

BANDARANAIKE
v.
DE ALWIS AND OTHERS (2)

SUPREME COURT

SAMARAKOON, C.J., WIMALARATNE, J., AND COLIN-THOMÉ, J.

S.C. REFERENCE 1 OF 1982.

SEPTEMBER 23, AND 24, 1982.

Special Presidential Commissions of Inquiry Law, No. 7 of 1978, sections 2, 16 and 18A – Misconduct by Member of Commission – Declaration that he is unable to act – Standing of private citizen to bring an action to remove member of Commission.

The 1st respondent is a Judge of the Court of Appeal and the other two respondents were Judges of the Supreme Court. All three respondents were appointed by His Excellency the President in terms of section 2 of the Special Presidential Commissions of Inquiry Law to enquire and obtain information relating to various matters set out therein.

Notices under section 16 were issued to a number of persons including one A.H.M. Fowzie businessman, politician and one time Mayor of Colombo. He received the notice on 1.11.78 and was informed that he was a person whose conduct should be the subject of inquiry and/or who is implicated or concerned in the matters under inquiry by the Commission.

On 20.11.78 Fowzie received another notice stating "until further communication is sent to you, you are not required to take any step in respect of the Notice dated 1.11.78."

The 1st respondent held a Power of Attorney on behalf of his son Chanaka who was away in U.K., working under a contract of employment. The 1st respondent acting on behalf of Chanaka advertised No. 4, Anula Road and 542/1, Havelock Road, Colombo 6 for sale and letting respectively in April 1981. Early in December 1981 one A.H.M. Mohideen and one Ebert Peiris met the 1st respondent at the above premises and made offers both to buy No. 4 Anula Road and rent out 542/1, Havelock Road.

On 17th December 1981, the 1st respondent entered into a tenancy agreement with Mrs. Fowzie having received Rs. 39,000/- the previous day. The 1st respondent in his affidavit stated it was on that day that he came to know that the tenant was the wife of A.H.M. Fowzie. On 1.1.82 the 1st respondent entered into a Sale Agreement No. 213 with Mohideen and handed over the keys. On 11.4.82 the Deed of Sale was executed and the balance of the purchase price was received on 15.4.82.

The petitioner alleged that the 1st respondent knowingly engaged in financial dealings with the said Fowzie and by doing so has (a) committed an act of grave misconduct (b) vitiated his integrity and thereby shown himself to be corrupt and guilty of corruption; and (c) compromised his position as a Judge of the Court of Appeal by his misbehaviour.

Held -*Per Samarakoon, C.J.*

- (1) "I cannot see anything dishonest in his (1st respondent's) conduct throughout the transaction. I therefore hold that the allegations of misconduct (grave or otherwise), misbehaviour and corruption, are unfounded and reject them. He has not compromised his position as a Judge of the Court of Appeal."

- (2) Yet the 1st respondent cannot properly continue to sit in judgment over Fowzie because there is a real likelihood and a reasonable suspicion that his judgment would be warped by favouritism though there is no proof of it.

I would therefore issue a writ of prohibition forbidding the 1st respondent from taking any further part in the investigation of the conduct of Fowzie and also prohibiting him from joining the other Commissioners in a final or other report to the President which incorporates a decision regarding Fowzie."

"I desire to state that that confidence in which justice is rooted has been destroyed as far as the investigation of Fowzie is concerned. Right minded people would not be unjustified if they look askance at other decisions of the 1st respondent. It might undermine that faith in the Commission itself which is necessary to command respect for its recommendations. This must be avoided, whatever the cost.

- (3) The petitioner as a member of the public has a right and interest to maintain this application and to seek the relief claimed.
- (4) The order being made does not have the effect of staying, suspending or prohibiting the Commission from functioning or setting aside or varying any order finding, report, determination, ruling or recommendation of the Commission. It merely prohibits one of the Commissioners from acting in circumstances.

Per Wimalaratne, J.

- (1) Declaration is granted that 1st respondent has by his misconduct become unable to act as a member of the Commission.
- (2) Every citizen has a standing to invite the Court to prevent some abuse of power and in doing so he can claim to be a public benefactor.

Per Colin-Thomé, J.

- (1) That all the transactions were carried on while the section 16 Notice was still in force and as there were allegations of serious offences committed by Fowzie the 1st respondent is guilty of misconduct unbecoming of a Judicial Officer.
- (2) That 1st respondent has, it is declared, become unable to act and is disentitled to hold office and function as Member of the Special Presidential Commission of Inquiry.
- (3) A writ of quo warranto should issue.

Cases referred to:

- (1) *Regina v. Dublin Corporation* (1878) 2 L.R. 1r. 371, 376.
- (2) *Everett v. Griffiths* (1921) 1 A.C. 631, 683.
- (3) *R v. Sussex Justices, McCarthy, Ex parte* (1924) 1 KB 256, 259.
- (4) *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1969) 1 Q.B. 577, 599.

APPLICATION for writs of prohibition and quo warranto.

Felix R.D. Bandaranaike, petitioner in person.

P. Navaratnarajah, Q.C., with *Dr. M.L.S. Jayasekera, K. Kanag-Iswaran, K. Sivanathan* and *A.A.M. Illiyas* for 1st respondent.

October 18, 1982.

Cur. adv. vult.

SAMARAKOON, C.J.

The petition in this case was filed in the Court of Appeal against the three respondents who comprise the Special Presidential Commission of Inquiry. They were appointed by the President of the Republic

by Warrant under his hand in terms of section 2 of the Special Presidential Commissions of Inquiry Law No. 7 of 1978. The 1st respondent is a Judge of the Court of Appeal and the 2nd and 3rd respondents are Judges of the Supreme Court. The petitioner applied for a Writ of Quo Warranto and a Writ of Prohibition against the 1st respondent. No relief was claimed against the other two. As the 1st respondent is a Judge of the Court of Appeal the petition was transferred to the Supreme Court in accordance with the requirements of section 18A(1) of the Law as amended by Act No. 4 of 1978. That is how this Court became seized of this matter.

By Warrant dated 29.03.1978 (1R1) the Commissioners were directed to inquire into and obtain information in respect of the period commencing May 28th 1970 and ending July 23rd 1977 relating to the various matters therein set out. The Warrant required the Commissioners to render a report to the President at the end of one year but this period has been extended from time to time. The last extension validates it up to 28th September, 1982. The Commission commenced sittings in August 1978. On the 9th November 1978 the Court of Appeal by its decision in Court of Appeal Application No. 1 of 1978 held that the said Warrant issued to the Commissioners was *ultra vires* the Law and issued a Writ of Prohibition against the Commissioners prohibiting them from inquiring into the conduct of the appellant in that case. The legislature then passed amending Act No. 4 of 1978 with retrospective effect from the date of the operation of Law No. 7 of 1978. The amendment to section 2 provided that a Warrant issued under section 1 may relate to any period whatsoever including any period before the date of commencement of the Law, thereby nullifying the decision of the Court of Appeal.

Prior to the 9th November, 1978, notices under the provisions of section 16 of the Law were issued to a number of persons, one of them being Mr. A. H. M. Fowzie a businessman, politician and one time Mayor of Colombo. He received a notice dated November 1, 1978 (1R3). The petitioner was another who was noticed in terms of section 16. He received notice dated 6th November, 1978 (1R2). Each person was informed that he was a person -

- (a) whose conduct should be the subject of inquiry; and/or
- (b) who is implicated or concerned in the matters under inquiry, by the Commission.

It will be convenient at this stage to revert to the allegations in the petition. The petitioner alleges that on the 10th December 1979 the respondents made a second Interim Report to the President

which has been published as Sessional Paper VI of 1979 (a copy of it has been produced marked XI). The Report states that notices issued before the said decision of the Court of Appeal were revoked and thereafter (presumably) after the amending Act was passed notice under section 16 were again issued. The names of several recipients are mentioned, one of them being the said Fowzie. His passport was impounded on the 8th August, 1978, thereby preventing him from leaving the country. The petitioner states that this passport was released on 1st October, 1979. The petitioner then states that while the said Fowzie was subject to the said notice and thereby subject to the jurisdiction of the Commissioners the first respondent knowingly engaged in financial dealings with him. This financial dealing comprises of a land transaction upon Deed No. 230 dated 11th May, 1982, attested by Pushpa Nanayakkara, N.P. by which the 1st respondent as Attorney of his son sold and transferred the land and premises bearing assessment No. 4, Anula Road, Colombo 6, described in the schedule thereto, to Fowzie's daughter for a sum of Rs. 575,000.00. It is alleged that the consideration was paid by Fowzie. It appears that commencing 1st January 1982 Mrs. Sakeena Beebee Fowzie, wife of the said Fowzie, took on rent premises No. 542/1, Colombo 6, at a rental of Rs. 6,500/- per mensem. This transaction was also with the 1st respondent as Attorney of the landlord. These transactions are admitted. The details of the transactions are not relevant at this stage and will be considered later together with the allegations of wrongful conduct. It is alleged that the money paid on both transactions was money of Fowzie. This allegation too is not controverted.

1 The 1st respondent contests the allegation that at the time of these transactions Fowzie was subject to a notice issued under section 16. He states that the notice 1R3 had been revoked by a notice dated 20.11.1978 (1R5) and that the statement in Report XI that notices had been reissued on all persons mentioned at page 2 thereof was incorrect. He states that in fact such notices were not again issued on Messrs Fowzie and Wickremanayake mentioned therein. The 2nd and 3rd respondents who have filed affidavits support him on this point. Two of the notices that are stated to have been again issued have been marked as exhibits. One is to the petitioner. It is dated 7th May, 1979; (1R14) and the other is to Mr. Jaya Pathirana dated 5th January 1979 (1R15). The counter affidavit of the petitioner does not contradict this statement and I accept the statement that the notice was again issued on Fowzie. But the question that arises for decision at this stage is whether the notice 1R3 was issued to him and in

law, revoked by 1R5 as contended by the respondents. 1R5 reads thus –

“20th November, 1978.

Mr. A. H. M. Fowzie,
81/22, Silversmith Lane,
Colombo 12.

Notice Under Section 16 of the Special Presidential
Commissions of Inquiry Law No. 7 of 1978

Until a further communication is sent to you, you are
not required to take any steps in respect of the Notice dated
1.11.78.

Sgd. J. G. T. Weeraratne
Chairman”

Revocation in its ordinary sense means a cancellation. Something that was done is undone. The legal effect of such act is that something that was, is now no more. 1R5 does not cancel or recall the notice 1R3. That notice remained valid and effective despite 1R5. The Commissioners' opinion and their decision in terms of section 16 remain unaltered and operative. Only the filing of the statement required of Fowzie has been postponed *sine die*, i.e., until such time as the Commissioners' decide that it should be filed. In the result the date of the inquiry stands adjourned *sine die*. Such statement will become necessary, and the inquiry will be held, when the occasion arises and the Commissioners stipulate dates for them. Until then the notice 1R3 remains in abeyance. Its legal validity and its operative effect are in no way undone by 1R5. I cannot therefore see the semblance of a revocation in 1R5. Further it appears to me that the legal validity of 1R3 cannot be questioned because the amending Act No. 4 of 1978 by retrospectively ensuring the legal validity of the Warrant from the 29th day of March 1978 automatically validated all acts done and steps taken on the faith of it. The notice 1R3 therefore remained valid in law from the date of its issue. The Commissioners must have been aware of the impending legislation. I find that the notice 1R5 is dated 20.11.1978. The amending legislation was certified on 22.11.1978. This accounts for the notice 1R3 being kept in abeyance by 1R5.

The dates earlier given to the petitioner by notice 1R4 were postponed *sine die* by letter 1R5 as in the case of Fowzie. After the 2nd November 1978 a fresh notice under section 16 has been served on the petitioner. (1R14 dated 7.5.79). It refers to the copies of evidence already sent with notice 1R2. It forwards a further set of evidence given by 4 witnesses and stipulates fresh dates for filing of

his statement and for inquiry. The inquiry against the petitioner commenced on 22.11.1979 and was concluded on 30.12.79. The 1st respondent states that thereafter the evidence against Fowzie was again considered especially in the light of facts revealed at the inquiry against the petitioner and it was unanimously decided that no allegations could be framed against him. Therefore in January 1980 the Commissioners decided not to take any further steps against Fowzie. The other respondents confirm this decision in January 1980. Thus states the 1st respondent in his affidavit –

“Mr. A. H. M. Fowzie ceased to be a person whose conduct was a subject of inquiry before us”. (Vide para 13(c) of the 1st respondent’s affidavit).

The petitioner challenges the veracity of this statement and gives reasons as to why it should not be accepted by this Court. I will deal with them later. The best evidence of the decision of this particular dispute would be the file or record of the Commission containing a record of such decision and the consequential directions that must have been given to the Secretary and to his staff. Such evidence was not forthcoming although we mentioned to Counsel that we would like to peruse them. On the other hand this may not have been a firm decision because the 1st respondent in his affidavit has disclosed the fact that the Commission also decided to mention only in the final report the names of those against whom no inquiry was held due to insufficiency of evidence. However I do not need to rule on this particular dispute as it is not necessary for this judgment of mine. Furthermore this concerns the conduct of the Commission which might be questioned later. What is most important is that even after this alleged decision of January 1980 the notice to Fowzie 1R3 was not revoked in fact or in law. It remains operative up to date and the decision recorded therein remains valid in law. It is in this background that the transaction of sale and of letting and hiring must be considered.

At the outset I must state that both transactions were open transactions. There was no secrecy about them. One of the allegations was that the sale on Deed X3 was done contrary to the Exchange Control Laws and Regulations in that it lacked the necessary permission from the Controller of Exchange. This was denied by Counsel for the 1st respondent who stated that such permission was in fact obtained. There was no proof of either the allegation of the petitioner or the assertion of the Counsel for the 1st respondent. It therefore

remains merely as an allegation and it is not relevant for the decision of this case. The properties belonged to the 1st respondent's son, Chanaka, whose power of attorney was held by the 1st respondent. Chanaka was a Marine Engineer employed in various ships and was therefore compelled to roam the seas. At the material time he was in Southshields, England where he was living for the purposes of his contract of service. The 1st respondent therefore handled these transactions on behalf of his son. House No. 4, Anula Road (sold on X3) and house No. 542/1, Havelock Road (rented on 1R27(a)) are stated to be two semi detached houses with a common garage. They were constructed in 1981 and completed in June 1981. A Certificate of Conformity was issued for each by the Colombo Municipal Council on the 16th June 1981. (1R17 and 1R18). In anticipation of their completion several public advertisements for their sale or lease were inserted in newspapers in April 1981. Two of them, in the Ceylon Daily News of 25th April, 1981, and 26th September, 1981, were produced marked 1R20 and 1R21. These advertisements were paid for by the 1st respondent and the relevant receipts have been produced (1R19a - c). Several brokers made offers. Early in December 1981 a broker, Ebert Pieris by name, along with one A.H.M. Mohideen and another, met the 1st respondent at the premises and made offers to purchase one and hire the other. The 1st respondent took time to consider these offers. On the 6th December the 1st respondent decided to accept the offers and so informed broker Pieris. In the evening of that day Mohideen paid him an advance of Rs. 10,000/-. On the next day he called for another 10,000/- necessary for payment to the National Savings Bank and that was paid that very evening by Mohideen. On that occasion an agreement (1R22) was signed by both 1st respondent and Mohideen. It mentioned the sum of Rs. 20,000/- already received as earnest money for the sale of the said house No. 4 for a sum of Rs. 575,000/- to Mohideen or his nominee (to be named thereafter). Mohideen said that it was for his niece. On the 16th December Mohideen paid a sum of Rs. 39,000/- as rent on the letting of premises No. 542/1, Havelock Road, and later that day requested the 1st respondent to grant the tenancy to his sister in law Mrs. Sakeena Beebe Fowzie. On the 17th December, 1981, the 1st respondent prepared a tenancy agreement in the name of Mrs. Fowzie, signed it, and handed the same together with the keys of the premises to Mohideen. It was then, that the 1st respondent came to know on inquiry that Sakeena Beebe was the wife, and that the niece of Mohideen was the daughter,

of A. H. M. Fowzie. He adds "About this time having seen him at the premises I came to know that the person who had come on the very first day with A. H. M. Mohideen was A. H. M. Fowzie". A sale agreement No. 213 dated 1st January, 1982 (1R27) attested by Pushpa Nanayakkara, N.P. was executed on the same day and the keys of premises No. 4, Anula Road, were handed over on the same day to Mohideen as he stated that his brother Fowzie, wished to start making certain alterations. The agreement (1R27(a)) acknowledges the receipt of a sum of Rs. 320,000/-. The balance purchase price of Rs. 250,000/- was paid in three instalments - the third being on 15.04.82. On the 11th May 1982 the Deed X3 was executed. The Broker was paid monies due to him on 18th May 1982. (1R28). The reverse of this Document shows that out of the total sum of Rs. 14,375/- a deduction of Rs. 3,300/- was made on account of nonpayment of interest by the buyer. On the 11th May the petitioner appears to have met the Secretary, Ministry of Justice personally and represented matters to him. He had been requested to make his representations in writing. He then wrote letter dated 12th May (X4) to the Secretary, Ministry of Justice setting out the facts as known to him. In it he refers to "the transaction still being incomplete." He does not appear to have been aware of the full facts. He alleged also that the financial dealings of the 1st respondent referred to constitute "a vitiation of his integrity" amounting to "corruption". He followed this up with another letter dated 23rd May 1982 (X5) in which he states that he had attended the wedding of Fowzie's son at a hotel in Colombo on 21st May and that the 1st respondent himself was present as a guest at that wedding. The Minister of Justice appears to have communicated to the President the above correspondence and had informed the petitioner that he had done so. The petitioner then addressed the President by letter dated 28th June 1982 setting out in detail the facts as known to him and also his allegations. He filed the petition in this case on the 9th July 1982. This is the background upon which our decision has to be made.

The petitioner's allegations are of a twofold nature. The first is that the 1st respondent "knowingly engaged in financial dealings with the said Fowzie" and by so doing he has -

- (a) committed an act of grave misconduct,
- (b) vitiated his integrity and thereby shown himself to be corrupt, and guilty of corruption,
- (c) compromised his position as a Judge of the Court of Appeal by his misbehaviour."

This is not a "financial dealing", simpliciter. Money has been paid for valuable consideration. It is a sale of land and a letting of premises. It is alleged that the 1st respondent entered into this transaction with the knowledge that he was dealing with Fowzie, a person whose conduct was the subject of inquiry by the Commission. There is no evidence that the 1st respondent was aware at the time he entered into negotiations with broker Peiris and Mohideen of the fact that Fowzie was concerned in this transaction. The transactions were clinched between these two persons and the 1st respondent. It was only after the 17th December 1981 that the 1st respondent became aware of the role of Fowzie in these transactions. By that time tenancy agreement (1R27(a)) had been signed and the keys of the house handed over to Mohideen. By that time also the informal sale agreement (1R22) had been executed and earnest money received. He could not have resiled from the tenancy agreement. He could have resiled from the sale agreement and faced the consequences but this alone would not have helped to clear him of wrongful conduct if any there was. He completed the transaction as openly and as lawfully as any vendor would have done. I cannot see anything dishonest in his conduct throughout the transactions. I therefore hold that the allegations of misconduct (grave or otherwise), misbehaviour, and corruption, are unfounded and reject them. He has not compromised his position as a Judge of the Court of Appeal.

There is however another aspect of the matter to be considered. At the time of these transactions Fowzie was one of those whose conduct had been the subject of inquiry by the Commission. The public was aware of this fact. The proceedings of this Commission were of public importance and its proceedings received wide publicity in the country through newspapers. Some of the popular ones gave full coverage to its proceedings. It is common knowledge that they were keenly read and followed by the reading public. Persons whose conduct was in question were public men such as Fowzie and other politicians. The public at large was aware that notices had been served on them in terms of section 16. Those who read Sessional Paper VI would have taken it for granted that such notice had been issued on Fowzie. Neither they, nor the public, would have known that this was a mistake. The public could not have known, and indeed would be ignorant of, the decision of the Commission made in January 1980 not to proceed against Fowzie. That would be known only to the respondent and perhaps to a few exclusive members of the staff. It has not been communicated to the President, to Fowzie

or to the staff. In the public eye Fowzie was, and continues to be, a person whose conduct is, in the opinion of the Commission, a matter for inquiry and therefore still subject to its jurisdiction. It is now stated that there is an insufficiency of evidence against Fowzie and therefore an investigation would not be justified and this fact will be incorporated in a final report to the President. A final report has not yet been sent to the President. The position may well change before it is sent. Should such a situation arise the 1st respondent cannot take part in any decision concerning Fowzie. In any event he cannot now join the other Commissioners in making a report to the President affecting Fowzie. He must bear in mind the cardinal fact that these Commissioners are bound to act judicially not because they are in fact Judges of Superior Courts but because their decisions involve consequences that affect the rights of the citizen. In this instance one of the most precious of them all is involved, civic rights. The oft quoted statement of May, C. J. in the Irish Case of *Regina vs Dublin Corporation* (1) was repeated by Lord Atkinson and adopted by the House of Lords in the case of *Everett vs. Griffiths* (2) as no better definition of a judicial act could be found or given. It is as follows:—

“It is established that the writ of certiorari does not lie to remove an order merely ministerial; ... but it lies to remove and adjudicate upon a validity of acts judicial. In this connection the term ‘judicial’ does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts.”

Being judicial acts of Commissioners they are subject to control by the Superior Court. High standards are expected of them, so much so, that appearances sometimes become “more important than reality”. Lord Hewart’s felicitous dictum gave expression to this aspect of the matter. He said:

“.....a long line of cases shows that it is not merely of some importance, but is of fundamental importance that

justice should not only be done, but should manifestly and undoubtedly be seen to be done". *Rex vs. Sussex Justices, McCarthy, Ex parte.* (3)

Lord Denning M. R. in *Metropolitan Properties Co. (F.G.C.) Ltd vs. Lannon* (4) referred to the operation of this principle thus:

"It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The Judge was biased.' "

That was a case in which it was held that the Chairman of the Rent Assessment Committee had an interest which was of a disqualifying character. It was conceded that there was no actual bias or want of good faith on the part of Mr. Lannon the Chairman. Yet there was a real likelihood of bias. The decision of the Committee was therefore quashed and the inquiry remitted to another Committee. In deciding the question of bias Lord Denning suggested the following test:-

"Test it quite simply: If Mr. John Lannon were to have asked any of his friends: 'I have been asked to preside in a case about the rents charged by the Freshwater Group of Companies at Oakwood Court. But I am already assisting my father in his case against them, about the rent of his flat in Regency Lodge, where I am living with

him. Do you think I can properly sit? The answer of any of his good friends would surely have been: 'No, you should not sit. You are already acting, or as good as acting, against them. You should not, at the same time, sit in judgment on them'.

A similar question can be asked of the 1st respondent. Can he properly continue to sit in judgment over Fowzie? Can he take part in making the final report to the President? The answer is clearly 'No'. There is both a real likelihood and a reasonable suspicion that his judgment was warped by favouritism though, I repeat, there is no proof of that. I would therefore issue a writ of prohibition forbidding the 1st respondent from taking any further part in the investigation of the conduct of Fowzie and also prohibiting him from joining the other Commissioners in a final or other Report to the President which incorporates a decision regarding Fowzie.

The petitioner however will not be satisfied with such an order. He has prayed for a writ of prohibition restraining and preventing the 1st respondent from continuing as a member of the Commission. This writ of prohibition is used to prevent the exercise of jurisdiction over a particular matter or dispute. It cannot be used to remove a person from office and I have found no instance of such user in the past. I cannot therefore accede to this part of the petition. I however desire to state that that confidence in which justice is rooted has been destroyed as far as the investigation of Fowzie is concerned. Right-minded people would not be unjustified if they look askance at other decisions of the 1st respondent. It might undermine that faith in the Commission itself which is necessary to command respect for its recommendations. This must be avoided, whatever the cost.

Two other matters need decision. It was contended that the petitioner has no right or interest to maintain this application and to seek the reliefs claimed. This is a matter of public importance and it is in the public interest to ensure that machinery set up by Government in the interest of good order should function properly. Accordingly the Court can award this remedy to any member of the public. ("Administrative Law" by Wade, Edn 4, page 541 and 542).

Lastly it was contended that this Court "by reason of the provisions of section 18A(2) of Act No. 4 of 1978 has no power or authority to make order prohibiting or to make any order which would have the effect of prohibiting, the holding of any proceedings by the

Special Presidential Commission". Section 18A(2) reads thus -

"18A(2) No Court shall, notwithstanding anything to the contrary, have power or jurisdiction to make any order at any stage whatsoever and in any manner -

- (a) staying, suspending or prohibiting the holding of any proceeding before or by any commission established by warrant issued by the President in the exercise or purported exercise of the powers vested in the President under section 2(1) or the making of any order, finding, report, determination, ruling or recommendation by any such commission;
- (b) setting aside or varying any order, finding, report, determination, ruling or recommendation of any such commission:

Provided that where by reason of the provisions of subsection (1) any application stands transferred to the Supreme Court, such court may, only upon final determination of such application, make any such order which, in the lawful exercise of its jurisdiction, such court may make:

Provided further, that where an application does not stand transferred by reason of the provisions of subsection (1), the Court of Appeal may, only upon final determination of such application, make any such order which in the lawful exercise of its jurisdiction, such court may make, subject however, that such order shall take effect only upon final determination by the Supreme Court in accordance with and subject to such order which the Supreme Court may make or where no appeal is filed, only upon the expiry of the period within which an appeal may be filed in the Supreme Court."

This Court is exercising a jurisdiction conferred by Article 140 of the Constitution by reason of the transfer of this application to this Court from the Court of Appeal (vide section 18A(1) of Act No. 4 of 1978). That jurisdiction is being exercised in accordance with the provisions of the first proviso to section 18A(2). This order does not purport to or have the effect of staying, suspending or prohibiting the holding of any proceeding before or by the Commission or the making of any order, finding, report, determination, ruling or recommendation by the Commission. Nor is the validity of the Warrant in any way nullified. The Commission can continue its work

unhindered. (Vide section 2(1)(2) and (3) of Law No. 7 of 1978). Nor is this Court being asked to make any decision contravening the provisions of section 18A(2)(b). It is merely prohibiting one of the Commissioners from acting in circumstances. What intrinsic worth any recommendation already made, or that will be made, in the future will have is not a matter for this Court. That must be judged by those who seek to impose punishments on the basis of such recommendations.

I have given careful consideration to the question of costs. The petitioner has acted as a public man in the interests of the public. He has partially succeeded. This is one of those applications in which monetary matters should find no place. I therefore do not make any order for costs. A writ of prohibition will issue in the terms indicated above.

WIMALARATNE, J.

I have had the benefit of reading the judgment prepared by the Chief Justice. I am in agreement with his findings that –

- (a) even after the alleged decision of the Special Presidential Commission in January 1980 not to proceed with the case against Fowzie, the notice 1R3 issued to Fowzie was not revoked in fact or in law, and it remains operative up to date;
- (b) the public could not have known, and indeed would be ignorant of, the decision of the Commission made in January 1980 not to proceed against Fowzie;
- (c) Fowzie was, and continues to be, a person whose conduct is, in the opinion of the Commission, a matter for inquiry, and therefore *still subject to its jurisdiction*;
- (d) the confidence in which justice is rooted is destroyed as far as the investigation of Fowzie is concerned (subject to what I have to say about investigations against other persons);
- (e) right minded people would not be unjustified if they look askance at *other decisions of the 1st respondent*; and that it might undermine that faith in the Commission itself, which is necessary to command respect for its recommendations;
- (f) this (loss of faith) must be avoided, *whatever the cost*.
- (g) this Court is possessed of jurisdiction to award the remedies prayed for by the petitioner to any member of the public; and
- (h) this Court has the jurisdiction to issue the prerogative writs against the Special Presidential Commission or any member

thereof, by virtue of the First Amendment to the Constitution, read with section 18A(1) of the amending Act, No. 4 of 1978.

For these, among other reasons, the Chief Justice is of the view that the issue of a writ of prohibition forbidding the 1st respondent from taking any further part in the investigation of the conduct of Fowzie, or from joining the other Commissioners in a final or other report to the President which incorporates a decision regarding Fowzie is justified on the ground of bias. In the result, there will be no impediment to the 1st respondent taking part in other investigations against other persons, and in joining the other Commissioners in a report to the President, as long as it does not incorporate a decision on Fowzie.

I may say straightaway that the Commission has already made an affidavit stating that they do not propose proceedings against Fowzie. Under these circumstances the issue of a writ of prohibition for the limited purpose as contemplated by the Chief Justice does not, in my view, serve the ends of justice. How then, can those right minded people who, in the words of the Chief Justice, "would not be unjustified if they look askance at other decisions of the 1st respondent" be satisfied? How can the undermining of the confidence in the recommendations of the Commission be avoided at all costs, which is the very laudable objective to be achieved? The dictum of Lord Denning that "justice must be rooted in confidence" must not be a mere empty catchword. Bias is not the only ground of disqualification; misconduct is a more serious ground. No amount of canons of judicial conduct mouthed at judicial seminars, no amount of prescriptions on judicial ethics written in law journals will serve any purpose unless we insist that these self same commandments are complied with. Those performing judicial and semi-judicial functions should be made aware that we give a meaning to the words "justice must be rooted in confidence"; and justice can never be rooted in confidence if they who administer justice engage in dealings, financial dealings or land transactions, with those who are litigants before them.

The main argument of the petitioner has been that the 1st respondent is disqualified, not on the ground of bias, but on the ground of misconduct, that as a result of a financial transaction between the 1st respondent and Fowzie, whilst the latter was yet a person whose conduct was the subject of investigation by the Commission of which the 1st respondent is a member, the 1st respondent "became unable to act" in terms of section 3(1) of the Special Presidential Commissions of Inquiry Act. In such situations the President, as the authority

vested with the power to appoint, has the power to remove a member who has so become unable to act, and to appoint in his place a new member. If no new member is appointed section 3(2) empowers the remaining members of the Commission to continue with the inquiry. Apart from removal by the President, the petitioner contends that there is a judicial power vested in this Court to declare that a member has become unable to act. He submits that the words "unable to act" should not be limited to physical or mental disability such as prolonged illness or absence. He invites us to give the phrase a wider interpretation so as to include within its compass the case of a member who, by his misconduct, renders himself unable to act. In such a case removal by the President of the member concerned is one remedy. A judicial declaration that that member has become unable to act is another.

I am of the view that our judicial power extends to the making of such a declaration. As an illustration let us take the extreme hypothetical case of a member, either of the Special Presidential Commission or of a Commission of Inquiry, against whom a prima facie case of bribery has been established. Such a member who refuses to resign may be removed by the President. Quite apart from such removal by the Executive, the Judicial Power of the State is virile enough to declare that such member has become unable to act. The jurisdiction to make such declaration is vested in this Court by Article 140 of the Constitution, read with amending Act No. 4 of 1978. The jurisdiction to issue the writ of quo warranto is at the present time the jurisdiction to make a declaration, for quo warranto has, in England, been replaced by declaration and injunction, by virtue of section 9 of the Administration of Justice (Special Provisions) Act of 1938 - *Wade - Administrative Law (4th Ed.)* 497.

Do the circumstances justify the making of such a declaration in this case? Evidence was led before the Commission in about September 1978. That evidence received wide publicity in the media. The 'Ceylon Daily News' of 2.9.78, for example, carried the following headline "Fowzie obtained concessions for people in whom he had an interest". Details of Mayor Fowzie's alleged intermeddling in certain customs detections and inquiries, as deposed to by an Assistant Collector of Customs, W. H. Jayawardene, as well as acts of abuse of power deposed to by B. A. Jayasinghe, Municipal Commissioner, and Tyrell Günatilleke S.P. CID were widely reported in the press. Any right minded person would have formed the view that the conduct of Fowzie deserved investigation by the Commission. The Commission

also formed the opinion that Fowzie should face an inquiry. That is why the Commission issued charges and sent Fowzie a copy of the evidence relating to him along with the notice IR3 dated 1.11.78. If then, charges of a serious nature were pending against Fowzie, any right minded person would expect no member of the Commission to have any dealings whatsoever with Fowzie even after the inquiry was over, and not at least till a report was sent to the President. The act of a member in entering into a land transaction with a person whose conduct remains the subject of inquiry amounts, in my view, to misconduct.

But the Commissioners in their affidavits aver that they decided in January 1980 not to proceed further against Fowzie because of (a) the death of B. A. Jayasinghe, who they say would have been the main witness against Fowzie, and (b) the findings of the G. P. A. Silva Commission set up to inquire into abuse of power in local authorities, and the consequential civic disability imposed upon Fowzie by Parliament. It is not for us to question the soundness of the above reasons given by the Commission for its change of opinion, but we note that both these events, namely, the death of B. A. Jayasinghe (on 22.9.78) and the imposition of civic disability on Fowzie (on 14.8.78) had already occurred when the Commission first decided to frame charges against Fowzie on 1.11.78. What is important is that in the eyes of the public Fowzie, like Pathirana, Manohara and Wickramanayake continued to be a person whose conduct yet remained to be investigated by the Commission. No amount of private, uncommunicated decisions arrived at by the Commission would suffice to erase the impression the public would have had that a prima facie case of an abuse or misuse of power had been established against Fowzie. A member of the Commission who enters into a transaction, which involves the sale of a house and a lease of another house to the daughter and wife of Fowzie, and in respect of which consideration was paid by Fowzie himself cannot expect to command that degree of public confidence which is a sine qua non for the proper functioning of the Commission.

A few words about the transaction itself. The 1st respondent avers that the first two instalments of Rs. 10,000/- each as advance purchase price for one of the houses was paid on 6.12.81 by one A. H. M. Mohideen, and that the deposit of Rs. 39,000/- as six months rent for the other house was also paid by Mohideen on 16.12.81. It was only on 16.12.81, according to the 1st respondent, that he came to know that the purchaser of one house was to be the daughter of

A.H.M. Fowzie and that the tenant of the other house was to be the wife of Fowzie. By that time he says it was too late to resile from either transaction, because he had entered into an informal agreement for the sale of one house to Mohideen or his nominee for a sum of Rs. 575,000/- and had handed over the keys of the other house to Mohideen. The deed of transfer No. 230 was executed six months later, on 11.5.82. According to the attestation clause however, the two instalments of Rs. 10,000/- each were paid before 1.1.82 by A.H.M. Fowzie. There is also the fact that no reference has been made in the deed of transfer to a previous informal agreement. As the 1st respondent says he had a copy of the informal agreement with him, and as the payments were all cash payments, one would have expected the date of payment of the Rs. 20,000/-; to have been mentioned; instead there is a vague statement that that amount was paid prior to 1.1.82, which could even be interpreted as being a date in 1980. There is therefore, no satisfactory proof that the 1st respondent was not aware about the interest that Fowzie had in these transactions until 16.12.81. Even if such knowledge dawned on him on that date, it was open to him to have paid back the Rs. 20,000/- and resiled from the agreement to sell on the ground that the virtual purchaser was a litigant before him.

As emphasised by the Chief Justice, loss of public confidence in the Commission must be avoided, whatever the cost. I am of the view that that objective cannot be achieved by merely prohibiting the 1st respondent from participating in any inquiry against Fowzie, because the Commissioners themselves tell us that they have decided not to proceed against Fowzie. It seems to me, therefore, that one way by which this objective could be achieved is by the exercise of the judicial powers vested in us by Article 140 of the Constitution, and declaring that by his misconduct the 1st respondent has become unable to act as a member of the Commission in terms of section 3(1) of the Special Presidential Commission of Inquiry Act. I would make the declaration accordingly, and grant the petitioner prayer (a) of the petition.

I have given careful consideration to the relief prayed for in para (b). A writ of prohibition restraining the 1st respondent from participating in any further proceedings of the Commission would virtually amount to a removal of the 1st respondent. Such power of removal is an executive power, vested exclusively in the President. I would, therefore, not grant the relief prayed for in para (b).

On the question of costs, every citizen has a "standing" to invite the Court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busybody, but as a public benefactor – *Wade 544*.

As the petitioner has succeeded in obtaining part of the relief prayed for, I would allow him half the costs of this inquiry payable by the 1st respondent.

COLIN-THOME, J.

I have had the advantage of reading the judgments of the learned Chief Justice and Wimalaratne, J.

The Legislature passed the amending Act No. 4 of 1978 with retrospective effect from the date of the operation of Law No. 7 of 1978. The amendment to section 2 provided that a Warrant issued under section 1 may relate to any period whatsoever including any period before the date of commencement of this Law. In other words, the amending Act No. 4 of 1978 by retrospectively ensuring the legal validity of the Warrant from the 29th of March, 1978, automatically validated all acts and steps taken earlier under it. Therefore, the section 16 notice, 1R3, dated 1st November, 1978, served on A.H.M. Fowzie, remained valid in law and in fact from the date of its issue, and has never been subsequently revoked up to date. By no stretch of imagination was it revoked by the letter to Fowzie, 1R5, which merely informed him of the postponement of the inquiry against him, as another inquiry has been given priority. The respondents were well aware of this. I agree with the learned Chief Justice that the legal validity of the notice 1R3 and its operative effect are in no way undone by 1R5, and this notice 1R3, therefore, remains valid in law from the date of its issue.

In this context the financial transactions between the 1st respondent and Fowzie took place while the section 16 notice 1R3 remained valid.

The 1st respondent has stated in paragraph 13 of his affidavit that the Commissioners had decided – "in January 1980 not to take any further steps against Mr. A.H.M. Fowzie" for the reasons that the principal witness B. A. Jayasinghe who had testified against Fowzie had died and that the G. P. A. de Silva Commission had already dealt with Fowzie in relation to the administration of the Colombo Municipal Council. These reasons were supported by the joint affidavit of the 2nd and 3rd respondents and the letter of the Commissioners to the President dated 4th June, 1982.

An unsatisfactory feature of these averments was that it was not disclosed to the President or to this Court in the affidavits of the respondents that serious allegations had been made against Fowzie by W.H.D. Jayawardene, Assistant Collector of Customs, that on two occasions Fowzie had interfered with the investigations conducted by Customs Officers into alleged smuggling offences and that Fowzie had actually abetted the offence of smuggling in one case by causing the disappearance of two large suitcases from the Customs premises. The death of B.A. Jayasinghe, and the G.P.A de Silva Commission in relation to the administration of the Colombo Municipal Council had nothing to do with these grave allegations against Fowzie.

It is also significant that the notice 1R3 served on Fowzie was dated 1st November, 1978, and it informed him that his "conduct should be the subject of inquiry: and/or (that he) was implicated or concerned in the matters under inquiry, by the Commission." B. A. Jayasinghe died on the 22nd of September, 1978, before the despatch of this notice to Fowzie.

The 1st respondent has stated in paragraph 28 of his affidavit that early in December, 1981, when he visited No. 4, Anula Road, Ebert Peiris, a broker, came with A.H.M. Mohideen, and a third man who remained in solemn silence without being identified. Mohideen offered to purchase the smaller of the two premises at No. 4, Anula Road, for Rs. 575,000/- and to take on rent premises No. 542/1, Havelock Road, for Rs. 6,500/- per month. He also offered to deposit Rs. 39,000/- being 6 months advance of rent. There was no agreement at the start, but on 6th December, 1981, when Ebert Peiris contacted him again he was agreeable to accept the offer. That afternoon Peiris and Mohideen paid him an advance of Rs. 10,000/- as an advance on the sale. Mohideen told them that the purchase would be as a dowry for his niece, whose name was not disclosed to the 1st respondent. The next day he telephoned Mohideen and requested a further Rs. 10,000/-. Mohideen gave him the money as agreed, at No. 4, Anula Road.

On the 16th of December, 1981, Mohideen brought him a further sum of Rs. 39,000/-. Later that night Mohideen telephoned him at his residence and stated that the tenancy agreement would be in the name of his sister-in-law Mrs. Shakeena Beebe Fowzie. He prepared a document accordingly and having signed it handed the agreement and the keys of the premises No. 542/1, Havelock Road, to Mohideen. Then he came to know on enquiry that Mrs. Fowzie was the wife

of A.H.M. Fowzie and the niece referred to earlier was his daughter. It was only at about this time that he came to know that the third man who accompanied Peiris and A.H.M. Mohideen on the 6th December was none other than A.H.M. Fowzie.

Even after he came to know that it was A.H.M. Fowzie he proceeded with the transaction and accepted from Fowzie four further instalments amounting to over 5 1/2 lakhs of rupees. All six instalments were paid to the 1st respondent in cash. They were not paid in the presence of a Notary.

Although the 1st respondent has averred in his affidavit that the 1st two instalments were paid by Mohideen, the attestation Clause of Deed No. 230, executed on 11th May, 1982, discloses that all six instalments were paid by Fowzie.

All these transactions were carried on while the section 16 notice against Fowzie was still in force and as there were allegations of serious offences committed by him, I hold that the 1st respondent was guilty of misconduct unbecoming of a judicial officer.

I allow the application of the petitioner to issue a writ of quo warranto to the 1st respondent under the proviso to Article 140 of the Constitution, read with section 18A of Act No. 7 of 1978, and declare that the 1st respondent has become unable to act, and that he is disentitled to hold the office and function as a Member of the Special Presidential Commission of Inquiry.

I agree with the order made by Wimalaratne, J., in connection with the petitioner's prayer under (a) and (b) and (c).

Writ of prohibition issued.