LAND REFORM COMMISSION

v.

GRAND CENTRAL LIMITED

SUPREME COURT
SAMARAKOON, C. J.
ISMAIL, J., WEERARATNE, J., SHARVANANDA, J.,
AND WANASUNDERA, J.
S. C. APPEALS NO. 36/81 and 37/81
C. A. (LA) NO. 20/81
D. C. COLOMBO 14125/L
JULY 27, 28, 29, 30 AND
AUGUST 3, 1981.

Constitutional Law — Fundamental right to practise Profession — Right of Attorney-General and State Counsel to appear in private capacity — Article 14(1) (g) of Constitution — Section 41 of Judicature Act No. 2 of 1978—

The right to be heard in a Court is a right conferred on the party to the proceeding. It is not a right conferred on the attorney-at-Law, It is open to an attorney-at-law to appear for the party litigant and to exercise his client's right to be heard on his behalf. The 'entitlement' follows and is dependent on the 'right' of the party. They are two different concepts. Although the Attorney-General and the Legal Officers of his Department have been granted permission to engage in private practice such arrangements between employer and employee cannot affect the issue if in fact there are legal constraints on the Attorney-General engaging in private practice.

The Attorney-General is the Chief Legal Officer and adviser to the State and thereby to the sovereign and is in that sense an officer of the public. The Attorney-General of this country is the Leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes. No Attorney-General can serve both the State and private litigant.

Cases referred to:

(1) In the matter of a Proctor of the Supreme Court (1927) 30 NLR 65, 70
(2) O' Toole v. Scott [1965] 2 All ER 240, 243
(3) Collin v. Hicks [1831] 2 B & Ad. 1290
(4) Simus v. Moore [1970] 3 All ER 1,3
(5) Le mesurier v. Layard (1898) 3 NLR 227, 230

Appeal from judgment of the Court of Appeal.

C. Thiagalingam Q.C. with K M. M. B. Kulatunga Acting Solicitor General and S. Ratnapala State Counsel for defendant-petitioner-petitioners.

H. W. Jayewardene Q.C. with H. L. de Silva, Romesh de Silva, and Lakshman Perera for Plaintiff-respondent.

A. C. de Zoysa with George Candappa and Siva Rajaratnam (on notice) for Bar Association of Sri Lanka.

Cur. adv. vult.

September 16, 1981.

SAMARAKOON, C. J.

Mr. Siva Pasupati the Attorney-General of Sri Lanka, appeared in this case at its hearing in the Court of Appeal and marked his appearance as private Counsel for the Land Reform Commission (hereinafter referred to as the Defendant) and not in his official capacity as Attorney-General of the country. Two State Counsel appeared with him and their appearance too was marked in the same manner by Mr. Pasupati. Mr. Pasupati was denied a right of audience by the Court of Appeal as that Court was of the opinion that he could only appear in his official capacity and not in his private capacity. He has not chosen to complain to this Court, or assert any right claimed by him either by way of application or affidavit, although this Court enrolled him and he now holds the exalted positions of Attorney-General of Sri Lanka and Leader of the Sri Lanka Bar. Therein lies a tragedy. Instead, his client, the Defendant, has sought to appeal to this Court, ostensibly on the plea that it has been denied the services of Counsel of its choice, and now appearing by Senior Queen's Counsel has submitted as his only argument that Mr. Pasupati has been denied his fundamental right of practising his profession, that he had a right to appear as plain Attorney-at-Law and be granted the right of audience by the Court of Appeal and that the Court of Appeal in denying him the right of audience infringed the fundamental right of Mr. Pasupati as a lawyer conferred on him by Article 14(1)(g) of the 1978 Constitution and it also committed a breach of Section 41 of the Judicature Act No. 2 of 1978. It is the hand of Esau but the voice of Jacob. But perhaps I should begin at the beginning

On 21. 1. 1981 Grand Central Ltd. (hereinafter referred to as the plaintiff) instituted proceedings in the District Court of Colombo against the defendant praying for an order directing the defendant to hand over to the Plaintiff the lands described in the schedule to the plaint and for an interim injunction restraining the Defendant and its servants and agents from interfering with the Plaintiff's right of management of the said lands. The learned Additional District Judge issued an interlocutory order coupled with an enjoining order of restraint on the Defendant: On 6-2-81 the Defendant applied *inter alia* for a discharge of the enjoining order which application was refused by the District Court by its

order of 20-1-81. The Defendant then appealed against that refusal to the Court of Appeal. It filed two applications – one for leave to appeal to the Court of Appeal (No. 20/81) and another to revise the order of refusal (No. 21/81). When these applications were taken up for hearing Mr. H. W. Jayewardene, Q.C. marked his appearance with his Juniors for the Plaintiff and Mr. Siva Pasupathi marked his appearance with his Juniors for the Defendant. To a pointed question by Mr. Jayewardene, Mr. Siva Pasupati stated that he and his Juniors (who were all State Attorneys) were appearing in their private capacities as Attorneys-at-Law and not in their official capacities of Attorney-General and State Attorney respectively. Thereupon Counsel for Plaintiff took objection to the Attorney-General appearing in his private capacity stating that he could only appear in his official capacity as Attorney-General. It is not clear whether the objection included the State Attorneys but that does not matter now because the order of the Court of Appeal refers only to the Attorney-General. It held that the Attorney-General cannot appear for a litigant in his private capacity and can only enter an appearance, if at all, in his official capacity as Attorney-General. He could therefore not be heard on behalf of the Defendant in his private capacity as Attorney-at-Law. The Defendant sought permission from the Court of Appeal to appeal to this Court which application was refused. This Court has granted the Defendant special leave to appeal to this Court in both cases. The appeals in S.C. No. 36/81 and No. 37/81 were taken together for hearing and this order of mine covers both appeals.

At the outset I desire to deal with a minor bone of contention. Mention has been made to the Court of Appeal by Mr. Pasupati suggesting that Mr. Pasupati and his Juniors were not appearing at their own volition but were doing so on the direction of the President of the Republic. There is no express record of it in the Court of Appeal record. However I find the following statement in the written submissions of the Defendant filed in the Court of Appeal:-

> "The Court has been informed from the Bar that the Attorney-General is appearing in his private capacity in accordance with a direction of the Head of State and Executive, His Excellency the President".

The Plaintiff has referred to this in his written submissions presented to this Court and states that the Attorney-General referred to this direction in the course of his submissions before the Court of Appeal. (Para 4 of written submissions). He adds that this statement of the Attorney-General was objected to and the Attor-

neyGeneral "was told by Court not to refer to it but at a later stage persisted in doing so though objected to" (para 6). The objection is of no consequence in this appeal. All that matters is that Mr. Pasupati did mention a direction stated to have been given to him by the Head of State to appear for the Defendant. Ranasinghe, J. has referred to this statement in his judgment and the impression created in his mind appears to be that it was mentioned to support the propriety of his appearing in the way he did. Perera, J. also refers to this statement although he expressed the view that Mr. Pasupati "did not seem to rely heavily on such direction". Neither of them appear to have been prejudiced in any way by this statement. The Plaintiff alleges that that statement of the Attorney-General was "calculated to cause prejudice" to the objection raised by the Plaintiff and that the Attorney-General made the statement from the Bar which he was not entitled to do. During the hearing before us Mr. Kulatunga, Junior Counsel for the Defendant who holds the post of Deputy Solicitor-General in the Attorney-General's Department, stated that the Attorney-General marked his appearance in the manner he did in consequence of something told to him by Mr. Menikdiwela, Secretary to the President. In the course of his argument Counsel for the defendant stated that there was in existence an administrative order by the Cabinet that the Attorney-General should not appear for State Corporations, and that when the Attorney-General received a directive (through the Land Reform Commission) from the President directing him to appear for the Defendant he was placed in a dilemma. Counsel submitted that if the Attorney-General disobeyed such directive he risked instant removal. Placed as he was in this dilemma he solved it by marking his appearance as private Counsel. If the Attorney-General found himself in this impasse it was his duty to bring it to the notice of the President and to advise him as to the proper course of action. He is the Chief Legal Adviser to the State. It is extremely unlikely that the President would have acted contrary to the directive of his own Cabinet nor is there anything in the record or in the statements made from the Bar to show that the President directed the Attorney-General to appear as private Counsel. How the Attorney-General came to mark his appearance as private Counsel remains a mystery. However it is immaterial to this Court, or to any Court for that matter, to know the identity of the person high or low, who has directed a State Officer to appear as private Counsel in private litigation. In an original Court Counsel is only required to state the name of the instructing Attorney whose proxy is on record. This is not a requirement in the Court of Appeal or Supreme Court. Name dropping in Court is therefore unprecedented and uncalled for. I will leave it at that.

I will for the purpose of this case proceed on the basis that the Attorney-General (irrespective of who presently holds the office) has marked his appearance as plain Attorney-at-Law (and not in his official capacity as Attorney-General) instructed by an Attorney who is also an employee of the Defendant. At the outset I asked Counsel for the Defendant what right he had to espouse the cause of the Attorney-General by way of appeal. He stated that the Defendant had been deprived of the services of the Counsel of his choice. I cannot see any substance in this complaint. The Defendant's right to be represented by Counsel has not been denied. He could well have retained other Counsel. Anyway as the matter for decision is one of importance I shall proceed to record my decision.

Counsel for the Defendant submitted that there was nothing wrong in appearing for the Land Reform Commission because it was an organ of State. It might in corporate language be loosely described as a "wholly owned subsidiary of the Treasury", but still it is a juristic person entitled in law to retain its own Counsel even from the private Bar. Besides, if it was an organ or agency of Government the Attorney-General could have, and would have, marked his appearance in his offical capacity. There would then have been no dilemma as he claims there was. I do not think any further comment is necessary as that argument was also intended to demonstrate that there was no conflict of interests.

It is claimed that a fundamental right of the Attorney-General was infringed by this refusal of the right of audience. Article 14(1) (g) of the Constitution of the Republic (1978) is called in aid. It reads thus—

"14(1) Every citizen is entitled to—

(g) the freedom to engage himself or in association with others in any lawful occupation, profession, trade, business or enterprise;"

This Article gives a citizen the freedom to engage by himself or in association with others "in any lawful profession". The profession we are concerned with is the legal profession. The Attorney-General has been admitted and enrolled in the legal profession. He has acquired that freedom and nobody can deny his general right to practise that profession as an Attorney-at-Law. The only restrictions are those that are prescribed by law in relation to the professional and other qualifications "necessary for practising" that profession. (*Vide* Article 15(5) of the Constitution (1978)).

For instance rules for that profession are made under Article 136(1) (g) and (h) for the admission, enrolment, suspension and removal of Attorneys-at-Law and for their attire when attending Court. These have the force of written law. The State cannot permit unqualified persons to handle the affairs of a citizen in Court and in legal matters. Hence these laws and rules. (*Vide* also the provisions of section 40 and section 42 of the Judicature Act No. 2 of 1978). The refusal of a right of audience in any particular case does not mean a denial of the fundamental right to engage himself in the legal profession. The ruling in this case is that he cannot appear as an Attorney-at-Law in his private capacity and therefore cannot practise as a private Attorney. His right to practise his profession as the Chief Law Officer of the State in all Courts in the Island has not been denied. Indeed it has been conceded in no uncertain terms.

Counsel for the Defendant then referred us to the provisions of section 41 of the Judicature Act No. 2 of 1978. It reads thus—

"41. (1) Every Attorney-at-Law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice and every person who is a party to or has or claims to have the right to be heard in any proceeding in any such court or other such institution shall be entitled to be represented by an Attorney-at-Law.

(2) Every person who is a party to any proceeding before any person or tribunal exercising quasi-judicial powers and every person who has or claims to have the right to be heard before any such person or tribunal shall unless otherwise expressly provided by law be entitled to be represented by an attorney-at-Law".

Counsel claimed that the section conferred a right on the Attorney-at-Law which cannot be denied by a Court and can only be denied if he was removed or suspended by the Supreme Court. The "right to be heard" is a right conferred on the party to the proceeding in Court. It is not a right conferred on the Attorney-at-Law. It is open to an Attorney-at-Law to appear for the party litigant and to exercise his client's right to be heard on his behalf. The "entitlement" follows and is dependent on the "right" of the party. They are two different concepts. "The practice of the law is not a business open to all who wish to engage in it; it is a personal right or privilege limited to selected persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the State. . . . . ."

(per Jayewardene, A. J. in the matter of a Proctor of the Supreme Court.[1] In the circumstances I hold that the provisions of section 41 of the Judicature Act have not been contravened.

Counsel for the Defendant contended that although a Court had the fundamental right to control its proceedings it had no power to deny the right of audience to an Attorney-at-Law. He conceded that a Court could deny that right in case of improper conduct in Court. He relied on the provisions of sections 40, 43 and 44 of the Judicature Act. Section 40 empowers the Supreme Court to enrol Attorneys-at-Law. Section 43 and section 44 deal with disciplinary enquiries when misconduct is alleged against any Attorney-at-law. These do not in my opinion affect the inherent power of a Court to control its own proceedings. In exercising that power "subject to usage or statutory power Courts or Tribunals may exercise a discretion whether they will allow any; and what persons, to act as advocates before them". per Lord Pearson in *O. Toole vs. Scott.*[2]

In the case of *Collier vs. Hicks* [3] the Plaintiff, who was an Attorney, attempted to appear for the informer in a case before two justices hearing the case. He was told by the justices that he could not appear for the informer as Attorney and Advocate as it was not their practice to allow such appearance. When the Plaintiff persisted in his attempt to take part in the proceedings he was, by order of the justices, expelled from the premises into the Street. He complained of trespass for assaulting and turning him out of the police office. The Court of King's Bench in appeal held that no one is entitled, without permission of the magistrates, and as a matter of right, to attend and take part as an Advocate. Lord Tenterden, C. J. said:

> "This was undoubtedly an open Court and the public had a right to be present as in other Courts; but whether any persons, and who shall be allowed to take part in proceedings, must depend on the discretion of the Magistrates, who like other Judges must have the power to regulate their own proceedings."

Littledale J. stated thus:

> " The plaintiff, indeed is an attorney of one of the Superior Courts, but he can derive no right from that character to act as an advocate in a proceeding before a magistrate. It seems to me, as magistrates have a right to regulate their own proceedings, they must, consequently, have authority to decide whether advocates shall not be permitted to plead before them, though in cases of difficulty it may be desirable and advisable that the liberty should be granted."

Parker J. stated the general rule thus:

> "No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage."

Lord Pearson's statement of the principle was accepted and repeated by *Lord Parker C. J.* in *Simus vs. Moore* [4] who stated: "Justices have always had an inherent power to regulate the procedure in their courts in the interests of justice and a fair and expeditious trial." Our Courts in Sri Lanka have always had that power and I know of no law or rule which takes away that power. I therefore hold that the Court of Appeal had the power to refuse the right of audience to any Attorney-at-Law for good reason..

I now turn to the main question. Has the Attorney-General the right of audience when he appears as private Counsel for a client while he holds the post of Attorney-General? The office of Attorney-General has a long history. It is the lineal descendant of the "Advocate Fiscal" which existed under Dutch rule in this country. It continued as such under British rule until 1833 when it was renamed "King's Advocate". He performed functions similar to the functions performed by the Attorney-General in England. (18 C. L. Rec. CV). By Ordinance 1 of 1883 this designation was changed to "Attorney-General" and he represented the Crown in all civil and criminal matters. In the year 1898 Bonser, C. J. referred to the post in these terms :-

> "The present Attorney-General is the lineal successor of the old Advocate Fiscal, and just as in old days actions against the Government were brought against the Advocate Fiscal as representing the local 'Fisc' or Treasury, so they may now be brought against the Attorney-General". *Le Mesurier vs. Layard* [5]

Then came the first Constitution – The Ceylon (Constitution) Order-in-Council 1946 (Chapter 376). By virtue of the provisions of section 60 the appointment and transfer of the Attorney-General was made by the Governor-General. This office was excluded from the purview of the Public Service Commission. In 1972 came the first Republican Constitution which provided that the Attorney-General shall be appointed by the President. It is the same in the 1978 Constitution. (*Vide* Article 54). The office of the Attorney-General is, as recognised by the Constitution, an exalted one. There is no doubt that there was a stage, many years ago, when

the Attorney-General engaged in private practice. This was the practice in England and was therefore adopted in this Country. The list of cases submitted by the Defendant ranging from 1880 and ending in 1915 bear testimony to this. Since 1915 the Attorney-General has not engaged in private practice. This has been the tradition built up over 60 years. No doubt it followed the English rule which was laid down by a Treasury Minute of June 29, 1894, forbidding the Attorney-General to engage in private practice and made at the instance of the then Prime Minister. This was a salutary rule in the interests of the administration of justice and justice itself. We have been informed that by a government fiat of 23rd July, 1980, the Attorney-General and the Legal Officers of his Department have been granted permission to engage in private practice. But such arrangements between employer and employee cannot affect the issue if in fact there are legal constraints on the Attorney-General engaging in private practice.

Counsel for the Defendant readily and quite correctly conceded that there is such constraint in the field of criminal law and practice. His powers in this field are vast. They extend even to quasi judicial functions. He is empowered to enter into and take over any criminal prosecution in the Island whether they be initiated by private plaint or by State Officer. He alone can enter a *nolle prosequi* in a criminal case. I need not labour the point. The Attorney-General engaging in private practice in criminal cases is unthinkable.

What of the civil law? All actions by or against the State must be instituted by or against the Attorney-General (section 456 Civil Procedure Code Chapter 101). All process issued against the State must be served on the Attorney-General (section 457 Civil Procedure Code). He has the power to undertake the defence in actions against Ministers, Parliamentary Secretaries and Public Officers (section 463 Civil Procedure Code). Special powers are given to him to watch the interests of wards of Court such as persons of unsound mind (section 556(2), section 572(2), section 575(1)) and minors (section 589, section 591, section 592(2) Civil Procedure Code). He is the Chief Legal Officer and Adviser to the State and thereby to the Sovereign and is in that sense an officer of the public. He is the watch-dog of public rights and can intervene in private litigation if public rights are in any way to be affected. He is vested with power in respect of all public charitable Trusts and actions alleging breach of any charitable Trust can only be brought by the Attorney-General or by others with his permission (section 101 of Trust Ordinance Chapter 87). He it is who advises the State and the Speaker on every Bill that is to be presented to Parliament

(Article 77 of the 1978 Constitution). Counsel for the Parliament brought to our notice certain facts connected with this duty which demonstrates the evils of the Attorney-General appearing in civil cases. This case was instituted in the District Court of Colombo on the 21st January, 1981, (Document DP1) and an interlocutory order coupled with an enjoining order was issued by the Court on 31. 1. 81 (Document DP2). The Defendant made application on 6. 2. 81 praying for the dissolution of the enjoining order (Document DP3) which application was dismissed by the Court on 20. 2. 81 (Document DP5). Application for leave to appeal and for revision of that order were filed in the Court of Appeal on 23. 2. 81. The Bill to amend the Land Reform Commission Law was presented to the Supreme Court on 18. 2. 81 (Document DP1D) and notice in terms of Article 134 of the Constitution was issued on the Attorney-General on 19. 2. 81 (Document DP9). The Bill was taken up for Consideration by the Supreme Court on 24. 2. 81 and Mr. Siva Pasupati as the Attorney General, himself appeared and tendered his opinion to the Supreme Court. The Plaintiff was also represented by Counsel who made submissions which went counter to those of the Attorney-General. The Supreme Court tendered its advice to the President and Speaker on the same day. The Court of Appeal heard the applications beginning on 3. 3. 81. At that time the Bills had not been passed by Parliament. No doubt long before 18.2.81 the Attorney-General would have, acting under powers conferred by Article 77 of the Consititution, tendered his advice to the State on the provisions of the Bill. It is relevant at this stage to take note of the position taken up by his client before the Court of Appeal set out in its written submissions–

"In view of the fact that the plaintiff-respondent has now resiled from the agreement to sell the said lands as evidenced by the Plaintiff-Respondent's present action and conduct, the Government has taken steps to enact amendments to the Land Reform Law as was contemplated in 1976, which would have the effect of vesting the Plaintiff-Respondent's estate Lands, in October 1975. The Bill for enacting the necessary amendments has been certified by the Cabinet of Ministers under Article 122 of the Constitution as being urgent in the national interest and the Registrar of the Supreme Court has served notice on the Attorney-General that the said Bill would be considered by the Supreme Court, in terms of Article 122 of the Constitution, on the 24th of February, 1981. The Defendant-Petitioner annexes hereto marked 'DP. 9' a true copy of the said notice and marked 'DP. 10', a true copy of the said Bill which was forwarded with the said notice."

"In the premises, the Defendant-Petitioner states that irreparable loss and damage will be caused if the said Enjoining Order dated 30th January 1981 and the Order of the learned District Judge made on the 20th February, 1981, affirming the said Enjoining Order are allowed to stand."

What is the effect of these? They expose the Attorney-General to the charge that he was partisan and biased when he tendered his advice on the Bill and when he made submissions on the Bill to the Supreme Court. There is an appearance of conflict between his duty to Court, his duty to the State and the legislature, and his duty to the client. The age-old concept that the Attorney-General is impartial and decides equally between State and subject would have been suspect. The eventual sufferer must necessarily be the administration of justice and justice itself.

In the course of the argument Counsel for the Defendant was asked what would the Attorney-General do if, when appearing for one of the claimants in a partition case, he discovered in the course of the case or in the course of receiving instructions that the State had a claim to the lands claimed by his client. His answer was that the Attorney-General would immediately cease his appearance for the client, advise the State on the basis of the knowledge so gained by him and then appear for the State. This contention cannot be accepted. It would be improper for him to jettison his client in that way. Unless he has his client's express consent, he would be acting in breach of the confidence reposed in him and also contrary to the provisions of section 125 of Evidence Ordinance which expressly forbids any Attorney-at-Law to disclose any knowledge acquired by him in the course of his professional employment. In short he will be guilty of professional misconduct and malpractice the consequences of which are serious in the extreme.

Counsel for the Defendant made another submission which I mention only because it was made. He said that the Attorney-General appears in his official capacity when he is nominative, that is when he is a party, and secondly when he is served with notice as required by law and in all other instances, eg. when he takes over the defence of a Minister or Public Servant, he does not appear in his official capacity but as plain Attorney-at-Law. I cannot agree. He cannot shed his office as and when the circumstances suit him. The law does not permit the Attorney-General to play Jekyll and Hyde. He had taken his oath of office as required by the provisions of the Constitution. Once an Attorney-General always the Attorney-General until he relinquishes office.

The Attorney-General of his Country is the leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It is for that reason that all Courts in this Island request the appearance of the Attorney-General as *amicus curiae* when the Court requires assistance, which assistance has in the past been readily given. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes. I cannot but agree with the judgment of the Court of Appeal that there are constraints on the Attorney-General engaging in private practice in the civil law as well as the criminal law. *It is regrettable that the State has sought to act counter to tradition, (prudence and propriety) in granting the Attorney-General and his law officers the right of private practice.* Justice is the loser thereby. No man can serve two masters. For either he will hate the one and love the other or he will hold to one and dispise the other. No Attorney-General can serve both State and private litigant. I would dismiss the appeal with costs. I desire to record our appreciation of the valuable assistance given to us by Counsel for all parties and more especially to Counsel for the Bar Association who gave also of their valuable time.

ISMAIL, J. I agree
WEERARATNE, J. I agree
SHARVANANDA, J. I agree
WANASUNDERA, J. I agree

Appeal dismissed