

**PASKARALINGAM BY HIS ATTORNEY-AT-LAW**  
**v.**  
**P. R. P. PERERA AND OTHERS**

SUPREME COURT  
G. P. S. DE SILVA C.J.  
WIJETUNGA, J. AND  
GUNASEKERA, J.  
SC. SPECIAL (WRIT) NO. 4/97  
CA APPLICATION NO. 773/97  
23RD AND 24TH MARCH 1998

*Writ of Certiorari – Decision of the Special Presidential Commission of Inquiry – Failure of one of the Commissioners to participate in making the impugned decision – Jurisdiction of the other Commissioners to make the decision – S. 3 of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978.*

The President by warrant dated 2.2.95 appointed the 1st, 2nd and 3rd respondents to inquire into matters mentioned in the said warrant. One of the matters inquired into was an allegation against the petitioner as the Secretary, Ministry of Finance and Secretary to the Treasury in respect of a contract to purchase bus chassis and body kits from Ashok Leyland Ltd. The Commission commenced sittings on 20.4.95 and concluded the inquiry on 19.12.96 during which period there were 33 sittings out of which the 3rd respondent was not present only on 5 occasions, after 12.11.96, because on 13.11.96 he was hospitalised with a heart ailment. The 3rd respondent, by a letter dated 18.11.96 addressed to the President offered to resign but the Secretary to the President by a letter dated 28.11.96 informed him that he could continue to remain a member and take part in proceedings when his health improved. The 3rd respondent remained a member of the Commission and in fact recommenced to attend the sittings of the Commission, later on. In the meantime, the date for the final report of the Commission was enlarged from time to time and finally, until 16.3.89, and the Commission made an interim report dated 2.3.97 which contained *inter alia*, a finding against the petitioner and a recommendation that he be subject to civic disability. The 3rd respondent did not participate in making that decision and the interim report was signed only by the 1st and 2nd respondents. The report states that the 3rd respondent was unable to participate in the proceedings of the Commission after 12.11.96 due to ill-health on medical advice. Hence the proceedings were continued before the 1st and 2nd Commissioners in terms of s. 3 (2) of Law No. 7 of 1978. However, the petitioner produced evidence to establish that the 3rd respondent had functioned as a single judge in the Court of Appeal on 10 days in January, 1997 and 18 days in February, 1997.

Held: (G. P. S. de Silva, C.J. dissenting)

S. 3 (2) of the Law operates only if one of the five situations set out in s. 3 (1) exists. One such situation is where a member of the Commission has become unable to act. The material placed before the Court did not indicate that the situation relied upon namely, that the 3rd respondent was unable to participate in the decision-making process in regard to the petitioner between 19.12.96 and 2.3.97. In the result while the three Commissioners continued to be members of the Commission at all times relevant, only two of them participated in the decision-making process, consequently, the interim report was without jurisdiction.

Per Wijetunga, J.

"What is repugnant to the principles of natural justice is that only two out of the three Commissioners who held the inquiry chose to express their views. Such a report cannot, in my view, be considered a report of the Commission, as contemplated by law."

**Cases referred to:**

1. *Wijerama v. Paul* 76 N.L.R 241.
2. *In the Beck and Jackson* (1857) 1 CB(NS) 695.
3. *Parr v. Winteringham the Jurist Reports* (1859) Vol. 5 Part I, 787 (CB).
4. *Morris v. Gestetner Ltd.* 1973 (1) WLR 1378 (NIRC).
5. *Regina v. Kensington and Chelsea Rent Tribunal Exp. Mac Farlane* 1974 (1) WLR 1486 (QB).
6. *Chief Constable of North Wales Police v. Evans* (1982) 3 All ER (HL) 141.

**AN APPLICATION** for a Writ of Certiorari against the Special Presidential Commission of Inquiry.

*Ranjith Abeysuriya P.C. with D. S. Wijesinghe P.C., Sanjeewa Jayawardena and Miss. P. Dias* for the petitioner.

*S. N. Silva P.C. A. G. with K. C. Kamalasyason P.C. ASG and Uditha Egalehewa S.C.* for the respondents.

*Cur. adv. vult.*

June 22, 1998

**G. P. S. DE SILVA, C.J.**

By Warrant dated 2.2.95 the President established a "Special Presidential Commission of Inquiry 1995" (Commission) in terms of section 2 of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978. The first respondent was appointed as the Chairman and the 2nd and the 3rd respondents as members of the Commission.

One of the matters inquired into by the Commission (Inquiry No. 3/95B) were the allegations against the petitioner, former Secretary to the Ministry of Finance and Secretary to the Treasury, in respect of a contract to purchase bus chassis and body kits from Ashok Leyland Ltd. In his present application for a Writ of Certiorari, the petitioner's complaint is that the Fourth Interim Report dated 2.3.97 submitted by the Commission to the President, which contained findings and recommendations adverse to the petitioner, was signed by the 1st and 2nd respondents but not by the 3rd respondent (Justice F. N. D. Jayasuriya). Mr. Abeyesuriya for the petitioner strenuously contended before us that the President having appointed three Commissioners, the failure of one of the Commissioners (the 3rd respondent) to participate "in the decision-making process" (to use counsel's own words) and his failure to sign the Interim Report rendered the Interim Report one made without jurisdiction and of no force or avail in law. Counsel strongly urged "that such report and recommendation was not in law the act and deed of that Special Presidential Commission which has been appointed by the Warrant dated 2.2.95".

It is not disputed that the 3rd respondent who was one of the Commissioners appointed by the President did not sign the Interim Report. It was signed only by the Chairman (1st respondent) and one of the Commissioners (2nd respondent). It is also not disputed that the 3rd respondent was present and participated in the Inquiry from its commencement upto the 12th of November, 1996. After the 12th of November, 1996 the 3rd respondent was not present. The inquiry, however, continued on 22.11.96, 25.11.96, 26.11.96, and 28.11.96 before the 1st and 2nd respondents and on these dates counsel for the petitioner cross-examined two additional witnesses called by the Commission.

The question arises as to why the 3rd respondent failed to participate in the inquiry after the 12th of November, 1996? It is common ground that the 3rd respondent fell seriously ill on the 13th of November 1996 and on that date he was warded at the Intensive Care Cardiology Unit of the National Hospital, Colombo. He remained in hospital till 18.11.96. In his affidavit filed in these proceedings the 3rd respondent

avers that he was discharged from hospital "on the strict assurance and promise of strict bed rest at home . . . During those periods I was so grievously ill that I could not have engaged in my work, without imminent risk to my life".

Admittedly, on 18.11.96 the 3rd respondent tendered to the President his letter of resignation from "the post of Commissioner" (3R1). The reason for his resignation stated in 3R1 is that "the doctors have advised a detailed investigation and a period of complete bed rest thereafter, to overcome risk to my life." (emphasis added). However, the Secretary to the President by 1R1 dated 28.11.96 informed the 3rd respondent that he "can continue to remain a member of the Commission and take part in its proceedings again, when your health permits you do so." It was the submission of Mr. Abey Suriya that 1R1 clearly shows that the 3rd respondent's letter of resignation (3R1) was not accepted by the President and that the 3rd respondent continued to be a member of the Commission.

As submitted by Mr. Abey Suriya, "the key to the decision" of the question that arises in this case is section 3 of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978. Mr. Abey Suriya described section 3 as the "pivotal provision" and it reads thus:

"(3) (1) Where any member of a commission dies or resigns, or desires to be discharged from the performance of his duties in respect of the whole or part of an inquiry, or refuses or becomes unable to act, the President may appoint a new member in his place for the whole or any part of such inquiry.

(2) Until such appointment is made, the inquiry **may continue** before the remaining members of the commission, and if no such appointment is made, **the inquiry shall continue and be concluded** before the remaining members of the commission.

(3) Where a new member has been appointed under the provisions of subsection (1) it shall not be necessary for any evidence which may have been taken before the commission prior to such appointment to be retaken and the commission shall be

entitled to continue its proceedings from the stage at which they were immediately prior to such appointment:

Provided, however, that where a commission consists of only one member, the inquiry shall commence *de novo*."

On a fair reading of the affidavits of the 1st and 3rd respondents filed of record, there is little doubt that the 3rd respondent was unable to continue to discharge his functions as a member of the Commission by reason of a serious illness. In other words, it was a situation where the 3rd respondent became "unable to act" within the meaning of section 3 (1). This position is strongly supported by what is **expressly** stated by the 1st and 2nd respondents in the **Interim Report itself**. The statement which appears at page 7 of the Interim Report reads thus: 'Commissioner Justice F. N. D. Jayasuriya who was a member of this commission appointed under the Warrant establishing the Special Presidential Commission was unable to participate in the proceedings of the Commission after the 12th of November, 1996 **due to ill-health on medical advice**. The proceedings were thereafter continued before the Chairman and Commissioner Justice H. S. Yapa in terms of section 3 subsection 2 of the Special Presidential Commissions of Inquiry Law, No. 7 1978". (emphasis added). It is to be noted that this is a **contemporaneous** record made by the 1st and 2nd Commissioners **long before** the petitioner filed the present application for a Writ of Certiorari.

As stated earlier, after the 3rd respondent was hospitalized on 13.11.96, the inquiry proceeded on several dates before the remaining two Commissioners (the 1st and 2nd respondents). It is intensely relevant to note that no objection whatever was taken on behalf of the petitioner to the inquiry proceeding in the absence of the 3rd respondent. In other words, the decision of the remaining two Commissioners to continue with the inquiry was not challenged. Indeed, at the hearing before us Mr. Abeysuriya conceded that there was no impediment to the inquiry proceeding before the 1st and 2nd respondents.

Admittedly, the President did not appoint a new member in place of the 3rd respondent. Accordingly section 3 (2) comes into operation – "the inquiry shall continue and be concluded before the remaining members of the Commission". The learned Attorney-General rightly drew our attention to the significant difference in the language between the earlier part of section 3 (2) and the latter part of the section – ". . . the inquiry may continue before the remaining members", and the succeeding words "the inquiry shall continue and be concluded before the remaining members". It was also pointed out to us by the learned Attorney-General that there is no provision similar to section 3 (2) in the Commissions of Inquiry Act on which Law No. 7 of 1978 is largely based. In my view it is a new provision the object of which is clearly to ensure the continuation of the proceedings.

The affidavits of the 1st and 3rd respondents and the statement at page 7 of the Interim Report (referred to above) clearly establish the sequence of events. The 3rd respondent was admitted to hospital with a serious illness on 13th November, 1996. The President was informed of that fact on 18.11.96. Section 3 (1) vests in the President a discretion to appoint a new member in place of the 3rd respondent who was taken ill. The remaining two Commissioners decided to proceed with the inquiry in the absence of the 3rd respondent. The President in the exercise of her discretion did not appoint a new member and so the inquiry continued and was concluded before the remaining two Commissioners. This is precisely what is provided for in section 3 (2).

Mr. Abeysuriya, however, contended that it was the President and the President alone who has the power to decide whether the remaining two members were entitled to continue and conclude the inquiry. With this contention, I am afraid I cannot agree. It is inconsistent with the plain meaning of sections 3 (1) and 3 (2). The opening words of section 3 (2) : "Until such appointment is made the inquiry may continue before the remaining members of the Commission" to my mind show that the decision whether the inquiry should continue or not rests with the two remaining members of the Commission. In this connection it is relevant to bear in mind that in terms of section 2, the members of the Commission shall consist of Judges "of the

Supreme Court or of any other court not below a District Court". As submitted by the learned Attorney-General, the President plays no part whatever in the decision whether the inquiry should continue before the remaining members of the Commission. Having regard to the scheme of the statute, it is certainly not a decision which could appropriately be left to the President. The only discretion vested in the President relates to the appointment of a new member in the place of the member who "becomes unable to act". It seems to me that the submission of the learned Attorney-General that section 3 (2) has to be read independently of section 3 (1) is well-founded. Section 3 (1) sets out the circumstances in which the "President may appoint a new member". Section 3 (2) however "operates" independently of any action that the President may take in terms of section 3 (1). I hold that the decision to continue with the inquiry was in terms of section 3 (2) in the exercise of the discretion vested in the remaining two members of the Commission. As stated earlier, there was no challenge to the exercise of the discretion vested in the two remaining Commissioners. On the other hand, there was acquiescence on the part of the petitioner in the continuation of the proceedings. In any event, the language in section 3 does not warrant the construction contended for by Mr. Abey Suriya.

In an effort to whittle down the "seriousness" of the illness of the 3rd respondent, Mr. Abey Suriya relied on the draft minutes of the Court of Appeal which revealed that the 3rd respondent had sat in the Court of Appeal as a "single Judge" on several dates in the months of January and February, 1997. I do not think that this fact detracts from the position of the 3rd respondent that he had become unable to function as a member of the Commission by reason of his grave illness. The preparation of the Interim Report would undoubtedly involve the close study of a considerable volume of evidence and the consideration of complicated questions of fact. It was not suggested that the occasions on which the 3rd respondent sat in the Court of Appeal involved strenuous work and study. The fact remains that the 3rd respondent suffered from a grave illness which could have endangered his life.

Mr. Abeyesuriya laid much emphasis on the fact that the correspondence (3 R1 and 1 R1) shows that the letter of resignation was not accepted by the President. But this fact is of little or no significance since the true basis of the decision of the two remaining members of the Commission to continue with the inquiry is expressly stated at page 7 of the Interim Report (referred to above). The 1st and 2nd respondents had addressed their minds to the relevant question at the material point of time.

Finally, I must refer to the case of *Wijerama v. Paul*<sup>(1)</sup> strongly relied on by Mr. Abeyesuriya. That case has little or no relevance to the issue before us, for the court was there not dealing with a statutory provision which was even remotely similar to section 3 of Law No. 7 1978. There is however an observation made by T. S. Fernando, J., in the course of his judgment which is not without relevance to the present case. "Alles, J. has held that a Judge who has not heard a material part of the case becomes disqualified from continuing as a Judge. While a proposition of that nature baldly stated is not unacceptable, it often becomes a difficult task to decide what is such a material part". (at page 250). Admittedly, in the case before us the 3rd respondent was absent on four days when two additional witnesses called by the Commission were cross-examined.

For these reasons I hold that the non-participation of Justice F. N. D. Jayasuriya (the 3rd respondent) in the proceedings after 12th November, 1996 and his failure to place his signature on the Interim Report do not render the Report one made without jurisdiction. The application is accordingly dismissed but, in all the circumstances, without costs.

#### **WIJETUNGA, J.**

I have had the advantage of reading in draft, the judgment of My Lord the Chief Justice. I regret very much that I am unable to agree with him.

Notice was issued on the respondents only on the following question of law:

"Does the non-participation of Justice F. N. D. Jayasuriya render the interim report one made without jurisdiction?"

It is, therefore, unnecessary to go into the facts relating to this inquiry.

In the written submissions filed on behalf of the respondents, it is claimed that it was grave misconduct on the part of the petitioner to reiterate in the counter affidavit, the averments set out in paragraph 54 of his original affidavit, despite the categorical denial by the 1st and 3rd respondents and that the said serious misrepresentation warrants dismissal of this application *in limine*.

The petitioner, in paragraphs 54 (b) and (c) of his original affidavit dated 27.9.97 had averred that the 3rd respondent had continuously participated in the proceedings even after 12.11.96, though the report states otherwise and that he did participate in the proceedings on 21.11.96, 25.11.96 and 26.11.96.

The 1st and 3rd respondents, in their affidavits dated 23.1.98 and 11.1.98 respectively, state that the 3rd respondent had not participated in any proceedings after 12.11.96 on account of ill-health. The 1st respondent however states that: "even though the 3rd respondent did not sit, his name appears in the proceedings of a few dates as that particular stenographer who maintained the record of the proceedings on those dates specified the names of all the members of the Commission".

The 1st respondent has annexed an affidavit from the Secretary of the Commission marked (1R2). In that affidavit, the Secretary states *inter alia* that: "some of the proceedings after 12th November, 1996, contained the name of the 3rd respondent although he was not present after the said date and did not participate in the said proceedings". He further states that: "the last public sitting in which the 3rd respondent participated was on 12th November, 1996; and that according to the summaries prepared by me he did not participate at any public sittings till 29th April, 1997".

It is thus apparent that the averment in the petitioner's original affidavit was in consequence of a mistake on the part of the Commission's stenographer who included the names of all the members of the Commission in the record of the proceedings, though the 3rd respondent did not participate in the proceedings after 12.11.96.

When the petitioner filed his counter-affidavit dated 12.3.98, he stated that: "answering paragraph 3 of the 3rd respondent's affidavit, I reiterate the averments contained in paragraph 54 of my original affidavit". He made a similar averment in respect of the 1st respondent's affidavit too.

Paragraph 3 of the 3rd respondent's affidavit states as follows: "I specifically deny the averments of paragraph 54 of the said affidavit insofar as the averments contained therein relate to the matter in respect of which notice was issued by Your Lordship's Court". The 1st respondent too has made a similar denial in his affidavit.

It is relevant in this context to advert to the nature of the averments contained in paragraph 54 of the petitioner's original affidavit. He states *inter alia* that: "I am advised to state and verily believe that the purported adverse findings arrived at by the 1st and 2nd respondents in respect of the allegations/charges preferred against me and the subsequent recommendations made by the said respondents to Her Excellency the President of the Democratic Socialist Republic of Sri Lanka are illegal, null and void and of no force or avail in law" and sets out the reasons therefor in 56 sub-paragraphs. The matter reiterated to which objection has been taken is contained in just one sub-paragraph thereof viz (c) of the original affidavit.

When the learned Attorney-General pointed out at the hearing that there was no express admission by the petitioner in his counter-affidavit of the fact that the 3rd respondent had not participated in the public sittings held on the three dates aforementioned, learned counsel for the petitioner categorically stated that the petitioner was conceding the fact that the 3rd respondent had not participated in the proceedings after 12.11.96, since the mistake made in the record of the proceedings had been explained. He said that the petitioner

was guided by the record of the proceedings when he made the said reference and regretted the lapse in the counter-affidavit.

In the written submissions of the petitioner dated 18.5.98 it is further stated as follows:

"14. It is most respectfully pointed out to Your Lordships, that it is clearly implicit in paragraphs 14, 15 and 16 of the counter-affidavit of the petitioner, that the petitioner was conceding the fact that Justice Jayasuriya had not, as asserted by him, functioned as a member of the Commission after the 12th of November, 1996.

15. On behalf of the petitioner himself and all the other lawyers associated with the preparation of the counter-affidavit, we wish to assure Your Lordships that once the actual position was made clear by Justice Jayasuriya in his affidavit, no attempt whatsoever was made in any way to doubt the correctness of his assertion that he had been hospitalised on the 13th of November, 1996.

16. We wish to add that if as a result of failing to expressly admit that factual assertion made by Justice Jayasuriya, an opportunity had been given for the learned Attorney-General to have raised that matter, we wish to express our deep regret for that lapse.

17. We wish also to state that the original assertion made in the main affidavit that Justice Jayasuriya had sat as a member of the Commission on 21st, 22nd and 25th November, 1996, had been made by us purely on the basis of what we assumed to be the correctness of the records relating to the proceedings issued by the Commission office itself. . . "

As was pointed out by Court to counsel at the hearing itself, there should have been an express admission in the counter-affidavit of the petitioner in regard to this matter, in view of the affidavits of the 1st and 3rd respondents. But, taking into consideration the above submissions and the fact that paragraph 54 of the original affidavit of the petitioner contained as many as 56 sub-paragraphs, this lapse

on the part of the petitioner cannot be considered an attempt to misrepresent facts to this Court, as *ex facie* it is due to inadvertance.

In these circumstances, I cannot agree that it was grave misconduct on the part of the petitioner or that it warrants the dismissal of this application *in limine*.

The President, by Warrant dated 2.2.95, appointed the 1st, 2nd and 3rd respondents to be her Commissioners for the purpose of inquiring into the matters mentioned in the said Warrant and further appointed the 1st respondent to be the Chairman of the said Commission. According to the interim report, the inquiry into the allegations against the petitioner lasted 22 days inclusive of 4 preliminary dates of inquiry and was concluded on 19.12.96.

The petitioner, however, states in his petition that the sittings of the Commission commenced on 20.4.95 and the allegations against him proceeded to inquiry on 33 occasions and the 3rd respondent was not present only on 5 occasions. The inquiry was admittedly concluded on 19.12.96.

There is no dispute that the 3rd respondent did not participate in the inquiry after 12.11.96. The 3rd respondent, in his affidavit dated 11.1.98, states that on 13.11.96 he "became seriously ill and was warded at the Intensive Care Cardiology Unit of the National Hospital Colombo with a heart condition of Cardio Myopathy" and that in view of his serious illness which incapacitated him and in order to ensure that the proceedings before the Commission continues without any undue delay, he submitted his resignation to the President, with a copy to the 1st respondent who was the Chairman of the Commission, by letter dated 18.11.96 (3R1). The letter states, *inter alia* that he is "reluctantly induced to submit humbly to Your Excellency my resignation from the post of Commissioner of the said Commission, to enable the other two members of the Commission to continue further sittings of the Commission, without any interruption and delay of its sittings".

The President's response was by letter dated 28.11.96 under the hand of the Secretary to the President (1R1), addressed to the 3rd respondent, with copy to the 1st respondent, which states *inter alia* as follows:

"The sections of the Special Presidential Commission Act referred to by you, viz sections 3 (1) & (2) do not appear to require your resignation, in consequence of your present illness. Your absence from the proceedings of the Commission on that account does not appear to invalidate those proceedings.

In the circumstances I am directed to inform you that you can continue to remain a member of the Commission and take part in its proceedings again, when your health permits you to do so."

In effect, therefore, the President did not accept the resignation of the 3rd respondent who thus remained a member of the Commission at every stage relevant to these proceedings, though he did not participate in such proceedings during a certain period due to ill-health.

Section 3 of the Special Presidential Commissions of Inquiry Law provides—

- (1) where any member of a commission dies, or resigns, or desires to be discharged from the performance of his duties in respect of the whole or part of an inquiry, or refuses or becomes unable to act, the President may appoint a new member in his place for the whole or any part of such inquiry.
- (2) until such appointment is made, the inquiry may continue before the remaining members of the commission, and if no such appointment is made, the inquiry shall continue and be concluded before the remaining members of the commission.
- (3) where a new member has been appointed under the provisions of subsection (1) it shall not be necessary for any evidence which may have been taken before the commission prior to such appointment to be retaken and the commission shall be entitled to continue its proceedings from the stage at which they were immediately prior to such appointment:

Provided, however, that where a commission consists of only one member, the inquiry shall commence *de novo*.

It was the submission of learned President's counsel for the petitioner that in law there was no resignation of the 3rd respondent.

The response of the President as reflected in the letter (1R1) makes it clear that she did not accept the resignation offered by the 3rd respondent by (3R1) dated 18.11.96. Instead, the 3rd respondent was informed that he can continue to remain a member of the Commission and take part in its proceedings again when his health permits him to do so. In fact, the 3rd respondent himself states in paragraph II of his affidavit that he *"recommenced to attend the sittings of the said Commission"* which is a clear indication that he not only accepted the views of the President and continued to remain a member of the Commission, but also participated in the sittings of the Commission when his health permitted him to do so.

The question then is whether the provisions of section 3 (2) apply, as the 3rd respondent did not cease to be a member of the Commission. In my view, for the President to appoint a new member, there should be a vacancy created by any one of the situations contemplated by section 3 (1), viz *death, resignation, desire to be discharged from the performance of his duties, refusal, or inability to act*. In this instance, though the 3rd respondent states in his affidavit that his serious illness incapacitated him, he *did not become unable to act* within the meaning of section 3 (1), necessitating the appointment of a new member in his place, as is demonstrated by his continued participation in the proceedings of the Commission thereafter.

Even if one assumes that, in view of the letter (3R1) by which the 3rd respondent sought to tender his resignation to the President, the other two Commissioners were entitled to assume that a situation contemplated by section 3 (1) had been brought about, and therefore continued with the inquiry, the letter (1R1) dated 28.11.96 put it beyond all doubt that the President did not accept the 3rd respondent's resignation and in fact informed him that he can continue to remain a member of the Commission. Therefore, the appointment of a *new member* did not arise. Equally, there was no question of continuing the inquiry before the *remaining members of the Commission* as the 3rd respondent had at all times material to this application continued to be a member of the Commission.

The learned Attorney-General in his submissions referred us to the Commissions of Inquiry Act No. 17 of 1948 as amended (cap. 8) and drew our attention to the fact that there was no provision in that Act which corresponds to section 3 (2) of the Special Presidential Commissions of Inquiry Law as amended. He submitted that the latter provision was a departure from the provisions of the Commissions of Inquiry Act and was intended to provide for the continuance of proceedings, notwithstanding the absence of one of the members of the Commission. It contemplates, he said, the physical absence of a member, even if it be volitional. He submitted that when section 3 (2) states that "the inquiry may continue before the remaining members of the Commission", it refers to a situation such as the present one, and the *vires* of the Commission were unaffected by the absence of the other member.

But, this submission fails to take into account the significance of the provision in section 3 (1) which states that "*the President may appoint a new member in his place*", which implies that a vacancy has been created in the Commission. The mere temporary absence of a member does not bring about such a situation.

It was his contention that the President becomes *functus officio* with regard to the functioning and continuance of the proceedings before the Commission once the Commissioners are appointed. Section 3 (2), he submitted, entirely vests the functional discretion with the Commissioners, who alone will decide on the continuation of proceedings, and is independent of any action on the part of the President under section 3 (1). He further submitted that the decision to continue the inquiry rested with the remaining members of the Commission and the President did not have any say in regard to the continuance or conclusion of the inquiry before such members.

Section 3 (1) provides that "the President may appoint a new member in his place for the whole or any part of such inquiry" if one of the situations referred to therein occur. It clearly gives the President a discretion as to whether a new member should be appointed or not. For the President to exercise such discretion, it must be brought to her notice that one of the five situations aforementioned has occurred. That is why subsection 2 commences with the words "until such appointment is made" and provides that "the inquiry may continue before the remaining members of the commission". This is an enabling

provision where the discretion, at that stage, as to whether the inquiry may continue is vested with the remaining members of the Commission.

The next stage contemplated by section 3 (2) is where the President makes no such appointment. Then "the inquiry shall continue and be concluded before the remaining members of the commission".

Section 3 (2), in my view, clearly vests the discretion with the President as to whether a new member should be appointed or not. There must, therefore, be a manifestation of the President's intention not to appoint a new member for the inquiry to be continued and concluded before the remaining members of the Commission. The discretion of the remaining members of the Commission whether to continue the inquiry until such appointment is made is obviously limited to the interim period between the occurrence of one of the five situations mentioned in section 3 (1) and the President's decision as to whether a new member would be appointed. I cannot, therefore, see how section 3 (2) can operate independently of section 3 (1). Section 2 (1) empowers the President to decide on the number of members that would constitute the Commission. She may well decide not to appoint a new member even if one of the five situations aforesaid has taken place. Then and then alone can the remaining members of the Commission continue and conclude the inquiry.

But, the factual situation with regard to the present matter is that none of the five events specified in section 3 (1) had actually occurred.

As regards the submission of the respondents that there was acquiescence on the part of the petitioner in the continuation of proceedings, the position of the petitioner, as borne out by the record of the proceedings, appears to be that though the 3rd respondent did not temporarily participate in the proceedings of the Commission and the other two members continued the sittings, there was no indication that a situation contemplated by section 3 (1) necessitating the appointment of a new member had arisen. The petitioner therefore continued to participate in the proceedings, apparently in the belief that the 3rd respondent remained a member of the Commission for the purposes of this inquiry.

This is demonstrated by what was stated by learned President's counsel for the petitioner when he formally handed over three copies of the affidavit signed by the petitioner for the use of the three Commissioners on 3.12.96, at which sitting the 3rd respondent was not present. He said : *"May I be permitted to hand over 3 sets of the same document each one bears the original signature of Mr. Paskaralingam. These are for the use of our Lordships and Justice Jayasuriya who will be joining your Lordships soon"*.

Again, on 16.12.96 when written submissions on behalf of the petitioner were handed over to the Commission, at which sitting too the 3rd respondent was not present, counsel for the petitioner stated: *"Our written submissions are ready. May I hand over to your Lordships three copies for the use of Justice Jayasuriya also and a 4th copy for the record"*. There was, therefore, no necessity for counsel who represented the petitioner to object to the continuation of proceedings after 12.11.96.

On the contrary, the other two members of the Commission made no indication to counsel even at that stage that the 3rd respondent had ceased to be a member of the Commission and the proceedings were being continued before the "remaining members" in terms of section 3 (2), as no "new member" had been appointed by the President under section 3 (1).

The submission regarding acquiescence thus seems to me to be devoid of merit.

In answer to a question by Court as to what the position would be if one member is temporarily unable to take part in the proceedings, but wishes to resume his participation, the Attorney-General submitted that once the remaining members decide to continue with the inquiry in the absence of the other member, he cannot participate in those proceedings thereafter. But, in the words of the 3rd respondent himself in his affidavit, he "recommenced to attend the sittings of the said Commission". In fact, the validity of his Warrant stands extended until 16.3.99.

If the learned Attorney-General's contention is correct that once the 'remaining' Commissioners exercise their discretion to continue with the inquiry, the other Commissioner no longer has a status in

regard to that inquiry, it raises a serious fundamental question as regards the validity of the Warrant issued by the President. In effect, his submission is that two of the three Commissioners can unilaterally keep the third Commissioner out of the inquiry, purporting to act under section 3 (2). In other words, they can countermand the very Act of Appointment by which the President empowered them to inquire into the matters specified in the Warrant.

However, the learned Attorney-General added that the 3rd respondent resumed duties on the Commission only after the President renewed and extended the Warrant in April, 1997, implying thereby that the 3rd respondent could not have continued to function until then. I cannot agree with this submission either. The Warrant dated 2.2.95 appointing the 1st, 2nd and 3rd respondents to be her Commissioners for the purposes specified therein continued to be in force at all material times, and required them initially to transmit their reports or interim reports to the President within 6 months from the date thereof. No fresh Warrant of appointment has been issued thereafter.

By the subsequent orders made by the President, only the time for the rendering of the final report of the Commission has been enlarged under section 4; on 24.7.95 until 2.2.96, on 1.2.96 until 2.8.96, on 1.8.96 until 2.2.97, on 31.1.97 until 2.3.97, on 28.2.97 until 30.6.97, on 30.6.97 until 14.1.98, on 14.1.98 until 17.3.98, and on 17.3.98 until 16.3.99. There was no change in the terms of reference and the original Warrant has been in force throughout. There was therefore no reason why the 3rd respondent could not have resumed his functions as a Commissioner once his health permitted him to do so, as he always remained a duly appointed Commissioner, his resignation not having been accepted by the President and the 3rd respondent having implicitly agreed to continue as a Commissioner.

I therefore hold that a situation contemplated by section 3 (1) did not occur and the question of appointing a **new member** did not consequently arise. All that did take place was a period of temporary absence on the part of the 3rd respondent, which in no way precluded him from resuming his functions as a Commissioner and participating in the decision-making process.

The proceedings of the said inquiry had concluded on 19.12.96 and the report is dated 2.3.97.

The petitioner in his counter-affidavit dated 12.3.98 averred that during the period between 12.11.96 and 2.3.97 the 3rd respondent sat as a single Judge in the Court of Appeal on 10 days in January, 1997, and 18 days in February, 1997. As such, he submitted that well before the adverse findings made against him and the compilation of the report thereon, the 3rd respondent was no longer unable to participate, at the very least in the decision-making process by subscribing to the report. He has submitted certified copies of the draft minutes of the Court of Appeal in respect of those 28 days, in January and February, 1997, marked CA-1 and CA-2, respectively.

There is no dispute that the 3rd respondent was unable to participate in the proceedings after 12.11.96, until the inquiry was concluded on 19.12.96.

But, I am unable to agree with the 3rd respondent when he states in paragraph 7 of his affidavit that *"having not participated in the proceedings held before the Commission after the 12th November, 1996, having not observed and heard the adduction of evidence and not heard the submissions of counsel, it would have been an unconscionable pretence and sham, not befitting judicial office, to have placed my signature to a report prepared by the other Commissioners. Likewise, I state that no new Commissioner appointed in my place could have lawfully arrived at findings based on evidence which was not led before him."* This is the sole reason given by the 3rd respondent for his non-participation in the decision-making process.

But this averment is contrary to the very provisions of section 3 (3) which states that "where a new member has been appointed under the provisions of subsection (1) it shall not be necessary for any evidence which may have been taken before the commission prior to such appointment to be retaken and the commission shall be entitled to continue its proceedings from the stage at which they were immediately prior to such appointment". This subsection clearly recognises that such evidence shall be acted upon though not taken before a particular Commissioner. In other words, these provisions enable the Commission of Inquiry to adopt such evidence even without the consent of parties, unlike in proceedings before a normal Court of law where evidence led before a Judge's predecessor in office could be adopted, but generally with the consent of parties (vide section 48 of the Judicature Act).

Learned President's counsel for the petitioner relied on *Wijerama v. Paul*, for the proposition that the non-participation of the 3rd respondent on a few dates of the inquiry did not prevent him from participating in the decision-making process, as a verbatim transcript of such proceedings was available to him and the proceedings were even tape-recorded.

In the aforementioned case, the then Court of Appeal of Sri Lanka observed (at page 250) that: "the phenomenon of one judge acting on evidence taken before another is not one wholly repugnant to our law, and our legislators have themselves recognised (see eg. sections 88 of the Courts Ordinance and 292 of the Criminal Procedure Code) the acceptability of decisions reached in that way".

The 3rd respondent having continued as a Commissioner, was thus not justified in not participating in the decision-making process on the grounds adduced by him.

Neither the Warrant of appointment nor the principles applicable to the conduct of such inquiries required him "to have placed (his) signature to a report prepared by the other Commissioners". One presumes that all three Commissioners were required to participate in the decision-making process and before a report or interim report is transmitted to the President, a full and proper analysis is made of the evidence relevant to the inquiry by all the Commissioners, as would enable them to arrive at a collective opinion. No material has been placed before this Court to indicate that the 3rd respondent was unable to participate in the decision-making process in regard to the petitioner between 19.12.96 (on which date the proceedings in the aforesaid inquiry had been concluded) and 2.3.97 when the report was signed by the other two Commissioners.

It is also relevant to note that on 28.2.97 the President had enlarged the time for rendering of the report of the Commission until 30.6.97, and if the Commissioners were so disposed, they had almost four more months within which to prepare the report.

The resulting position then is that while the three respondents continued to be members of the Commission at all times relevant, by reason of the President having enlarged the period of validity of their Warrant of appointment without interruption, which Warrant was and still is in force, only two of those members participated in the decision-making process.

The President as the appointing authority, the petitioner as the party aggrieved by the findings and recommendations of the Commission, Parliament which under Article 81 of the Constitution is empowered to give effect to the recommendation that the petitioner be made subject to civic disability, and last but not least, the 'People' in whom 'Sovereignty' is vested by Article 3 of the Constitution have a right to know the views of the 3rd respondent in regard to this matter, as he continued to be a member of the Commission. Though undoubtedly such a decision could be made by a majority of the members of the Commission, I see no warrant in law for a member of the Commission to refrain from expressing his views one way or the other, while continuing to be a member of such Commission. It is immaterial whether by the 3rd respondent's participation in the decision-making process, the conclusions reached and the recommendations made by the other Commissioners could have been different, or whether their collective thinking could have tilted the scales differently. What is repugnant to the principles of natural justice is that only two out of the three Commissioners who held the inquiry chose to express their views. Such a report cannot, in my view, be considered a report of the Commission, as contemplated by law.

Mustill & Boyd in the Law and Practice of Commercial Arbitration in England (1982 edition) state at pages 322 and 323 that where the reference is to more than one arbitrator, all the arbitrators must act together, unless the arbitration agreement provides otherwise and quote Creswell, J's observations in *Re. Beck and Jackson*<sup>(2)</sup> (citing Russel) that: "the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges so that by conference they shall mutually assist each other in arriving together at a just conclusion".

Russel on The Law of Arbitration (20th edition, 1982) states at page 221 that: "arbitrations need not follow the procedure laid down for actions in a court of law" but goes on to state at page 234 that "on a reference to more than one arbitrator, . . . each of them must act personally in performance of the duties of his office, as if he were sole arbitrator; for, as the office is joint, if one refuses or omits to act, the others can make no valid award".

If this principle applies to arbitrators who are 'Judges' selected by the parties, then with how much greater force does it apply to proceedings before a Commission of Inquiry such as the one we are concerned with, which is appointed by no less a person than the Head of the State.

In *Parr v. Winteringham*<sup>(3)</sup> three persons were appointed to act as stewards of a horse race, the rule of the course being that all disputes were to be settled by the stewards and all such decisions were to be final. Two of the stewards, not being together at the time, signed a paper containing their decision in favour of the plaintiff's horse, from which the third steward dissented. In an action by the plaintiff to recover the stakes, it was held that the decision was valid and binding.

But, Lord Campbell, C.J. expressed the opinion that: "if these functionaries were in the nature of Arbitrators or Judges, they must meet together, deliberate, and give a joint judgment. But stewards of races are Judges of a peculiar description . . ."

In *Morris v. Gestetner Ltd.*<sup>(4)</sup> where an employee applied to the Industrial Tribunal for unfair dismissal and the majority of the Tribunal decided that the employee had been unfairly dismissed and the minority took no part in a decision on whether to make a recommendation under section 106 (4) of the Industrial Relations Act, 1971 and no such recommendation was made, on appeal by the employee it was held, allowing the appeal, that even though the decision that the employee had been unfairly dismissed was a majority decision, it was for the Tribunal and every member of it to consider whether there should be a recommendation for re-engagement under section 106 (4).

In *Natural Justice* by Paul Jackson (2nd edition, 1979) it is stated at page 90 that: "once it is established who constitutes a tribunal, it is clear that all the members must participate in its decision".

In *Regina v. Kensington and Chelsea Rent Tribunal, ex. p. Mac Farlane*<sup>(5)</sup> Lord Widgery, C.J. recognised this principle when he stated at page 1490 that: counsel "has given us a timely reminder that under the Act the tribunal consists of a chairman and two other members; he submits quite rightly that no decision can be taken except by a tribunal so constituted".

In *Chief Constable of the North Wales Police v. Evans*<sup>(6)</sup> Lord Brightman observed at page 154 that "judicial review is concerned, not with the decision, but with the decision-making process".

Having regard to the authorities cited above and for the reasons stated in my judgment, I cannot but come to the conclusion that the interim report of the Commission in respect of this inquiry is thus fatally flawed.

I therefore hold that the non-participation of Justice F. N. D. Jayasuriya **does** render the interim report one made without jurisdiction.

Accordingly, I direct that a mandate in the nature of a Writ of Certiorari do issue, as prayed for by the petitioner, quashing the adverse findings made by the 1st and 2nd respondents against the petitioner and the recommendations made by them to the President in pursuance of such findings.

I make no Order as regards costs.

**GUNASEKERA, J.**

I have had the benefit of reading the draft judgments of my Lord the Chief Justice and that of Hon. Wijetunga, J. with whom I was associated at the hearing of this application. Having given my anxious consideration to both drafts, on a careful examination of the submissions made on behalf of the parties and upon an analysis of the relevant provisions of the statute namely the Special Presidential Commissions of Inquiry Law, No. 7 of 1978, as amended I most respectfully regret that I am unable to agree with the findings of my Lord the Chief Justice.

Whilst I agree with the observations and findings of Hon. Wijetunga, J. I concur with his Order that a Mandate in the Nature of a Writ of Certiorari be issued to quash the adverse findings made by the 1st and 2nd respondents against the petitioner and the recommendations made by them to Her Excellency the President in pursuance of such findings in their interim report dated 2.3.1997 in respect of inquiry No. 3/95B.

As the facts relating to this application are fully set out in the judgments of my Lord the Chief Justice and that of my brother Wijetunga, J. it is unnecessary for me to repeat them.

The only question of law upon which notice was issued on the respondents is as follows:

"Does the non-participation of Justice F. N. D. Jayasuriya render the interim report one made without jurisdiction".

In regard to this question I wish to make the following observations as well:

The interpretation section, namely section 22 of the Special Presidential Commissions of Inquiry Law, No. 7 of 1978, as amended states that "in this law unless the context otherwise requires 'Commission' means a Special Presidential Commission of Inquiry established under this Law".

The establishment of the Commission in the present application is referable to section 2 (1) which *inter alia* states that "The President may by Warrant under public seal of the Republic of Sri Lanka establish a Special Commission of Inquiry consisting of such member or members, each of whom shall be a Judge of the Supreme Court or any other Court not below a District Court as shall be specified in the Warrant, to inquire into and report upon such administration, conduct or matter".

Subsection 2 of section 2 of the statute is in the following terms. "Every Warrant issued under this law shall –

- (a) set out the name of the member or each of the members of the Commission;
- (b) where a Commission consists of more than one member, specify the member who is to be the Chairman of the Commission".

In the instant case Her Excellency the President by virtue of the powers vested in her under section 2 of the Special Presidential Commissions of Inquiry Law by Warrant dated 2.2.1995 established

a Special Presidential Commission of Inquiry 1995 naming the first respondent as its chairman and the second and third respondents as the **other two members** of the said Commission".

Thus it is clear that the Special Presidential Commission of Inquiry, 1995 aforesaid was to consist of **3 members** the first respondent being its chairman and the second and third respondents being the other two members.

Section 2 (2) (e) provides that every Warrant issued under this law shall require the rendering of such reports, including interim reports as to the "**Commission**" may appear fit.

There is no dispute that the 4th interim report dated 2.3.1997 pertaining to inquiry No. 3/95B relating to the petitioner has been signed only by the 1st and 2nd respondents, for at page 7 of the interim report it is stated as follows: "Commissioner Justice F. N. D. Jayasuriya who was a member of this Commission appointed under the Warrant establishing the Special Presidential Commission was unable to participate in the proceedings of the Commission after the 12th of November, 1996, due to ill-health on medical advice. The proceedings were thereafter continued before the chairman and Commissioner Justice H. S. Yapa in terms of section 3 (2) of the Special Presidential Commissions of Inquiry Law, 7 of 1978".

Since the chairman and the other member who have signed the interim report dated 2.3.1997 have set out the above to be the basis for the non-participation of Justice F. N. D. Jayasuriya, the 3rd member of the Commission, in the decision-making process, I wish to consider the provisions of section 3 in order to decide as to whether the said section has any application to the facts relating to the present application and consider whether the 1st and 2nd respondents were lawfully entitled to have acted under the provisions of section 3 (2) of the statute.

Section 3 (1) provides that: "where any member of a Commission dies, or resigns, or desires to be discharged from the performance of his duties in respect of the whole or part of an inquiry, or refuses or becomes unable to act, the President may appoint a new member in his place for the whole or any part of such inquiry" and section 3 (2) states that "until such appointment is made, the inquiry may

continue before the remaining members of the Commission, and if no such appointment is made, the inquiry shall continue and be concluded before the remaining members of the Commission".

There is no dispute that the 3rd respondent did not participate in the inquiry after 12.11.1996. In his affidavit dated 11.1.1998 the 3rd respondent states that on 13.11.1996 he became seriously ill and was warded at the Intensive Care, Cardiology Unit of the National Hospital, Colombo, with a heart condition of Cardio Myopathy and in view of his serious illness which incapacitated him, in order to ensure that the proceedings before the Commission continued without any undue delay that he submitted his resignation as a member of the Commission to Her Excellency the President by letter dated 18.11.1996 marked '3R1' with a copy to the 1st respondent who was the chairman of the Commission. Her Excellency's response was conveyed to the 3rd respondent with a copy to the 1st respondent under the hand of the Secretary to the President by letter '1R1' dated 28.11.1996. It states as follows:

"Her excellency the President has directed me to acknowledge receipt of your letter dated 18.11.1996 by which you have submitted your resignation from the membership of the abovementioned Special Presidential Commission.

The sections of the Special Presidential Commission Act referred to by you viz sections 3 (1) & (2) do not appear to require your resignation in consequence of your present illness. Your absence from the proceedings on that account does not appear to invalidate the proceedings.

In the circumstances I am directed to inform you that you can **continue to remain a member of the Commission** and take part in its proceedings when your health permits you to do so."

Thus it is clear, to my mind, that the resignation of the 3rd respondent was not accepted by Her Excellency and that the situation contemplated in section 3 (1) did not arise and consequently the chairman and the 2nd respondent could not lawfully have continued with and concluded the inquiry purporting to act under the provisions of subsection 3 (2) without the participation of the 3rd respondent who in fact and in law continued to be the 3rd member of the

commission appointed by Her Excellency by virtue of the powers vested in her under section 2 and in my view the acts and deeds of the 1st and 2nd respondents only cannot in law be considered to be the acts and deeds as envisaged in section 2 of the statute.

The only reason adduced by the 3rd respondent for non-participation in the decision-making process was that the proceedings of the inquiry had concluded on 19.12.1996 and having not observed and heard the evidence or the submissions of counsel after 12.11.1996 it would have been an unconscionable pretence not befitting judicial office to have placed his signature to a report prepared by the other Commissioners and that no new Commissioner appointed in his place could have lawfully arrived at findings based on evidence which was not led before him.

The petitioner along with his counter-affidavit dated 12.3.1998 has produced certified copies of the draft minutes of proceedings held before the 3rd respondent who had functioned as a single Judge of the Court of Appeal marked 'CA1' and 'CA2' which establish that he had performed judicial functions on 10 days in January, 1997, and 18 days in February, 1997.

In my view the fact that the 3rd respondent functioned on 28 days in the months of January and February, 1997, negatives the assertion that he was unable to participate in the decision-making process, as it appears in the interim report dated 2.3.1997. Further an examination of section 3 (3) shows that it enabled the 3rd respondent to have lawfully examined the proceedings held after 12.11.1996 and to have considered the written submissions tendered on behalf of the parties and to have participated in the decision-making process.

For the reasons stated I am of the view that the interim report dated 2.3.1997 in respect of Inquiry No. 3/95B signed by the 1st and 2nd respondents without the participation of Justice F. N. D. Jayasuriya was not one made by the Commission as contemplated by the law under which it was established and was one made without jurisdiction.

I make no Order for costs.

*Application allowed.*  
*Certiorari issued.*