IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

N.V. Gooneratne
No. 12, Vanderwet Place,
Dehiwela.

PETITIONER

C.A 412/07 (Writ)

Vs.

1. Sri Lanka Land Reclamation and Development Corporation
No. 3, Sri Jayawardenaprua Mawatha
Rajagiriya.

2. The Chairman
Sri Lanka Land Reclamation and Development Corporation

3. Mr. M. Manimuthu
Former Chairman,
Sri Lanka Land Reclamation and Development Corporation

All of No. 3, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya.

4. Mr. A.N.R Amaratunge
Former Secretary,
Ministry of Urban Development and Water Supply, "Sethsiripaya"
Battaramulla.

5. Dr. P. Ramanujan
Former Secretary,
Ministry of Urban Development and Sacred Area Development,
Battaramulla.

6. Mr. B.H.M. Ratnasiri
Former Additional Secretary
(Admin)
Ministry of Urban Development,
"Sethsiripaya", Battaramulla.

7. Mr. Wickremarachchige Kithsiri
Wickremasinghe,
Former Deputy General Manager,
Lands and Marketing, Land
Reclamation and Development
Corporation
No. 3 Sri Jayawardenaprua
Mawatha, Rajagiriya.

8. Mrs. Prathapage Hemalatha
Deputy General Manager,
Lands and Marketing, Land
Reclamation and Development
Corporation
No. 3 Sri Jayawardenaprua
Mawatha, Rajagiriya.

9. Mr. S. D. Chandradasa
No. 396, Negombo Road,
Seeduwa.

RESPONDENTS

BEFORE: Sathya Hettige P.C. J. (P/ C.A) &
Anil Gooneratne J.

COUNSEL: Dr. Almeida Gunaratne P.C with Lasitha Chaminda
For the Petitioner
Vikum de Abrew S.S.C for the 1st, 2nd, 4th , 5th & 6th Respondents

ARGUED ON: 21.01.2011

WRITTEN SUBMISSIONS FILED ON :
21.09.2010 & 01.12.2010

DECIDED ON: 24.02.2011

GOONERATNE J.

The Petitioner is an Engineer by profession who was the General Manager of the 1st Respondent Corporation with effect from 29.3.2004. Prior to his appointment to the said post he held several responsible posts in the said corporation as well as acting General Manager at a certain point of time. A Writ of Certiorari is sought to quash documents P4, (which sent the Petitioner on compulsory retirement) and document P6 which state to give the findings of a committee and the request for such findings made by the Petitioner and refusal to give such findings as in P6. The contents of P6 states as follows:

> You have retired in the normal course. The findings of the committee has no effect on your retirement directly. On the other hand, there is no necessity to give the findings of the committee to you particularly in the light of the fact that no action has been taken on the findings, However, if there is a direction to submit these findings to a court of law, such a request will be positively complied with.

Petitioner has in the prayer 'c' sought a Writ of Mandamus to restore him in the post of General Manager,

The main issue is on a deed of transfer (P2a) being executed without prior approval where the Petitioner had placed his signature on same. In the above circumstances I would refer to the following facts in

order to approach the problem placed before this court in the manner as set out in the written submissions of the Petitioner.

1. On or about the 11th of March 2004, the Petitioner (then serving as Acting General Manager as aforesaid), was during the course of his duties, directed, by the 3rd Respondent (the the Chairman and his immediate superior) to place his signature on deed number 289, effecting a transfer of an allotment of land described as Lot No. 1 in Plan No. 1270, dated 17th July, 1987 in favour of Rev. Depanama Sugathabandu in his personal capacity while excluding his successors in title who had been named in the previous deed relevant to the said property (Vide **P2(a))**

2. In his averments before Court, the Petitioner had specifically stated that, being an Engineer (B.Sc Peradeniya) as aforesaid, he had no knowledge of the legality or otherwise of the said transaction but that he had signed the said deed as it was 'asked of him being a subordinate officer to the said Chairman and also with a feeling of assurance that it was in good order and that, in any event, had he refused to sign, it could be construed as an act of insubordination' (Vide paragraph 13 of the Petition).

3. The Petitioner also stressed before Court, that he had, prior to placing his signature on the above mentioned deed, taken reasonable precautions to ensure that the said transaction was legal, by querying from the two members of the land division of the 1st Respondent Corporation, namely the 7th and 8th Respondents above named, Mr. Wickremarachchige Kithsiri Wickremasinghe and Mrs. Prathapage Hemalatha who were witnesses to the attestation of the said deed, as to the legality of the transfer and had been assured that the transaction was in order. (Vide paragraph 26 B of the petition).

4. In this background and following a full two years since the execution of the said deed, **(P2a),** the Petitioner received a charge sheet signed by the 4th Respondent,

on the 13th of March 2006 charging him with inter alia the illegal transfer of the above mentioned property to the Rev. Sugathabandu in his personal capacity, without the requisite approval. (Vide **P3.).** The Petitioner denied all charges and appointed his defence officer for the inquiry (vide **P3a and P3b)**.

5. The disciplinary inquiry which was conducted by the 9th Respondent ran from July 18th 2006 to October 2nd 2006, (vide proceedings marked as **P3(d).** On or about the 9th of January 2007, the Petitioner received a letter dated 8th January 2007 signed by the 2nd Respondent, informing him that he will be retired compulsorily with immediate effect. (vide **P4).** Thereafter, in response to several requests by the Petitioner that he be given a copy of the findings of the above mentioned disciplinary inquiry held against him in order to enable him to make an appeal against the decision (vide **P5 being an example thereof)** the 6th Respondent (writing for the 4th Respondent) informed the Petitioner by letter dated 26th February 2007 which was received by the Petitioner only in the second week of March,) that he could not be given a copy of the said findings on the basis that, inter alia, the Petitioner had retired in the normal course and that the said findings had no direct effect on his retirement. (vide **P6).** That is, in effect, adding insult to inquiry and blatantly choosing to ignore the fact that, before the date of retirement fell in the normal course (that is, on 20th September 2008), he had been compulsorily retired on 8th January 2007 **by P4).**

I would at this point refer to the following matters urged by the Petitioner briefly before I consider the position of the Respondents and counter arguments.

(a) Procedural impropriety of the disciplinary inquiry –charge sheet should be framed under Section 48(1) of the Establishment Code and not 48(a) of the Code.

(b) Deed P2 not revoked prior to executing deed P2A. Deed P2 has the effect of creating a charitable trust. P2A does not prejudice the rights in deed P2. No legal consequences flow.

(c) Compulsory retirement of Petitioner unreasonable and arbitrary.

(d) Petitioner had authority to sign deed P2A. Rely on 7th & 8th Respondents assurance (signed P2A as witnesses). Some form of assurance by 7th & 8th Respondents and such reliance has not been effectively refuted by the 1st to 6th Respondents. 7th & 8th Respondents had not denied such position.

(e) Petitioner's compulsory retirement offends the principle of proportionality.

(f) Petitioner's authority flow from Section 5(2), 12(1) and 12(2) of the Colombo District (low lying areas) Reclamation and Development Board Act. Provisions of Act does not limit Petitioner's authority.

(g) Paragraph 26(b) of the Petition not denied. Petitioner relies in the case of Maithripala 2006(1) ALR 9.

(h) Decision or finding of the authorities arrived at by taking into consideration irrelevant factors.

(i) Finding of the Report 1R6 not in accordance with charge sheet P3 (P3 served on Petitioner after a lapse of 2 years from P2A).

(j) Findings in 1R6 (folio 61) where Petitioner is found guilty would qualify for 2nd schedule punishment of the Code. (urged as in(e) above).

(k) Mala Fides – Petitioner focused on irregularities by P7a, P7b & p7c.

(l) Document P8 by chairman contains an interpolation – Mala Fides

(m) Mala Fides – paragraph 15(d) (g) of Petitioner's counter affidavit and annexture P14.

In view of the several allegations/lapses suggested by the Petitioner, Position of the Respondents need to be considered very carefully. Statement of objections of 1st, 2nd, 4th, 5th & 6th Respondents are filed of record along

with the 2nd Respondent's affidavit (Chairman of the 1st Respondent Corporation). The 7th & 8th Respondents who were signatories to deed P2A have not filed any pleadings in this court, although they were witnesses to a controversial deed (P2A).

The affidavit and objections of the above mentioned Respondents with documents 1R1 to 1R5 support the position of the 1st Respondent as follows in so far as deed P2. It is averred that the 1st Respondent had only renounced its rights, title and interests by Deed of Declaration No. 18(P2) dated 09.12.1988 in respect of the land described in 'P2' in favour of Rev. Sugathabandu Thero and Shishyanushishya Paramaparawa of Sri Wijayashramaya referred to therein. The Respondents state that:

(a) Consequent to a proposal by the Urban Development Authority, the 1st Respondent took steps to re-arrange the land referred to in Lot No. 24 of Plan No. CO 5534 dated 01.07.1981 and to re-demarcate and re-locate the premises held by the said temple so as to enhance the utility value of the lands as seen by Plan No. 1270 dated 17.07.1987.

(b) The Respondents state that the above proposal was given effect to by the 1st Respondent in pursuance of the approval granted by the Committee appointed by the Cabinet Sub-Committee on Urban Development to Determine the Sale of Lands Re-Claimed by the Sri Lanka Land Reclamation and Development Corporation and the 1st Respondent accordingly renounced its rights, title and the interests in respect of an extent of A0: 2R: 20P only as stated in 'P2'.

As regards deed P2(a) it is averred by the said Respondents that the Petitioner and the 3rd Respondent purported to have executed the Deed No. 289 marked as P.2.a, by which they purportedly have transferred the property in question to Rev. Depanama Sugathabandu Thero in his personal capacity. The Respondents state that neither the petitioner nor the 3rd Respondent had informed the Land and Marketing Division of the 1st Respondent Corporation of the purported execution of the said Deed; as such they did not have the authority to do so for and on behalf of the 1st Respondent Corporation. The Respondents specifically deny the alleged circumstances under which the act referred to therein was said to have been carried out by the petitioner.

These Respondents stress Petitioner's irresponsible conduct and total disregard to his accountability to the 1st Respondent Corporation. Further the Petitioner as the Chief Executive Officer of the 1st Respondent Corporation could not and should not have in any event subjugated to the authority of the 3rd Respondent and no special knowledge on law was required by Petitioner to be attentive and diligent in the discharge of his official duties.

These Respondents have denied paragraph 26(b) of the Petition and state that the petitioner had not exercised his powers of judgment in

giving his authority to execute the Deed No. 289 (P.2.a) jointly with the 3rd Respondent. There is, however, no material before Court to indicate that the 7th and 8th had in fact stood as attesting witnesses in their official capacity and as to the circumstances under which the two witnesses were alleged to have stood as witnesses to the impugned execution of the Deed. In any event, the fact that the 7th and 8th Respondents had become signatories as witnesses did not absolve the petitioner of his duty to be circumspect and to be satisfied that all the procedural steps had been followed prior to the execution of the Deed by which the alienation of the land owned by the 1st Respondent was intended to be effected.

As regards paragraph 26(c) of the petition Respondents aver

> (a) The Deed No. 289 (P.2.a) was found to have been executed purely to meet the personal request by Rev. Depanama Sugathabandu Thero to have and hold the property by him personally after more than fifeen years from the date of execution of the Deed of Declaration No.18 (P2) as evidenced by his letter dated 12.02.2004, which is annexed hereto marked '1R-9'. The Respondents state that the petitioner by acceding to the said request in less than four weeks with the transfer of the property was privy to the apparent collusion orchestrated by the said Thero jointly with the 3rd Respondent.

I would at this point of this judgment consider the views of both sides. On the question of procedural impropriety of the inquiry I am of the view that no prejudice had been caused to the Petitioner. Reference to the

relevant schedule as (a) instead of '1' cannot be a serious objection. Thus it would not have mislead the Petitioner, since there are other important and relevant matters to be discussed and Petitioner's continued participation at the inquiry indicates that it is not a valid objection. As regards Petitioner's contention that the deeds referred to in this application, deed P2A does not prejudice the rights in deed P2, and that no legal consequence flow cannot be answered so simply as 'yes' or 'no'. Validity of deed P2A, authority to execute same are two important matters to be tested by a Court of Competent jurisdiction and the matter needs to be argued fully by both sides very seriously. As such I am unable to agree with the Petitioner's views expressed in this regard. Writ of Certiorari and Mandamus being discretionary remedies of court, based on this submission I do not think that the Petitioner has the edge over the Respondent. There is no direct bearing on the main issue i.e authority of Petitioner to execute deed P2a. Absence of Board approval/or ministerial sanctions supported with statutory provisions would tend to leave room for criticism against the Petitioner's expected official functions.

Learned President's Counsel for Petitioner also argued that Petitioner's authority flow from Section 5(2),12(1)and 12(2) of the Colombo

District (Low-Lying Area) Reclamation and Development Act. The said Sections reads thus:

5(2) The Board shall be a body corporate having perpetual succession and a common seal and may sue and be sued in the name assigned to it by subsection (1).

12(1) The seal of the Board shall be in the custody of such person as the Board may decide from time to time.

(2) The seal of the Board shall not be affixed to any instrument or document except in the presence of the Chairman, or some other member, of the Board and the chief executive officer of the Board, both of whom shall sign the instrument or document in token of their presence.

In terms of the above provisions there is no limitation on Petitioner authority. But Petitioner could perform any official act only with proper approval of the Board or sanction of the relevant Ministry or else any act performed by the Petitioner would be invalid or illegal.

However when I consider all the facts and circumstances of this case with the background details, I would advert to the following matters which favour the Petitioner.

(a) Execution of deed P2A was not the sole decision of the Petitioner. It appears that the Chairman at that time who is the 3rd Respondent, initiated the entire process which is explained by document P8. Petitioner has invited this court to an interpolation in P8 and I have no hesitation in accepting the version of the Petitioner in this regard, although the Petitioner cannot be exonerated altogether.

(b) The role of the 7th & 8th Respondents to some extent favour the Petitioner notwithstanding the fact that the 7th & 8th Respondents were only signatories to the deed. As such the petitioner may have had some assurance by those

Respondents but Petitioner should not have taken things for granted in the absence of proper written authority. This position would be only a mitigatory fact or factor in the absence of a effective denial by the 7th & 8th Respondents who are also responsible officers of the 1st Respondent Corporation.

(c) Lapse of 2 years from date of execution of deed P2A to issuance of charge sheet P3. During the 2 year period Petitioner was also promoted to the post of General Manager.
(d) Irregularities focused in letter P7, P7a, P7b & P7c tend to support mala fides as pleaded by Petitioner
(e) Decision in P6 contradicts P4 or P6 retract from the decision in P4.
(f) Decision in P4 (sent on compulsory retirement) is disproportionate, unreasonable and outrageous.

The Petitioner's submission on proportionality is a recognized Principle in Administrative Law. I have no hesitation with the development of law in this direction, to apply the doctrine of proportionality to the facts of this case. I am in full agreement with the submissions of learned President's Counsel for the Petitioner regarding applicability of the above principle. Having this in view I refer to the following authorities which paved the way to apply this principle.

Administrative Law 8th Ed. – H.W.R. Wade – pg. 368/9 ....

In the law of a number of European countries there is a 'principle of proportionality' which ordains that administrative measures must not be more drastic than is necessary for attaining the desired result. This doctrine has been adopted by the European Court of Justice in Luxembourg and may well infiltrate British law through the decisions of that court, since British law must conform to European Union law. It is recognized also by the European Court of Human Rights in Strasbourg, so that it should infiltrate also through the Human Rights Act 1998. Lord Diplock took judicial notice of this prospect when he set out the categories of judicial review in 1985, but he spoke of it only as a possibility

for the future. Encouraged by these dicta claimants have invoked proportionality in a number of cases, but mostly without success. Proportionality has also been advocated as a desirable principle of judicial review.

It is clear that the principles of reasonableness and proportionality cover a great deal of common ground. In the case, for example, where the revocation of a market trader's licence was quashed as being an unreasonably severe penalty for a small offence, the decision could have been based on disproportionality as easily as on unreasonableness, and the Court of Appeal has long been accustomed to reducing awards of damages which are 'out of all proportion to the circumstances of the case'. Where attempts have been made to rely upon proportionality judges have tended to equate it with reasonableness. As Lord Hoffmann has said, it is not possible to see daylight between them. They will often be assimilated by the 'margin of appreciation' allowed by EU law, which gives latitude for administrative decisions by national authorities in a manner similar to the British doctrine.

Nevertheless the House of Lords have detected a difference, in that proportionality requires the court to judge whether the action taken was really needed as well as whether it was within the range of courses of action that could reasonably be followed.

Textbook on Administrative Law 2nd Edition – Peter Leyland & Terry Woods
Pg. 218....

> Proportionality works on the assumption that administrative action ought not go beyond the scope necessary to achieve its desired result. In other words, if measures are considered to do more harm than good in reaching a given objective, they are liable to be set aside. This is a useful concept to adopt when seeking to balance the exercise of the kind of discretion placed in the hands of administrators. Proportionality may be regarded as an extra safeguard which is activated only after it has been established that a public body has the legal power to act, or that the body is not pursuing an improper purpose, i.e., even if these grounds do not apply, it may still be relevant to consider whether the body

concerned is acting proportionately (Craig 1994, p. 414). At its simplest, the court may be called upon to perform a kind of balancing exercise to assess if the objective for an official decision justifies the means employed to achieve it, or whether the means can be deemed to be disproportionate.

I would also prefer to look at this doctrine adopted in various other countries and in India. The following material gathered from the text by *Justice Bhagabati Prosad Banerjee on Judicial Control of Administrative Action Edition 2001,* provides useful reading material

Pg. 102/103/104..

Canada Court in *Smith v. Queen* 40 DLR (4^{th}) 435 also applied the principle of disproportionate punishment as a ground to set aside the order of conviction in a criminal case. Section 5(2) of the Narcotic Control Act (Canada) provides for minimum sentence of seven years' imprisonment on conviction for importing narcotics. The accused pleaded guilty for importing narcotics contrary to section 5 of the Narcotic Control Act, RSC 1970, as a result of an attempt to bring into Canada a quantity of cocaine having a street value of approximately $ 150,000/-. It was argued that section 5 of the said Act was unconstitutional as it required imposition of minimum term of imprisonment of seven years. In Canada there is also a protection against imposition of cruel and unusual punishment. The State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate. It was held that in assessing where the sentence is grossly disproportionate the Court may consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentence would have been appropriate to punish, rehabilitate or deter the particular

offender or to protect the public from him. It was held that section 5(2) of the said Act is unconstitutional as the punishments are grossly disproportionate which constitutes cruel and unusual punishment.

This has been a new ground of challenge for judicial review: If punishment is excessively high or disproportionate it violates the principles of natural justice. It is held the judicial review generally speaking is not directed against the decision but it is directed against the decision making process. The question of choice and quantum of punishment is within the jurisdiction and discretion of the disciplinary authority. But the sentence is to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect which is, otherwise, within the exclusive province of the Disciplinary authority, if the decision of the authority even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized ground of judicial review.

In *Bhagat Ram v. State of Himachal Pradesh,* AIR1983 SC 454 at 460, the Supreme Court held that "it is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution" *(Bhagat Ram v. State of Himachal Pradesh,* AIR 1983 SC 454).

In *Council of Civil Service Union v. Minister for the Civil Service,* (1984) 3 WLR 1174 (HL) LORD DIPLOCK said: - "Judicial review as I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently clarify under three heads the grounds upon which administrative action is subject to control by judicial review, The first ground I would call 'illegality', the second 'irrationality' and the third

'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adopted in the further of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the Economic Community...". It was also said by DIPLOCK J. that a decision to be held as irrationality the decision should be so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could be arrived at it. The doctrine, proportionality, seems to be increasingly accepted in English Law as a last of lawfulness of official act, requiring simply that excessive means should not be employed to achieve given ends. To be unlawful for want of proportionality, a decision must not be 'unreasonably disproportionate" or perhaps "disproportionately disproportionate".

All those points referred to in this judgment in favour of the Petitioner as in paragraph (a) to (f) above and the following matters which I focus from the findings of the inquiry (1R6) would fortify Petitioner's stance on proportionality. I observe that the punishment imposed on Petitioner is highly unwarranted and unreasonable in terms of the law and applicable judicial precedents.

(1) Petitioner had been found not guilty of 2 counts namely charges 2:2 & 2:4 of P3. One charge namely 2:4 is to act in such manner to bring the 1st Respondent Corporation into disrepute. Inquiring Officer observes that there was no evidence to establish that count. 2(4). Charge emerging from 2:4 of P3 if established would bring the 1st Respondent as well as the public service into disrepute. This is a serious thing. To be exhonourated from it would definitely favour the Petitioner and disciplinary authority should give credit for same, and should have imposed a lesser punishment.

(2) Charge 2:1 & 2:3 of P3 refer to execution of deed P2A without prior approval/authority or the required Board Approval. The inquiring officer in arriving at his conclusion states inter alia that execution of the deed is a well planned fraudulent act. Refer to non-affixing of corporation seal, element of fraud introduced in this way are not within the ingredients of the charge 2:1 of P3. It appears to be an inference on the issue of fraud.

In 1R6 there is reference to dishonesty and fraud. These are not ingredients of the above two counts. Dishonest intention would have to be proved by either direct or circumstantial evidence. I cannot find any trace of it in 1R6.

3. I also agree with the submissions of the Petitioner that the offences charged with do not come within any of the 1st schedule offences of the Code. It seems to fall within (9) & (10) of the 2nd schedule.

The written submissions filed by the Respondents refer to certain matters not pleaded in their objections, and in fact it is in violation rule 3(8) of the Court of Appeal (Appellate procedure) rules 1990. There is no specific mention of non compliance with rule 3(i) of the said rules averred in the objections. Nor does the Respondents specifically pleaded that writs being public law remedies do not lie in respect of private law rights and failure to have recourse to other remedies. Counsel for the Respondent should have raised a preliminary objections on above at the oral hearing of this application but it was not done. To put it in a broad sense as in

paragraph 23, of the Respondent's statement of objection, would operate unfairly against the Petitioner who had no opportunity to meet that argument. As such I reject above objections raised in the written submissions. However I would generally give my considered views on same.

Document P6 is a refusal by the Respondents to make available the findings of the disciplinary inquiry. However the Respondents have along with their statement of objections annexed to same the findings, of the inquiring officer marked 1R6. On one hand refuse it and thereafter complain for not asking for it. Can one take contrary positions? Therefore the purpose of referring to rule 3 is of no value. Further matters to be raised initially cannot operate as a bar to the Petitioner pursuing the application, notwithstanding the fact that compliance with rule 3 is mandatory as held in *Brown & Co. Ltd and others vs. Ratnayake 94 SLR 91* which incorporates Basnayake J's dicta. However this court is not inclined to grant all the relief as prayed for in the prayer to petition of the Petitioner. Writs being discretionary remedies of court would also mean that court could use it's discretion to entertain or reject an application.

Petitioner would not be prevented in moving the Court of Appeal under Article 140 of the Constitution in an appropriate case although

an alternative remedy is available. In the circumstances of the case in hand, resort to writ jurisdiction to test the legality of documents P4 & P6 seems to be a better remedy and the party concerned should have the option but may not be able to pursue both remedies.

The writ jurisdiction has been enlarged in terms of the provisions of the Constitution. Although Petitioner could have moved the Labour Tribunal there is nothing to prevent him invoking the writ jurisdiction of this court. In *W. K. C. Perera vs. Professor Daya Edirisinghe 1995(1) SLR at 156..*

> The fact that by entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged is implicit in Article 126(3), which recognizes that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right. While learned Senior State Counsel is correct in suggesting that the Appellant may have sought redress under Article 126(2), she was also entitled to apply to the Court of Appeal for Certiorari and Mandamus, and when it appeared that there was, prima facie, an infringement of a fundamental right, the whole matter could have been referred to this Court under Article 126(3).

The next matter is whether the appointment of the Petitioner is contractual and as such writ does not lie? In terms of the statute and letters marked P1f, P1h, P1; P2b there is nothing to suggest a pure contractual right

to deprive a remedy by way of a writ. In fact the following section of the Act indicates a statutory flavour.

Section 14(1) & (2) reads thus:

(1) The Board may appoint such officers and servants as it considers necessary for the efficient discharge of its functions

(2) The officers and servants of the Board shall be remunerated in such manner and at such rates, and shall be subject to such conditions of service, as may be determined by the Board.

Respondents have not produced any disciplinary code or document to suggest any contractual obligation. Therefore this court cannot go on a voyage of discovery to find such a prohibition.

In *Nanayakkara vs. The Institute of Charted Accountants of Sri Lanka and others (1981) 2 Sri L R 52 at 61.* In the above judgment *Thamiah J.* observed"

> "I agree with the submission of learned Counsel fro the petitioner that the petitioner's employment has a statutory flavour, with differentiates is his employment from the ordinary relationship of master and servant.
> The Manual of Procedure (R1), gives rights to the employee and imposes obligations on the employer, which go beyond the ordinary contract of service. An employee can be dismissed only on specified grounds and he is entitled to an inquiry before dismissal. Limitations or restrictions have been placed on the employer's power of dismissal-he cannot dismiss his employee capriciously but only for specified reasons and he must hold an inquiry before dismissal. If there is to be a hearing or an inquiry, then the essential characteristics of natural justice have to be observed"

I have also examined the case of *Premachanda vs. Bank of Ceylon CA 678/05; Weligama Co-operative Society vs. C. Daluwatta 1984(1) SLR 195; Trade Exchange (Ceylon) vs. Asian Hotels Corporation (1) 1981 (1) SLR 67 etc.* which could be distinguished as all those cases suggest contractual rights to prevent issue of a writ. A mere suggestion of a contractual right is not sufficient. Party who asserts must establish with sufficient proof. In the absence of proof petitioner could proceed by way of a writ.

In the public service one has to give his undivided allegiance to the state. This applies to all those serving the state either as public servants or statutory/corporation employees. As such this category of employees irrespective of rank should follow the applicable rules and regulations without any kind of pressure by any person or authority suggesting irregular practices. Any attempt or move suggesting irregular practice should be resisted at any cost by the employees, both State and Corporations.

When I consider all the facts and circumstances of this case it appears that the Petitioner who had an unblemished service record who ultimately rose to the rank of Chief Executive Officer of the 1st Respondent Corporation was a victim of circumstances, where the main perpetrator (3rd

Respondent) of the irregular practice as evidenced in document P8 and other material, does not seem to have been tried by a Court or a Tribunal competent to adjudicate. Further there is no material before us to ascertain as to how the 1st Respondent Corporation wishes to deal with the controversial deed P2A. (even in the future).

In all the above circumstances this is a fit and proper case to apply the doctrine of proportionality. As such we grant and issue an order in the nature of a writ of certiorari quashing the decision in document P4 only. We are not inclined to grant the other relief prayed for in his petition. Subject to above, sub paragraph (b) of the prayer to the petition allowed with costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Sathya Hettige J.

I agree.

PRESIDENT OF THE COURT OF APPEAL