka to any part of the world. According to its Articles of Association (which constitute its regulations) the share capital of the

company is Rs. 500,000,000 (five hundred million) with power to increase or decrease the same. The shares in the capital of the company for the time being are, unless otherwise directed by it at a general meeting, to be at the disposal of the Board of Directors but the Board is enjoined to ensure that in the disposal or allotment of the shares the total holding of shares in the capital of the company by or on behalf of the Government of Sri Lanka shall not at any time be less than 60% of the issued capital for the time being. The first Directors of the company are appointed by the Government, i.e. by the Minister in charge of aviation. The Directors shall not be less than 5 nor more than 7 in number, of whom 2 shall be elected. So long as the Government holds (whether directly or through any government institution or company) not less than 60% of the issued capital for the time being it is entitled to nominate and have on the Board a majority of the Directors, referred to as nominee Directors. Such a Director may at any time be removed from office by the Government (the Minister) and another person nominated in his place to fill the vacancy. A nominee Director (unlike an elected Director) cannot be requested in writing by his co-Directors to resign nor can he be removed from office by resolution of the company. The Chairman of the Board is appointed by the Government (the Minister). The business of the company is managed by the Board. These provisions reveal the legal and pervasive character of control which the Government exercises over the company through its nominees. The authorised capital of the company has, by 2 special resolutions, been increased from five hundred million to five thousand million rupees divided into 50,000,000 shares of Rs. 100 each. Out of this amount 32,650,005 shares have been issued as set out in the annual return of the company dated 2.1.1986 (X). Of these latter shares the Secretary to the Treasury holds 32,350,000 whilst the People's Bank and the Bank of Ceylon hold 150,000 shares each. Thus more than 99% of the issued share capital is held directly by the Government whilst the other two semi-government institutions hold virtually the balance. As pointed out by learned counsel for the petitioner, it is also significant that in this country the operation of air transport services was earlier a function that was envisaged to be carried on by the Government under the name of Air Ceylon through the Department of Civil Aviation. Subsequently Air Ceylon Ltd., a company established under the Air Ceylon Act (Cap. 280), commenced to carry on air transport services. S. 30 of this Act vested all the assets of the air undertaking of Air Ceylon in Air Ceylon Ltd. from the date of

commencement of the latter's business. Air Ceylon Ltd., just as much as Air Lanka, was empowered and authorised to operate air transport services, both local and international. In fact the objects of Air Lanka and Air Ceylon Ltd. are substantially the same. A close scrutiny of the provisions of the Air Ceylon Act point unmistakably to the fact that Air Ceylon Ltd. is an organ of the Government—vide sections 3 (4), 4, 4A, 5, 6, 7, 9, 10, 11 (a), 12, 14, 21, 22, 24, 27 (later repealed), 28, 29, 30 and 32. Hence historically the airline transport service is a function that was assigned to and an activity that was carried on by or on behalf of the Government. Air Ceylon Ltd., though its corporate shell still exists, has virtually ceased to function.

It is also relevant to note that the Air Navigation (Special Provisions) Act, No. 2 of 1982, empowered the Minister, by order published in the Gazette, to appoint "as an Agent of the Government, a company registered under the Companies Ordinance, being a company of which 95% of the shares are held by the Government and the balance shares are held by the Corporation or the body or company which operates the national airline" for certain purposes specified in the Act. "National airline" is defined in the Act as the airline for the time being designated as the national carrier of Sri Lanka. This is obviously a reference to Air Lanka which carries the national flag. This provision itself recognises a company incorporated under the Companies Ordinance being an agent of the government for certain specified purposes.

All the above circumstances enumerated by me show that Air Lanka is no ordinary company. It has been brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors. It has been so created for the purpose of carrying out a function of great public importance which was once carried out by the government through the agency of a statutory corporation. In reality Air Lanka is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by the company for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in Part III of the Constitution, be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of all the above factors and features would, in my view, render Air Lanka an agent or

organ of the government. Its action can therefore properly be designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. The petitioner has thus established that he is entitled to relief under Article 126(4).

The only other matter that remains for consideration is the nature of the relief that should be granted to him. Article 126(4) empowers this court to grant a petitioner such relief as it may deem just and equitable in the circumstances. There is no doubt that the petitioner in this case has suffered grave financial loss, particularly by way of the heavy expenditure incurred by him in obtaining his qualifications and training abroad. His hopes and aspirations of obtaining employment in the national carrier have proved abortive. I think an award of Rs. 200,000 (two hundred thousand) would be reasonable compensation to him in the circumstances of this case. I therefore make order directing the 1st respondent (Air Lanka Ltd.) to pay to the petitioner the said sum of Rs. 200,000. He will also be entitled to a further sum of Rs. 5000 as costs from the 1st, 2nd and the 3rd respondents.

### SENEVIRATNE, J.

The petitioner K. M. N. D. Rajaratne has obtained qualifications as a Flight Engineer in Air Crafts Boeing 727 from Northrop University Institute of Technology of the United States of America, an Institution approved by the Federal Aviation Agency of the United States of America. On these qualifications the petitioner has obtained a Flight Engineer's Licence in respect of Boeing 727 Aircraft, issued by the Director of Aviation, Sri Lanka under the relevant regulations of the Air Navigation Act No. 15 of 1970. By applications of March, 1984 and September 1985 the petitioner on his own applied for a post of Flight Engineer in Air Lanka Limited the 1st respondent to this application. While the petitioner's application in March 1984, on which application he was also interviewed by the 1st respondent, was pending, in August 1984, the 1st respondent Air Lanka Limited recruited as a Cadet Flight Engineer Aruna Wijesinghe, who was a trainee Ground Engineer in Air Lanka Limited. In this petition the petitioner states that the "non offer" of employment to the petitioner, who was qualified for recruitment as a Flight Engineer was discriminatory and in violation of the petitioner's fundamental rights that "all persons are equal before the law and are entitled to the equal protection of the law" as

guaranteed by Article 12(1) of the Constitution. In this application made under Article 126 of the Constitution the petitioner prays, *inter alia* :-

- (a) for an order declaring that the fundamental rights enshrined in Article 12(1) have been violated;
- (b) to direct the respondents to recruit the petitioner to the post of Flight Engineer;

and (c) for an award of damages as claimed.

I will first consider the claims of the petitioner to be appointed as a Flight Engineer in Air Lanka Limited. The petitioner in his application made in March 1984 (R10), and the later application of 17.9.85 (P6) has applied for "a post of Flight Engineer at Air Lanka". It is accepted that the 1st respondent Air Lanka treated this application as one, only, for a post of Cadet Flight Engineer for the reason that the petitioner as admitted by the 1st respondent had the basic qualifications as a Flight Engineer, but did not have the qualifications to be a Flight Engineer in the type of Air Craft then operated by Air Lanka to wit-

- (a) Boeing 747,
- (b) Lockheed 1011,
- (c) Boeing 737.

Further, in the course of the petition filed the petitioner admits that he would have qualified for a post of Flight Engineer only after a short course of what he called "Transitional Training".

The petitioner had passed the G.C.E. (Ordinary Level) Examination and in 1974, he had undergone a course of training in Flying at the Ratmalana Airport. In 1976 he had passed a technical examination and obtained a private licence. A private licence is in contra - distinction to a Commercial Pilot's Licence, which kind of licence is imperative to be a Pilot in a Commercial Air Line. In 1983 the petitioner has enrolled for a Course of Training as a Flight Engineer, in the Northrop University Institute of Technology in California, United States of America, and on completion of the Course he has been awarded a Certificate dated 17th September, 1983 (P2). Having "successfully completed the curriculum of Flight Engineer", the petitioner has also received a Certificate dated 15.9.83 (P2A) from the Flight Engineer Instructor, Northrop University, certifying that he has "successfully completed the Flight Engineering Programme". The

petitioner has obtained further certificates—Federal Aviation Administration, U.S.A. School Graduation Certificate dated 17.6.83 (P3), the Federal Aviation Agency Certificate Flight Engineer (P4), and the Flight Engineer's Licence issued by the Department of Civil Aviation Sri Lanka in March 1984 (P5).

At times relevant to this application Air Lanka had not formally called for applications for post of Cadet Flight Engineer or Flight Engineer, and both applications for post of Flight Engineer made by the petitioner referred to above have been voluntarily made by him, motivated by the desire of a young man to obtain a post suitable for his specialised field of training. When the petitioner made the first application in March 1984, he has been called for an interview, and according to the petitioner he was informed that he was fully qualified for the post, but Air Lanka was not recruiting Flight Engineers at the time, and assured that the application will be considered on a later date. The 3rd respondent Sarath Jayasuriya Chief Flight Engineer and the Flight Engineer Instructor of the 1st respondent, who has filed the main affidavit relied on by the 1st respondent has affirmed that it is most unlikely that the petitioner would have been informed that he was fully qualified, because he was not fully qualified.

In the Sunday Observer of 15.9.85 the 1st respondent by advertisement called for applications in respect of the vacancies for Cadet Pilots in Air Lanka. The notice calling for applications sets out the qualifications necessary, and terms of appointment. The notice particularly states—“candidates will be required to pass a *written test* and flying test to prove their ability” (underlined by me for the reason that the petitioner has protested that a written test was held in respect of his application for post of Flight Engineer, whereas it was not the practice of the 1st respondent Air Lanka earlier to hold a written test, and as against this the 3rd respondent in his affidavit has affirmed as to why Air Lanka began to hold written tests for the applicants at this relevant time.) At about the time the Air Lanka advertised for applications for Cadet Pilots which appeared in the press, the petitioner by his application dated 17.9.85 voluntarily applied for “a post of Flight Engineer at Air Lanka”. There is no evidence which reveals whether the petitioner was aware or not aware of the notice calling for applications for post of Cadet Pilots. But this strange coincidence between the notice calling for applications for post of Cadet Pilots, and the application by the petitioner for a post of Flight Engineer has led to



unwarranted complications and confusion, on which the petitioner bases his main claim that he was discriminated in the selection. Though the notice (P8) called for applications for Cadet Pilots, and the application (P6) by the petitioner was for a post of Flight Engineer, the petitioner received a communication from the Air Lanka Limited dated 2.12.85 (P7) with the caption "post of a Cadet Pilot", and requested the petitioner—"reference to your application for the above post call over at Flight Operations Department for a technical test on Friday 6th December, 1985". It is this particular letter (P7) that has created complications and problems which has mainly led to this application. Here, the 1st respondent Air Lanka Limited is calling an applicant for a post of Flight Engineer for a technical test in respect of the applications received for the post of Cadet Pilot, in response to the paper advertisement.

The grievance of the petitioner which has resulted from the above confusion or complication is the one set out by the petitioner at length in this application. The petitioner states that in response to the letter (P7) of 2.12.85, he presented himself for the technical test on 6.12.85, and the exam held was in respect of Cadet Pilots, for which post he did not apply. As such it was unfair by the petitioner, and also it was a wrong done to the petitioner. The 3rd respondent has further confused and complicated the matter by affirming in his first affidavit dated 5.6.86 that the "petitioner presented himself for the said technical test along with the other applicants for the post of Cadet Pilot without any protest. The 3rd respondent has further affirmed that it was "neither wrong nor unfair to subject the petitioner to the same test, as the other applicants for the post of Cadet Pilot, because the petitioner could have answered a total of 19 of the said questions which related solely to the basic knowledge of an applicant for appointment as Cadet Flight Engineer and obtained a total of 86 marks. Had the petitioner answered the said questions satisfactorily he could have been appointed a Cadet Flight Engineer". This is a fantastic explanation for a blunder made by the 1st respondent, Air Lanka, to explain how and why an applicant for the post of Flight Engineer was permitted to present himself for a post in respect of Cadet Pilots, which in the field of aeronautics are two widely different fields. The 3rd respondent further affirmed that at that test the petitioner answered only 9 questions and obtained only 19 marks, and the implication is that as such he could not be recruited as a Cadet Flight Engineer. These affirmations are made in paragraphs 8:1, 8:2

and 8:3 in an attempt for irresponsible justification of a patent blunder by the 1st respondent, whereas the 1st respondent should have frankly admitted that it was an administrative blunder in respect of this test and that when the petitioner pointed out this blunder and the wrong done to the petitioner, the position was corrected by holding a second test meant for a Cadet Flight Engineer in respect of only this petitioner. After the petitioner pointed out that he was called for a test for Cadet Pilots, the 1st respondent remedied this position by calling the petitioner by letter dated 1.1.86 (P9) to present himself for a written examination on 13.1.86 for post of Cadet Flight Engineer. The petitioner's case for discrimination against him by the 1st respondent is heavily based on this second test. Firstly, the petitioner's case is that he should not have been required to sit for a written examination for recruitment as a Cadet Flight Engineer because he had the necessary academic qualifications for such a post. Secondly the petitioner states that the paper contained 63 questions to be answered in 78 minutes. The petitioner has further stated that "it was a totally unfair paper and set for the purpose of belittling the qualifications possessed by the petitioner and intended to cover up the mistake made in requiring the petitioner to sit for the Cadet Pilots paper earlier. The petitioner has become aware that it was the 3rd respondent, who had set the paper and was also the invigilator at the test". The result of this examination was not conveyed to the petitioner, and the petitioner wrote to the 2nd respondent inquiring about the results of the examination and complaining about the type of the paper set by his letter dated 10.11.86 (P10). To this letter (P10) the 2nd respondent replied by his letter dated 28.3.86 (P11) that the examination comprised 53 questions and not 63 as stated by the petitioner, and the time given was 75 minutes, i.e. one minute and thirty seconds for each question, and further an additional 5 minutes was granted to the petitioner on his application. The petitioner was also informed by (P11) that he had got only 39% of the marks and if marks were deducted for the mistakes the aggregate marks would have been 24%. Further the 2nd respondent by letter of 28th March, 1986 (P11) informed the petitioner that "Air Lanka cannot offer you employment". The examination for the petitioner held on 13.1.86 has become a very contentious matter, and a good portion of the 3rd respondent's affidavit and the counter affidavits of the petitioner and the 3rd respondent deal with this contentious matter.

The 3rd respondent in his affidavit dated 5.6.86 has affirmed that notwithstanding the petitioner's poor performance at the first examination for Cadet Pilots held on 6.12.85 it was decided to subject him to a second test pertaining solely to the knowledge that should be possessed by an applicant for appointment as a Cadet Flight Engineer". The 3rd respondent has also affirmed that the paper contained 53 not 63 questions to be answered in 75 minutes; and further that at the petitioner's request a further additional 5 minutes were given to him. The questions set could have been answered with ease within the time set as they were mainly multiple choice questions, and the answers required no longer than 1 or 2 sentences. The 3rd respondent has produced the script of the petitioner marked (R4), and a copy of the paper set with model answers marked (R5). The 3rd respondent has denied that it was an "unfair paper", and that it was "set for the purpose of belittling the qualifications possessed by the petitioner, and intended to cover up for the mistake in requiring the petitioner to sit for the Cadet Pilots paper earlier". The petitioner obtained only 39% of the maximum number of marks without deductions for wrong answers on multiple choice questions. The minimum number of pass marks was 70%.

The petitioner in the counter affidavit filed dated 13.6.86 contests the affirmations of the 3rd respondent regarding the paper set for the second examination held on 13.1.86, and also contests the answers given in the model answers marked (R5) with reference to some American Publications. The 3rd respondent has denied knowledge of those publications and further stated that in any event, on the face of them, the Publications are not from an authoritative source. The 3rd respondent admits the error in respect of one answer in the model answers (R5), and has stated that that error would not have materially affected the total marks received by the petitioner at this test. In his counter affidavit the petitioner has reiterated that he had qualifications as a Flight Engineer to be recruited as a Cadet Flight Engineer in Air Lanka, and what he needed was only a short training, which is described as a "Transitional Training" in order to operate as a Flight Engineer in the type of Aircraft operated by the 1st respondent. The 3rd respondent in his counter affidavit admits that the petitioner had the basic qualifications to be considered for selection for training as a Cadet Flight Engineer. The 3rd respondent has contested the petitioner's affirmation that what he required was only a "Transitional Training" and explained that the petitioner was not qualified to

undergo such "Transitional Training". In paragraph 6:1 of the counter affidavit the 3rd respondent states – "in terms of the normal practice followed by Air Lanka Limited..... and by all other reputed International Air Lines, "Transitional Training", which is also known as "Conversion Training", is the training given to Flight Engineers, who have both completed their initial training on a particular type of aircraft and gained substantial experience operating 'Solo' as Flight Engineers, on such type of Aircraft, in order to qualify them to operate as Flight Engineers on another type of aircraft". In paragraph 6:3 of the counter affidavit the 3rd respondent affirms as follows: "since the petitioner did not have any previous experience operating 'Solo' as a Flight Engineer on any type of aircraft or Air Lines (International or otherwise) and had only 1.3 Flying Hours to his credit, he was not qualified to receive "Transitional Training". The 3rd respondent has further affirmed that the Regulations of the Federal Aviation Administration of U.S.A. for licensing crew members of an air craft had no application whatsoever to the 1st respondent Company as the said Company was bound by the Air Navigation Act of Sri Lanka, and the Regulations made thereunder.

The petitioner's case of discrimination is that while his application, that of an applicant qualified as a Flight Engineer in respect of Boeing 727, and one who needed only a short "Transitional Training" was pending, one Aruna Wijesinghe, who has had a training in Air Lanka Limited as a Ground Engineer was recruited to a post of Cadet Flight Engineer in August, 1985. The acts of discrimination alleged by the petitioner are as follows:

- (1) In March, 1984 the petitioner made an application for a post of Flight Engineer, which application has been considered as one for Cadet Flight Engineer, and while that application was pending Aruna Wijesinghe an Apprentice Aircraft Ground Engineer in Air Lanka Limited was selected for the post of Cadet Flight Engineer in August, 1984. Arising from this the petitioner has made three points:

- (1) That Aruna Wijesinghe did not possess a Flight Engineer's Licence with a typerating (a technical term defined in the Regulation 3 made under the Air Navigation Act 15 of 1950),

- (2) That Aruna Wijesinghe did not sit for a Flight Engineer's Examination.

What is meant seems to be one held by Air Lanka Limited; as will be shown later, this statement No. 2 above is an error,

- (3) that with the qualifications of the petitioner only a short term training course, under Air Lanka would have been necessary for the petitioner to extend his Flight Engineers Licence in respect of the type of Aircraft operated by Air Lanka.

I have set out above the allegations of discrimination made by the petitioner in paragraph 17 of his affidavit. In course of the argument the learned counsel for the petitioner developed the following further grounds of discrimination. The arbitrary selection of Aruna Wijesinghe indicates unfettered discretion of Air Lanka Limited, to select personnel which was a negation of equal rights. The petitioner's case is that these acts of discrimination brought the case of the petitioner within the terms of Article 12 (1) of the Constitution, which is as follows:— "All persons are equal before the Law and are entitled to the equal protection of the law". The petitioner's case is that Air Lanka Limited is an "organ of Government". He has made this application under Article 17 of the Constitution as his fundamental rights under Article 12 (1) of the Constitution have been infringed by the executive or administrative action of Air Lanka Ltd. an organ of the Government.

I will now deal with the reply of the 1st respondent to this allegation of discrimination made by the petitioner in respect of the appointment of Aruna Wijesinghe. One of the main acts of the discrimination alleged is factually incorrect. That is the allegation that Aruna Wijesinghe was recruited without a test. Perhaps the petitioner was not aware that a test was held for Aruna Wijesinghe until the 3rd respondent filed his affidavit. The 3rd respondent has affirmed that a written examination was held for Aruna Wijesinghe before he was considered for appointment as a Cadet Flight Engineer, and has produced 3 answer scripts of Wijesinghe, (R3A), (R6A) and (R6B), and has affirmed that Wijesinghe faired excellently and obtained 82% in each paper.

The 3rd respondent has affirmed to the special circumstances under which Aruna Wijesinghe came to be appointed as Cadet Flight Engineer in August 1984. In mid 1984 the 1st respondent had appointed 8 Cadet Pilots. These Cadet Pilots had completed their Ground School Training Course and Cockpit Procedure Training Course successfully, and Lockheed 1011 Simulators had been reserved in Hongkong for the purpose of imparting to these Cadets their "Simulator Training" in aeronautical terminology. A "Simulator" is a "Computer Controlled Machine, which is almost identical to the Cockpit of the relevant type of aircraft and simulates almost exactly the said type of aircraft in flight". One of the Cadet Pilots Hatharasinghe left the services of the 1st respondent having completed the Courses of training mentioned above, but before the commencement of simulator training. As such the 1st respondent was at that time in urgent need of a Second Officer for Lockheed 1011 Aircraft. The 3rd respondent has affirmed that Cadet Pilots employed by the 1st respondent were trained for appointment as Second Officers on Lockheed 1011 Aircraft. The duties and functions of such Second Officers are identical to those of Flight Engineers. The 3rd respondent has affirmed that Aruna Wijesinghe had been appointed as an Apprentice Air Craft Maintenance Engineer on 6.2.1980, and had been in training up to March 1984, and had already completed successfully a course of Ground School Training relating to Lockheed 1011 Aircraft. The said Ground School Training Course successfully completed by Aruna Wijesinghe was a Course for Aircraft Maintenance Engineers and was consequently a more detailed and comprehensive Course than the Ground School Training Course designed for Cadet Pilots and Cadet Flight Engineers.

Aruna Wijesinghe had submitted an application dated 10.7.84 (X-IV) for the post of Flight Engineer. Para 3: of this application (X-IV) sets out among the qualifications of Aruna Wijesinghe that he has "successfully completed Civil Aviation Authority (U.K.) Basic Technical Examination for Flight Engineers Licence (including Air Law and Weight and Balance)". This statement is certified by the Certificate dated 7th September 1983 from Civil Aviation Authority (U.K.) document (Y3). The papers filed show that Aruna Wijesinghe had acquired some qualifications as a Flight Engineer. I must state that the petitioner has been taken unawares by these documents, because these documents including Aruna Wijesinghe's application for post of Flight Engineer were filed in the course of the hearing. I have already

referred to two such documents, the application dated 10.7.84 (X4) and Certificate dated 7th September 1983 (Y3). I now refer to another document dated 24.5.84 from the Civil Aviation Authority (U.K.)-(Y1), the results of the Flight Crew Technical Examination, which states that he has passed in the following subjects—Load Aviation Law (Flight Engineers) Part II. The 1st respondent has also produced a letter received by Aruna Wijesinghe from the Civil Aviation Authority, (U.K.) dated 25.4.83 stating that he has qualified himself for entry to the Flight Engineers Licence Technical Examination. Ultimately the 3rd respondent has affirmed that although the petitioner had already tendered an application for appointment as a Flight Engineer, at the time Aruna Wijesinghe was appointed a Cadet Flight Engineer to fill the vacancy created by the resignation of one Hatharasinghe, the petitioner could not have even been considered for appointment to the said vacancy, because, at that time, the 1st respondent required a Cadet Second Officer or Cadet Flight Engineer to take the place on the Simulator Training Course, of the said Hatharasinghe who had resigned, and the petitioner was not qualified to do so, while Aruna Wijesinghe was.

Thus, it is clear that the 1st respondent has taken up two positions as to why the petitioner was not selected as a Cadet Flight Engineer. I must state that one material point that has to be taken into account, is that Air Lanka Limited did not call for any applications for post of Cadet Flight Engineers. If that was done this Court would have had the 1st respondent's criteria for selection of Cadet Flight Engineers and the competing claims of the petitioner and Aruna Wijesinghe could have been judged on that basis. The above observation is clarified by the Notice (P8) of 16th September, 1983 calling for applications for vacancies for Cadet Flight Pilots, which Notice (P8) gives the basic qualifications required. In this instance the problem for the petitioner has arisen by the fact that no vacancy was advertised setting out the necessary qualifications and the petitioner quite understandably as a young man qualified as a Flight Engineer with a desire to take to Flying and a youngman's dream of being a member of the Aircraft Crew of Air Lanka Limited, in his enthusiasm, applied for a post of Flight Engineer in Air Lanka Limited. The 3rd respondent in the affidavit has explained that up to this time Air Lanka had not called for applications for posts of Cadet Flight Engineers or even Flight Engineers. The mode of appointment has been as follows. The 3rd respondent has affirmed that at the inception the 1st respondent's

Company recruited as Flight Engineers fully qualified and experienced Flight Engineers from the former Air Ceylon and from foreign Air Lines. It also recruited as Cadet Flight Engineers the former employees of Air Ceylon who had the basic qualifications to be Flight Engineers, and who would have been thrown out of employment with the liquidation of Air Ceylon, had they not been recruited by the 1st respondent. There was no need to hold written examinations for the said Cadet Flight Engineers as their personal files indicated their training. I must at this stage state that the 1st respondent has also explained why in 1984 the 1st respondent for the first time decided to hold written examinations. The 1st respondent had taken a batch for training as Cadet Pilots without a written examination and found that such trainees proved to be unsatisfactory and had to be discontinued. This is borne out by the advertisement (P8) of 15.9.85 calling for applications for Cadet Pilots, which states "Candidates will be required to pass a written and flying test to prove their ability". In fact the Regulations framed under the Air Navigation Act No. 15 of 1950 for extension of Flight Engineers Licence (Regulation 56(6)) provide in Regulation 65 that the applicants will undergo a test for aeronautical knowledge, experience and skill practical test. Schedule 1 Regulation 3:2:5 Flight Engineers provides that "an applicant for extension of Air Craft rating of a licence.....at the discretion of the Director would be required to undergo all or any part of the technical examination". Further the 3rd respondent has affirmed that there was no rule or law which set out the criteria to be followed and the methods to be adopted in selecting personnel—Cadet Pilots or Cadet Flight Engineers. The 1st respondent had a right to lay down its own criteria for and methods of selection, and was the sole judge of the suitability or otherwise of any candidate for appointment as a cadet Pilot or Cadet Flight Engineer in its services. The 1st respondent owed a duty to its passengers and all who sought its services to ensure that its Aircraft are operated by highly skilled and competent personnel. The 1st respondent was under a necessary duty to exercise the greatest care and caution in the selection of personnel to operate its Aircraft as Pilots and Flight Engineers. Ultimately, the 3rd respondent has affirmed that the petitioner did not have the necessary qualifications for appointment as a Flight Engineer or Cadet Pilot.

As for the technical aspects of the matters that are in dispute in this application, i.e. the nature of the papers set for the second examination for which the petitioner sat, and the technical aspect of



the competence, that is required, the most competent person to speak to these matters in respect of this application is the 1st respondent, who has placed these matters before Court through the 3rd respondent. As against the opinion of the 1st and 3rd respondents is that of the petitioner as averred in his petition and counter affidavit. There is no other independent view placed before this Court by the petitioner. Undoubtedly it is the duty of and the burden is on the petitioner to prove his case of discrimination by the 1st respondent. There has been no third independent view placed before this Court. In this situation the court has to act on the opinion expressed by the 1st respondent through its agent the 3rd respondent a highly qualified, competent and experienced person who can express opinions on the technical matters in issue.

On the facts placed before this Court I cannot hold that the 1st respondent has acted in a discriminatory or unjust manner in not appointing the petitioner as a Cadet Flight Engineer in preference to the said Aruna Wijesinghe. As such the case of discrimination and unjust or unequal treatment made by the petitioner is not factually proved and fails. The above finding on facts is sufficient to conclude this application. However, I propose to record the legal issues raised, and the submissions made by learned Counsel for both parties as the submissions were both far reaching and illuminating. Counsel for the Petitioner submitted that this Court should widen the frontiers of the law pertaining to the interpretation of Articles 4(d) and 17 of the Constitution. Learned President's Counsel for the Respondents invited the Court to reconsider the basis of the decisions in the leading cases on this subject.

The learned Counsel for the Petitioner submitted that the main legal issue arising in this application, was whether Air Lanka Limited was an organ of Government, and whether the discriminatory action of the 1st respondent Jayasuriya was executive or administrative action. The difficulty arises when, as in this instance, actions of persons who are not strictly State Officers are in issue, that is whether such actions are state actions or individual actions. Further, the learned counsel for the Petitioner submitted that so far this Court has considered the Articles of the Constitution pertaining to fundamental rights only in respect of bodies which are statutory bodies. Such leading cases are: *Wijesinghe v. Insurance Corporation and another* (2) *Chandrasena and two others v. National Paper Corporation and two others* (13) heard together with (2) above, *Wijeratne and another v. The People's Bank and another*

(3) (Divisional Bench of Five Judges), *Gunaratne v. People's Bank* (5) (Divisional Bench of Five Judges), which reconsidered the position in the earlier *People's Bank* case and distinguished and explained that case. (Pages 354–356), *Perera v. University Grants Commission* (1), *Roberts v. Kandy Municipal Council*. (6).

Learned counsel for the petitioner submitted that this was the first occasion this Court has to decide whether an incorporated body – a Company performing commercial functions in this instance, Air Lanka Ltd., was an organ of government. It is in this context that the learned counsel for the petitioner urged this Court to consider the extension of the frontiers of the law to cover such bodies as Air Lanka Ltd. In support of this theory to extend the law to cover such bodies, the learned counsel for the petitioner relied heavily on American Authorities, both texts and decided cases. Learned counsel referred to several texts – Civil Liberties and the Constitution by Paul G. Kauper (Page 155) – which is as follows: – “We now consider the second category of situations where we have actions taken by persons or associations or organisations that may be regarded as private in character but whose relationship to State by reference to special privileges enjoyed, property used, or position in the State’s regulatory scheme, may raise questions as to whether their actions are to be identified with the State for the purpose of the Fourteenth Amendment Restrictions. . . . This category embraces several types of enterprise which serve public purposes but are not publicly owned or operated”; Civil Liberties under the Constitution by M. Glenn Abernathy, (Page 78) onwards, Cases on Constitutional Law by Barret, (Page 12) – Fourteenth Amendment to the Constitution. Learned Counsel for the petitioner also relied on several Judicial decisions in the States – *Kerr v. Enoch Pratt Free Library* (14), *Marsh v. Alabama* (15). Learned counsel submitted that on the authorities cited above, in the States–

- (a) Incorporated bodies,
- (b) Private Groups of persons, incorporated or not have been held to be State Bodies.

Learned counsel for the petitioner submitted that the real test, whether a body exercises State or Government power depends not on how it was created but as to why it was created and its functions. For this proposition learned counsel cited the case of – *Ajay Hasia, v. Khalid Mujib Schravardi and others*, (9). In considering the decisions of the Supreme Court of India, it has to be noted and borne in mind that

our Constitution has not defined the term "organ of government" in Article 4(d), and the term "executive and administration action" in Article 17 of the Constitution, whereas the Constitution of India Part 111 Fundamental Rights Articles 12-25 refers to State Action, and Article 14 has defined the term "State" widely - "In this part unless the context otherwise requires "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all Local or other authorities within the territory of India or under the control of the Government of India".

Learned counsel for the petitioner directed the attention of Court to several provisions in the Memorandum and Articles of Association of Air Lanka Ltd., a Company formed under the Companies Ordinance, which showed the involvement of the State/Government, inter alia, the contribution of 60% of the capital by the State, appointment of the First Directors by the Government, and the Government to have the majority of Directors nominated, appointment of the Chairman by the Government, and such other features. Learned counsel for the petitioner submitted that Air Navigation was a State subject and a State function. In the Company Air Lanka Ltd., the government has employed a device to perform the functions of the government. Air Lanka Ltd., was an instrument of government performing airline business. "A Company" was only a facade. In fact it is the government which controls Air Lanka Ltd. On these submissions learned counsel for the petitioner urged the Court to consider Air Lanka Ltd., as an organ of government in terms of Article 4(d) of the Constitution.

The respondents to this Application have raised a preliminary objection to the effect that the 1st respondent Air Lanka Ltd., was not "an organ of the State performing governmental functions, and that the acts of the 2nd and 3rd respondents do not constitute executive or administrative action, and are not justiciable in terms of Article 126 of the Constitution" - Para. 14:4 of the affidavit of the 3rd respondent. The submission made by the learned President's counsel for the respondents as to which kind of body was "an organ of government" was widely divergent from that of the learned counsel for the petitioner. The learned President's counsel submitted that the 1st respondent Air Lanka Ltd., was a commercial body formed under the Companies Ordinance, the Articles of the Company bind the internal administration of the Company and the fact that the government contributed capital, appointed Directors as such did not make it an organ of government. For a body to be an organ of Government/State,

it must be a body created by statute to which some attribute of State/Sovereign power has been conferred by statute. The Air Lanka Ltd., is a Company. No State power has been conferred on it. This submission that for a body to come within the terms of Articles 4(d) and 17 of the Constitution, it must be created by statute, and must be conferred with some state of sovereign power went beyond the decisions of this Court cited earlier, and as to what are the attributes or tests of State Power. This Court has used as tests the functional test and the 'government controlled' test. Learned President's counsel submitted in relation to the Supreme Court decision in *Wijetunge v. Insurance Corporation and another* (referred to above) that the functional test applied in the case was not a safe test, but conceded that the conclusion in the case was correct. Learned President's counsel got support for this thesis from certain leading Indian cases—*Rajasthan State Electricity Board, Appellant v. Mohanlal and others, respondents* (7) Shah, J. (Pages 1862-1864), *Heavy Engineering Mazdoor Union v. State of Bihar* (16), *Sukhdev Singh and others, Appellants v. Bhagatram and another, respondents* (8), Judgment of Aligirisamy, J., *Somprakash Rekhi, Pet. v. Union of India and another, respondents* (10). Learned President's counsel for respondents summed up his submissions as follows – that the issue of fundamental rights arises in respect of that kind of body which shares State power, and can infringe on public rights.

I have made a summary and a record of the submissions made as they were illuminating and went away from the decided cases, and had a new look at Articles 4 (d) and 17 of the Constitution. But in view of my finding in respect of the factual position re the allegation of discrimination by the petitioner, it is unnecessary for me to make a ruling on the above farreaching submissions made by the learned counsel for the petitioner and the respondents. I regret to take this course of action. There are precedents of this Court on this matter, which in these circumstances, I will follow. The Application—*Gamini Samarasinghe v. Bank of Ceylon and another* (17) – was one made under Article 12 (1) of the Constitution—right to equality. While denying the allegations made by the petitioner the respondent Bank had also taken the preliminary objection "that the 1st respondent is not an organ of the government, nor does it exercise the executive or administrative power of the State". This Court per Weeraratne, J. held that it was satisfied that the respondent Bank had not violated Article 12 (1) of the Constitution, and further held that due to this finding, the

Court does not express an opinion on the validity of the objections. The Application of *Gunaseena Thenabadu v. University of Colombo and others* (18) was one under Articles 12 (1) and 12 (2) of the Constitution pertaining to the denial of equality before the Law—language rights. This Court per Samarakoon, C.J. held that the petitioner has failed to prove the allegation made in the petition against the respondents. Having come to this conclusion the Court further held as follows:— “Counsel for the respondents took up a preliminary objection that the allegations in the pleadings of the petitioner did not disclose infringement of a fundamental right of the petitioner by executive or administration action”, and that the action of the respondents was not “an act of executive or administrative action by some organ of government”. Having made this observation this Court ruled as follows:— “We heard interesting arguments on this point by both counsel, but we do not propose to make any comments on this point because of the view that we have formed on the other objections of counsel for respondents”. In the Application—*Wijetunge v. Insurance Corporation and another* (referred to above)—application made under Articles 14 (1) (a) and 14 (1) (d) of the Constitution, the respondents took up the preliminary objection that the alleged violation of these rights by the Insurance Corporation did not amount to infringement by executive or administrative action as it was not an organ of the government. In the Application decided on the same day *Chandrasena and two others v. National Paper Corporation and two others (supra)* application was made under Article 12 (2) of the Constitution. In this Application also preliminary objection had been taken that that action of the respondents did not amount to executive or administrative action as it was not an organ of government. Sharvananda, A.C.J., who delivered the judgments upheld the preliminary objections in both these Applications, and further held, that as such it was not necessary to go into the factual merits of the petitioner’s complaint.

I have followed these precedents of this Court. The Application is therefore refused, and in the circumstances of this case it is refused without costs. The Application is dismissed. No costs.

After I had formulated my judgment I received the judgment of my brother Atukorale, J. I do not agree with the judgment.

**H. A. G. de Silva, J.**

I have had the advantage of reading the judgments of both my brothers, Atukorale, J. and Seneviratne, J. I agree with the reasons and conclusions given in the judgment of Atukorale, J. on both matters that arise for decision in this case. I therefore agree with the order he has made allowing the Application with costs and awarding the sum stated by him as compensation to the petitioner.

*Application allowed.*

*Compensation awarded.*

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