

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

In the matter of an application for a Writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sri Lanka Telecom Limited,  
Head Office, Lotus Road,  
Colombo 1.

**PETITIONER**

**CA (Writ) Application No. 519/2008**

Vs.

1. Human Rights Commission of Sri Lanka,  
No. 36, Kynsey Road,  
Colombo 8.
2. Justice S. Ananda Coomaraswamy,  
Former Chairman.
- 2A. Dr. Deepika Udagama,  
Chairperson.
3. Justice D. Jayawickrama,  
Former Member.
- 3A. Ghazali Hussain,  
Member.

4. M.T. Bafiq,  
Former Member.

4A. Saliya Peiris,P.C.,  
Member.

5. N.D. Abeywardena,  
Former Member.

5A. Ambika Sathkunanadan,  
Member.

6. Mahanama Thilakaratne,  
Former Member.

6A. Dr. Upananda Vidanapathirana,  
Member.

7. Nimal G. Punchihewa,  
Former Additional Secretary.

7A. S. Jayamanna,  
The Secretary.

All of the Human Rights Commission of  
Sri Lanka,  
No. 36, Kynsey Road, Colombo 8.

8. M.M.M. Zaheed,  
585/1/A, 2<sup>nd</sup> Division,  
Maradana,  
Colombo 10.

## RESPONDENTS

**Before:** Arjuna Obeyesekere, J

**Counsel:** Sanjeeva Jayawardena, P.C., with Ms. Pubudini Wickramaratne for the Petitioner

Parinda Ranasinghe, P.C., Additional Solicitor General for the 1<sup>st</sup> – 7<sup>th</sup> Respondents

W. Dayaratne, P.C., for the 8<sup>th</sup> Respondent

**Argued on:** 5<sup>th</sup> September 2018

**Written Submissions:** Tendered on behalf of the Petitioner on 7<sup>th</sup> August 2018, 11<sup>th</sup> January 2019 and 30<sup>th</sup> May 2019

Tendered on behalf of the 8<sup>th</sup> Respondent on 15<sup>th</sup> February 2019

**Decided on:** 4<sup>th</sup> September 2019

**Arjuna Obeyesekere, J**

The Petitioner has filed this application, seeking *inter alia* a Writ of Certiorari to quash the recommendation of the 1<sup>st</sup> – 6<sup>th</sup> Respondents, annexed to the petition marked ‘G’ by which the Petitioner was directed to:

- (a) Place the 8<sup>th</sup> Respondent on salary scale A6 from 22<sup>nd</sup> June 1999 with all allowances and other payments which are no less than of his colleagues;
- (b) Pay reasonable compensation to the 8<sup>th</sup> Respondent for the full loss of career.

This application was initially dismissed by this Court<sup>1</sup> on a preliminary objection raised by the Respondents that a recommendation of the Human Rights Commission is not liable to be quashed by a Writ of Certiorari. On appeal, the Supreme Court held that this Court was in error in dismissing this application and held that "*if a recommendation of a Public Body affects the right of an individual, Superior Courts, in the exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of certiorari.*"<sup>2</sup> Having set aside the judgment of this Court, the Supreme Court directed this Court to re-hear this application on its merits.

The facts of this matter very briefly are as follows.

The 8<sup>th</sup> Respondent had joined the Department of Telecommunications in 1983 as a Clerk and had been absorbed to the Petitioner company in the same capacity. The Petitioner had been selected as an Assistant Sales Manager in 1998 and had been transferred to the Marketing Division on 26<sup>th</sup> April 1999. The issue which gives rise to this application arose in August 1999, when the Petitioner received a complaint from a customer, that the 8<sup>th</sup> Respondent had solicited a bribe from him to provide five telephone lines and IDD facilities to his business establishment under the premium package. The Petitioner states that a preliminary investigation was held in respect of the said complaint, and that the Investigation Officer, by his report annexed to the petition marked 'P1', had arrived at the conclusion that the 8<sup>th</sup> Respondent was "*not fit to hold the responsible position of Assistant Sales Manager*" and "*allowing him to continue there would not win customers, but will bring disrepute to the*

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<sup>1</sup>Judgment dated 30<sup>th</sup> January 2012.

<sup>2</sup> SC Appeal No. 215/2012; SC Minutes of 1<sup>st</sup> March 2017; judgment by Sisira De Abrew, J.

*company". The Inquiry Officer, while holding that "it is difficult to establish bribery ... for bribes had not been given or taken, but the gravity of the offence will not be reduced" had recommended that the 8<sup>th</sup> Respondent be transferred out of the Marketing Division.*

The Petitioner states that it took into consideration the recommendation in 'P1', and by letter dated 4<sup>th</sup> November 1999, transferred the 8<sup>th</sup> Respondent to the Commercial Division with immediate effect, pending formal disciplinary action. The Petitioner states further that it was compelled to take prompt action in order to maintain the reputation of the company. The 8<sup>th</sup> Respondent had however refused to report to work at the Commercial Division and about a month later had protested against the said transfer. The formal inquiry had commenced on 17<sup>th</sup> January 2000 and had been re-scheduled for 21<sup>st</sup> January 2000. The 8<sup>th</sup> Respondent, having attended the inquiry on the first date, had failed to attend the inquiry on the latter date as well as on the subsequent dates to which the inquiry had been postponed. By letter dated 18<sup>th</sup> January 2000, annexed to the petition marked 'P2', the 8<sup>th</sup> Respondent had informed the Petitioner that he has made an application to the Labour Tribunal on the basis that there has been a constructive termination of his employment by the Petitioner and that in view of the said application, he would not be attending the formal inquiry. The Petitioner states that the formal inquiry was abandoned in view of 'P2'.

It is therefore observed that the incident that gave rise to the application to the Labour Tribunal is the transfer of the 8<sup>th</sup> Respondent to the Commercial Division.

By letter dated 24<sup>th</sup> April 2000, annexed to the petition marked 'P4', the 1<sup>st</sup> Respondent, the Human Rights Commission had called for observations of the Petitioner on a complaint filed by the 8<sup>th</sup> Respondent with the 1<sup>st</sup> Respondent. This Court has examined the said complaint annexed to the petition marked 'P3', and observes that the grievance of the 8<sup>th</sup> Respondent was that, "*suddenly, I received a transfer order on 4<sup>th</sup> November 1999 stating no reason, transferring me to Commercial Section, demoting my position/grade without notice whatsoever, for no reason.*"

When the matter came up for inquiry before the 1<sup>st</sup> Respondent on 19<sup>th</sup> June 2001, the Counsel for the Petitioner had raised a preliminary objection that the 1<sup>st</sup> Respondent did not have jurisdiction to hear the application of the 8<sup>th</sup> Respondent for the reason that the act complained of by the 8<sup>th</sup> Respondent did not constitute an executive or administrative action. This Court has examined the extensive written submissions filed by the parties<sup>3</sup> and must observe that the said written submissions were limited to the question of jurisdiction and that the parties did not address the 1<sup>st</sup> Respondent on the merits of the complaint of the 8<sup>th</sup> Respondent.

By a letter dated 3<sup>rd</sup> April 2006 annexed to the petition marked 'P15', the 1<sup>st</sup> Respondent had informed the Petitioner as follows:

*"The Human Rights Commission rejected the preliminary objections forwarded by the Respondent and inquired into the above matter.*

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<sup>3</sup> The Written Submissions have been annexed to the petition marked 'P9'-'P14'.

*According to the report prepared by the retired Judge of the Court of Appeal in relation to the above application, there is a violation of Article 12(1) of the Constitution. Therefore it is recommended:*

- i. *To grant the salary scale of A6 from 22<sup>nd</sup> June 1999 and place at appointment with all allowances and other payment which are not less than that of his colleagues V. Niles, Neteumam and P.M.W. Kumara;*
- ii. *To pay a reasonable compensation for the full loss of career."*

Dissatisfied by 'P15', the Petitioner had invoked the jurisdiction of this Court by way of CA (Writ) Application No. 1373/2006 seeking to quash 'P15'. Apart from the argument that the 1<sup>st</sup> Respondent had erred on the aforementioned preliminary objection, the Petitioner had also argued that it was deprived of an opportunity to present its case on the substantive issue of whether the complaint of the 8<sup>th</sup> Respondent is a violation of the 8<sup>th</sup> Respondent's fundamental rights. The said application had however been withdrawn by the Petitioner on an undertaking given by the 8<sup>th</sup> Respondent that he was willing to have a fresh inquiry conducted by the 1<sup>st</sup> Respondent.

By letter dated 12<sup>th</sup> March 2007, annexed to the petition marked 'C', the 1<sup>st</sup> Respondent informed the parties that an inquiry would be held before the 6<sup>th</sup> Respondent on 20<sup>th</sup> March 2007, thereby demonstrating the agreement of the 1<sup>st</sup> Respondent to conduct a fresh inquiry. The parties had thereafter been

requested to file written submissions.<sup>4</sup> At the inquiry held on 24<sup>th</sup> April 2007, the Petitioner had raised the following two preliminary objections:

- a) The actions of the Petitioner are not executive or administrative acts as contemplated by Article 17 and 126 of the Constitution and therefore the Human Rights Commission does not have the jurisdiction to hear the complaint of the 8<sup>th</sup> Respondent;
- b) As the Labour Tribunal has decided on the complaint of the 8<sup>th</sup> Respondent with regard to his transfer, the 1<sup>st</sup> Respondent cannot go into the identical question.<sup>5</sup>

The 1<sup>st</sup> Respondent by its recommendation dated 3<sup>rd</sup> March 2008, annexed to the petition marked 'G', overruled the said objections and proceeded to grant the 8<sup>th</sup> Respondent the same relief contained in 'P15'.

It is in the above background that the Petitioner has filed this application seeking a Writ of Certiorari to quash the said Recommendation of the 1<sup>st</sup> Respondent marked 'G'. During the course of the hearing, the learned President's Counsel for the Petitioner submitted that he is challenging the decision of the 1<sup>st</sup> Respondent on four grounds. This Court will now consider each of the said grounds.

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<sup>4</sup>Annexed to the petition, marked 'D', 'E' and 'F'.

<sup>5</sup> It is admitted between the parties that the Labour Tribunal, by its order dated 3<sup>rd</sup> March 2005, annexed to the petition marked 'P29' had held that the services of the 8<sup>th</sup> Respondent had not been constructively terminated by the Petitioner and that the 8<sup>th</sup> Respondent had vacated his post. The application had accordingly been dismissed by the Labour Tribunal.

The first ground urged by the learned President's Counsel for the Petitioner was that Sri Lanka Telecom is not a State entity and therefore, the 1<sup>st</sup> Respondent does not have the jurisdiction to inquire into the complaint of the 8<sup>th</sup> Respondent as the acts of the Petitioner do not amount to "executive or administrative actions" as required by the Human Rights Commission of Sri Lanka Act No. 21 of 1996. In order to address this issue, this Court is required to consider whether the acts of the Petitioner which forms the subject matter of this application, can be considered as executive and administrative actions.

The power of the 1<sup>st</sup> Respondent to look into complaints of alleged Fundamental Rights violations is contained in Section 14 of the Human Rights Act, No. 21 of 1996, and reads as follows:

*"The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused-*

*(a) by executive or administrative action; or*

*(b) as a result of an act which constitutes an offence under the Prevention of terrorism Act No .48 of 1979, committed by any person."*

The Petitioner had originally been a Department of the Government of Sri Lanka. Its status had been changed to a Corporation known as 'Sri Lanka Telecom' in terms of an order made under the provisions of the State Industrial

Corporations Act No. 49 of 1957. 'Sri Lanka Telecom' had thereafter been converted into a public company by the name of 'Sri Lanka Telecom Limited' under and in terms of an order made under Section 2 of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. In 1997, the Secretary to the Treasury, in whose name the shares of the Petitioner was held, had sold 35% of the shares in the Petitioner to Nippon Telephone and Telegraph Corporation (NTTC). 3.5% of the shares of the Petitioner had been distributed among the employees, leaving the Government with 61.5% of the shares in the Petitioner. This is the position that prevailed at the time the 8<sup>th</sup> Respondent filed a complaint with the 1<sup>st</sup> Respondent.

Over the years, the Supreme Court has sought to define and interpret what is meant by 'executive and administrative action'. In Hemasiri Fernando vs. Hon. Mangala Samarweera, Minister of Posts, Telecommunication and Media and others<sup>6</sup>, the Secretary to the Treasury, purporting to act on behalf of the Government of Sri Lanka, removed the Chairman / Director of Sri Lanka Telecom. In considering the issue whether the said action was a violation of the petitioners fundamental rights, the Supreme Court held as follows<sup>7</sup>:

*"As observed earlier the Government of Sri Lanka owns 61.5% of the shares of the company and it is the beneficial owner of 35% of the shares held by the NTTC. Behind the veneer of the commercial company is the State. The power of the State is conferred on the 3<sup>rd</sup> Respondent to be held for the benefit of the public."*

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<sup>6</sup>(1999) 1 Sri LR 415.

<sup>7</sup>Ibid. at page 420.

In Leo Samson vs. Sri Lankan Airlines Ltd and Others<sup>8</sup> the Supreme Court adopted the “deep and pervasive control” test to determine whether the acts complained of falls within the ambit of the meaning of executive and administrative action. In Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd and Others<sup>9</sup>, the Supreme Court adopted the “agency test” to hold that the impugned acts in that case fell within the meaning of executive and administrative actions. The “agency test” in this case was when the Government owns the majority of shares in a company, such a company becomes a “state agency” and when the Government hands over the management of such a company to minority shareholders, the acts of that person becomes executive or administrative action.

In Prof Dharmaratne and Others vs. Institute of Fundamental Studies and Others<sup>10</sup>, the Supreme Court was called upon to determine whether the Institute of Fundamental Studies, which was a corporate body established by Statute, was an agency or instrumentality of the State. Justice Marsoof, having identified the several tests that have been developed to ascertain whether a corporate body is an agency or instrumentality of the State, stated as follows:

*“... our Courts have applied various tests to determine whether a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions. Where the body whose action is sought to be impugned (is) a corporate entity these tests have focused, among other things on the nature of the*

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<sup>8</sup>(2001) 1 Sri LR 94.

<sup>9</sup>(2001) 1 Sri LR 365.

<sup>10</sup>(2013) 1 Sri LR 367.

*functions performed by the relevant body, the question whether the state is the beneficiary of its activities, the manner of (its) constitution, whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds, the degree of control exercised by the State, the existence in it of sovereign characteristics or features, and whether it is otherwise an instrumentality or agency of the State. However, as will be seen, these tests flow into each other."*

In the recent case of Captain Channa D.L. Abeygunewardena vs. Sri Lanka Ports Authority and Others<sup>11</sup> Justice Prasanna Jayawardena, having analysed the development of the interpretation of "executive and administrative actions" held as follows:

*"Drawing from the aforesaid decisions of this Court and Indian decisions, some of the identifying characteristics which show a corporate body to be an agency or instrumentality of the State, may be collated as follows:*

1. *The State, either directly or indirectly, having ownership of the corporate body or a substantial stake in the ownership of the corporate body;*
  
2. *The corporate body performing functions of public importance which are closely related to Governmental functions;*

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<sup>11</sup>SCFR 57/2016 SC Minutes of 20<sup>th</sup> January 2017.

3. *The corporate body having taken over the functions of a Department of the State;*
4. *The State having deep and pervasive control of the corporate body;*
5. *The State having the power to appoint Directors and Officers of the corporate body;*
6. *The State providing a substantial amount of financial assistance to the corporate body;*
7. *The corporate body transferring its profits to the State;*
8. *The State deriving benefits from the operation of the corporate body;*
9. *The State providing benefits, concessions or assistance to the corporate body which are usually granted to organs of the State;*
10. *The Accounts of the corporate body being subject to audit by the Auditor General or having to be submitted to the State or an official of the State;*
11. *The State having conferred a monopoly or near monopoly in its field of business to the corporate body or the State protecting such a monopoly or near monopoly;*

*12. Officers of the corporate body enjoying immunity from suit for acts done in their official capacity."*

Having laid out the above characteristics, Justice Jayawardena proceeded to state as follows:

*"Although I have, for purposes of easy reference, set out the above list of some of the identifying characteristics of a corporate body which is an agency or instrumentality of the State, it is important to keep in mind that, this list is by no means exhaustive. Further, it must be stressed that, the presence of one or more of these identifying characteristics does not, necessarily, lead to the conclusion that a corporate body is an agency or instrumentality of the State. Instead, it is, usually, the cumulative effect of some of these identifying characteristics being found in a corporate body, which leads to the conclusion that it is an agency or instrumentality of the State. As Bhagwati J, as he then was, emphasised in Ramana Dayaram Shetty vs. the International Airport Authority of India<sup>12</sup>, ".... it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency....It is the aggregate or cumulative effect of all the relevant factors that is controlling."*

This Court will now consider the position of the Petitioner in the light of the above judgments of the Supreme Court.

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<sup>12</sup> AIR 1979 SC 1628.

As observed earlier, at the time the 8<sup>th</sup> Respondent was transferred, the Government, through the Secretary to the Treasury, held 61.5% of the shares in the Petitioner.

After the sale of 35% of the shares in the Petitioner to NTT, the Government, as the majority shareholder had entered into a Shareholders Agreement (SHA) with NTT, which has been annexed to the petition marked 'P25' Clause 6.1 of the said SHA provides that the Board of Directors of the Petitioner shall consist of up to ten Directors, up to six of whom shall be appointed by the Government. Of the said Government directors, one shall be the Chairman of the Petitioner. In terms of Clause 7.3 of the SHA, the quorum for a meeting of the Board of Directors shall be any four Directors present in person thereat of whom at least two must be Government Directors. Clause 5.3 of the SHA provided that the quorum for a General Meeting shall include the Government.

Schedule 2 of the SHA sets out a list of items referred to as 'Restricted Matters', which include the ability of the Petitioner to raise finance, acquisition and sale of assets having a value in excess of USD 10m etc. Clause 7.2 of the SHA provides that any resolution in relation to the 'Restricted Matters' shall require approval by a majority of the votes cast at such meeting of the Directors with at least one Government Director and at least one Investor Director voting in favour of the resolution.

When this Court considers the above facts, it is clear to this Court that at the relevant time, the Government held the majority of the shares in the Petitioner and through its Directors, controlled the Petitioner. Thus, the Government was

in control of the Petitioner, both at the Directors' level as well as at the members level. In these circumstances, this Court takes the view that the acts of the Petitioner fall within the description of 'executive and administrative' action, and therefore this Court is not in agreement with the first submission raised on behalf of the Petitioner. This Court is therefore of the view that the decision of the 1<sup>st</sup> Respondent in rejecting the first preliminary objection is correct.

The second ground urged by the learned President's Counsel for the Petitioner was that the 1<sup>st</sup> Respondent Commission made their recommendation 'G' on the substantial issue of whether the Petitioner violated the fundamental rights of the 8<sup>th</sup> Respondent, without affording the parties a hearing on the merits, which is mandatory in terms of Section 15(5) of the Human Rights Commission Act, which reads as follows:

*"No recommendation shall be made by the Commission under the preceding provisions of this section in respect of the infringement or imminent infringement of a fundamental right except after affording an opportunity of being heard to the person alleged to be about to infringe or to have infringed such fundamental right."*

A consideration of this argument requires this Court to briefly re-examine the sequence of events that led to the making of the recommendation 'G'. This Court has examined the initial complaint of the 8<sup>th</sup> Respondent to the 1<sup>st</sup> Respondent, annexed to the petition marked 'P3'. Having narrated the relevant facts pertaining to the allegation of bribery made against him, the 8<sup>th</sup> Respondent states that, "But suddenly I received a transfer order on 4<sup>th</sup>

*November 1999 stating no reason, transferring me to S/Commercial Section, demoting my position / grade without notice whatsoever for no reason. I protested against this arbitrary transfer and returned the order to CAO."*

The 8<sup>th</sup> Respondent's complaint to the 1<sup>st</sup> Respondent was therefore two fold – the first is that he was transferred, and the second was that he had been demoted in the process of being transferred. The task of the 1<sup>st</sup> Respondent was therefore to inquire into this complaint and consider whether the fundamental rights of the 8<sup>th</sup> Respondent were infringed by this act of the Petitioner.

Having called for and received the observations of the Petitioner,<sup>13</sup> the hearing before the Inquiry Officer had commenced on 31<sup>st</sup> May 2000. The preliminary objection that the 1<sup>st</sup> Respondent does not have the jurisdiction to inquire into the said complaint as the act complained of does not constitute executive or administrative action was raised on 19<sup>th</sup> June 2001. The Petitioner states on a direction made by the Inquiry Officer, the parties had tendered written submissions on the jurisdictional objection, which have been annexed to the petition marked 'P9' - 'P14'. As observed earlier, the said written submissions have dealt solely with the jurisdictional objection. The said submissions do not contain a discussion on the merits of the aforementioned complaint of the 8<sup>th</sup> Respondent.

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<sup>13</sup> The letter sent by the 1<sup>st</sup> Respondent is annexed to the petition marked 'P4' while the response of the Petitioner has been annexed to the petition marked 'P5'.

Having filed the last written submission 'P14' in December 2001, the Petitioner states it did not hear from the 1<sup>st</sup> Respondent until it received the letter dated 3<sup>rd</sup> April 2006 marked 'P15', which reads as follows:

*"The Human Rights Commission rejected the preliminary objections forwarded by the Respondent and inquired into the above matter.*

*According to the report prepared by the retired Judge in relation to the above application, there is a violation of Article 12(1) of the Constitution. (A copy of the report is attached).<sup>14</sup> Therefore it is recommended:*

- i. *To grant the salary scale of A6 from 22<sup>nd</sup> June 1999 and place at appointment with all allowances and other payment which are not less than that of his colleagues V. Niles, Neteunam and P.M.W. Kumar;*
- ii. *To pay a reasonable compensation for the full loss of career."*

This Court finds annexed to 'P15', the observations of the retired Judge, marked 'P16', which consists of the following parts:

Part I - containing the findings on the preliminary objection; and

Part II - containing the findings of fact, which led to the aforementioned recommendation.

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<sup>14</sup> The report has been annexed to the petition, marked 'P16'.

The Petitioner states (a) that the person who eventually made the recommendation in 'P16' was not the Inquiry Officer before whom the parties had appeared; (b) that it was never informed that a retired Judge had been appointed to inquire into the complaint 'P3'; and (c) that it was not afforded an opportunity of making representations before the said retired Judge. More important however is the allegation of the Petitioner that the 1<sup>st</sup> Respondent did not afford the Petitioner a hearing on the substantive complaint, either orally or by way of written submissions and did not conduct an inquiry into the primary complaint of the 8<sup>th</sup> Respondent. The Petitioner states that as a result, it was deprived of an opportunity of placing before the 1<sup>st</sup> Respondent, its case on the merits of the complaint of the 8<sup>th</sup> Respondent.

It is in these circumstances that the Petitioner filed CA (Writ) Application No. 1373/2006 challenging 'P15' and 'P16'. As referred to earlier in this judgment, the said application had been withdrawn by the Petitioner on 23<sup>rd</sup> February 2007 upon being informed that the 8<sup>th</sup> Respondent is agreeable to a fresh inquiry being conducted. The 1<sup>st</sup> Respondent had accordingly informed the parties by its letter marked 'C' to be present before it for an inquiry on 20<sup>th</sup> March 2007 before a new Inquiry Officer, thus demonstrating the agreement of the 1<sup>st</sup> Respondent to conduct a fresh inquiry.

The Petitioner had raised the aforementioned two preliminary objections at the fresh inquiry.<sup>15</sup> This Court has examined the written submissions tendered by the parties annexed to the petition marked 'D', 'E' and 'F' and observes that

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<sup>15</sup> The objections being that the acts complained of is not an 'executive or administrative act' and the fact that the issue before the 1<sup>st</sup> Respondent has already been decided by the Labour Tribunal and therefore cannot be gone into by the 1<sup>st</sup> Respondent.

the said written submissions have been tendered only in respect of the said preliminary objections, and that a discussion of the merits has not taken place.

The decision of the 1<sup>st</sup> Respondent has been communicated to the parties by letter dated 3<sup>rd</sup> March 2008, annexing the recommendation of the 1<sup>st</sup> Respondent, marked 'G'. This Court has examined 'G' and observes that, having overruled both preliminary objections and having determined that it has jurisdiction to determine the said application, the 1<sup>st</sup> Respondent had held as follows:

*"Since the application is nearly nine years old, and in the recommendation the question of jurisdiction too was adverted to, there is no need now to hold a fresh inquiry. Therefore the previous recommendation has to stand."*

The above recommendation gives rise to two issues. The first is, having agreed to conduct a fresh inquiry, and having informed the parties that a fresh inquiry will be conducted, the Inquiry Officer has erred by arriving at a conclusion that a fresh inquiry need not be held. The second issue is, having rejected the preliminary objections, the Inquiry Officer ought to have fixed the matter for a hearing on the merits. Instead of doing that, the Inquiry Officer has erred by adopting the previous recommendation, which had not considered the merits at all, and thereby deprived the Petitioner of presenting its side of the story. In other words, the 1<sup>st</sup> Respondent has not afforded the Petitioner a hearing on the merits either at the first inquiry or at the second inquiry. The 1<sup>st</sup> Respondent has therefore acted not only in violation of Section 15(5) of the

Act but contrary to the legitimate expectation of the Petitioner that it would be afforded a hearing on the merits.

This Court is of the view that it is fundamental that an Inquiry Officer follow the principles of natural justice and affords both parties a proper hearing, thereby enabling each party to present their side of the story.

In Gamlathge Ranjith Gamlath vs Commissioner General of Excise and two others,<sup>16</sup> Sripavan J (as he then was) held as follows:

*"It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide Errington v. Minister of Health<sup>17</sup>). The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In Schmidt and another v. Secretary of State for Home Affairs<sup>18</sup> Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say."*

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<sup>16</sup> CA (Writ) Application No. 1675/2002; CA Minutes of 28<sup>th</sup> March 2003.

<sup>17</sup> (1935) 1 KB 249.

<sup>18</sup> (1969) 2 Ch. 149 at 170.

This Court is of the view that the 6<sup>th</sup> Respondent who conducted the inquiry the second time round, should have gone into the evidence and made a factual determination as to whether there was infact a violation of the fundamental rights of the 8<sup>th</sup> Respondent arising from 'P3'. This Court is further of the view that in the light of the agreement reached in CA (Writ) Application No. 1373/2006 to conduct a fresh inquiry, the 6<sup>th</sup> Respondent could not have resorted to the earlier recommendation contained in 'P16'. The fact that nine years had lapsed since the complaint should not be held against the Petitioner. It is significant to note that the 1<sup>st</sup> Respondent had made no reference to, nor made any factual determination as to the liability of the Petitioner with regard to the alleged fundamental rights violation arising as a result of the transfer, even though it has recommended the payment of compensation to the 8<sup>th</sup> Respondent.

This Court is therefore in agreement with the second ground placed before this Court by the learned President's Counsel for the Petitioner that the 1<sup>st</sup> Respondent did not afford the Petitioner a hearing on the substantive dispute and is of the view that the recommendation 'G' is liable to be quashed by a Writ of Certiorari.

As the 1<sup>st</sup> Respondent had adopted the recommendations made in 2006 contained in 'P16', and as 'P16' contained findings of fact which had been arrived at without hearing the parties, this Court is of the view that it is appropriate for this Court to consider the recommendation made by the Inquiry Officer in 2006 in order to ascertain the basis for such finding of fact in 'P16'.

Having filed the initial complaint in 2000, the 8<sup>th</sup> Respondent, by a letter dated 18<sup>th</sup> April 2001, annexed to the petition marked 'P7', had reiterated the circumstances that led to his transfer in 1999. It appears from paragraph 11 of 'P7' that while the inquiry was proceeding, a proposal had been made that the 8<sup>th</sup> Respondent return to employment on the last paid salary and face a disciplinary inquiry. The 8<sup>th</sup> Respondent had agreed to the said proposal on the condition that he be permitted to resume work in the post of Assistant Manager. However, the Petitioner had not been agreeable to the said condition, as by then, the Marketing Division of the Petitioner had been reorganised and the position of 'Assistant Manager, Sales' had been redesignated as 'Senior Marketing Representative', and the 8<sup>th</sup> Respondent was of the view that the new designation was a post inferior to what he held and that the restructuring had frustrated his legitimate expectations. The 8<sup>th</sup> Respondent had stated further that three others who had been selected as Assistant Manager, Sales together with him, had been placed on salary scale 'A6' with effect from 22<sup>nd</sup> June 1999 and that he too should be placed on the same salary scale.

The complaint that the 1<sup>st</sup> Respondent had to adjudicate upon was the complaint that was made by the 8<sup>th</sup> Respondent in March 2000, marked 'P3', that he had been unfairly transferred and in the process of which he had been demoted. The fact that the Marketing division of the Petitioner had undergone re-structuring and the fact that the position held by the 8<sup>th</sup> Respondent had been abolished, becomes relevant, if at all, only once a determination is made by the 1<sup>st</sup> Respondent on the complaint 'P3', since 'P3' was the complaint that the Petitioner had been called upon to answer. In this background, this Court examined Part II of 'P26' and finds that the Inquiry Officer has not considered

at all the matters set out in 'P3'. Instead, the Inquiry Officer had focussed his attention to what was set out by the 8<sup>th</sup> Respondent in 'P7' and made the following observations:

*"The complainant states that according to the re-organised structure he would be assigned the new salary group of M3. He further states that although his earlier designation was "Assistant Manager Sales", his new designation would be "Senior Marketing Representative". It is his view that the object of this re-structuring is not for the attainment of permissible corporate objectivity but for the sole purpose of effectively invalidating some of the appointments made in the Marketing group.*

*He states V. Niles, Nateunam and P.M.W. Kumara had already been assigned a new salary scale of A6 as of 30<sup>th</sup> September 1999. He states these two officers were selected along with the rest in the list including the complainant consequent on the internal advertisement and therefore he says he belonged to the same case. The complainant states that assigning him to an inferior post i.e "Senior Marketing Representative" in the reorganised structure constitutes and frustrates his legitimate expectation of holding the post of Assistant Manager Sales as per the internal advertisement to which post he was appointed unconditionally. He says the respondent has violated his fundamental right to equality guaranteed in Article 12(1) of the Constitution. According to the complainant, the respondent had indicated to the Commission that some of the persons who had been appointed as "Assistant Sales Manager" were in the process of being assigned to salary group A6 but the eligibility criteria for such assignment were not disclosed.*

*The complainant states such action on the part of the respondent constitutes an imminent infringement of his fundamental rights. He states the selection of persons to salary group A6 from among holders of the post of Assistant Manager on undisclosed criteria violates his right to equality guaranteed by Article 12(1) of the Constitution.*

*The complainant feels that he can no longer work under his employer with the confidence that he would be treated fairly and justly.*

*Having considered the submissions made by both parties I am of the view that the complainant's fundamental rights guaranteed under Article 12(1) have been violated by the respondent. I suggest that the complainant be granted the salary scale of A6 from 22.06.1999 and placed at a point with all allowances and other payments which are not less than that of his colleagues V. Niles, Neteunam and P.M.W. Kumara.*

*Since he does not wish to work under the respondent anymore I suggest that he be paid compensation for full loss of career which the Commission thinks is appropriate."*

The Inquiry Officer has sought to make a determination on the permissibility of the restructuring process of the Petitioner without addressing the complaint of the 8<sup>th</sup> Respondent that his transfer and what followed thereafter was bad in law. It is therefore clear that the Inquiry Officer who prepared 'P16', and on which the recommendation that is now sought to be quashed is based, has gone on a ~~voyage~~ of his own and considered irrelevant matters while failing to

consider relevant matters contained in 'P3'. In these circumstances, is it safe for this Court to uphold 'G'? This Court thinks not, and takes the view that the decision of the 1<sup>st</sup> Respondent is liable to be quashed by a Writ of Certiorari in view of the fact that the first Inquiry Officer has taken into consideration, irrelevant material when arriving at the conclusion contained in 'P16' which has been blindly followed by the second Inquiry Officer.

The third ground urged by the learned President's Counsel for the Petitioner is that in any event, the relief recommended by the 1<sup>st</sup> Respondent is vague and cannot be given effect to. As observed earlier, the Petitioner has been directed to pay a 'reasonable compensation' for the full loss of career. What is 'reasonable' is subjective and any payment made by the Petitioner can give rise to further complaints and litigation. Furthermore, the payment of compensation for the full loss of career is inconsistent with the first recommendation to place the 8<sup>th</sup> Respondent on the same salary scale as that of his colleagues, which in effect contemplates reinstatement. A recommendation must be specific and must be capable of being given effect to, which unfortunately is not the case in this application. This Court is in agreement with the submission of the learned President's Counsel for the Petitioner that the two recommendations made by the 1<sup>st</sup> Respondent are incompatible and irreconcilable and that they are in fact mutually exclusive and collectively exhaustive.

Even though this application is liable to be dismissed in view of the above findings of this Court, for the sake of completeness, this Court would now proceed to consider the final argument of the learned President's Counsel for the Petitioner.

As observed earlier, by an order dated 3<sup>rd</sup> March 2005, annexed to the petition marked 'P29', the Labour Tribunal had held that the services of the 8<sup>th</sup> Respondent had not been constructively terminated by the Petitioner and that the 8<sup>th</sup> Respondent had vacated his post. The Order of the Labour Tribunal was pronounced prior to both recommendations of the 1<sup>st</sup> Respondent, namely, the initial Recommendation 'P15' dated 3<sup>rd</sup> April 2006, and the subsequent Recommendation 'G' dated 3<sup>rd</sup> March 2008. This Court observes that there has been no appeal from the Order of the Labour Tribunal, marked 'P29'. The Petitioner states that as no appeal was lodged against 'P29', the Labour Tribunal Order is final and conclusive vis-à-vis the rights of the 8<sup>th</sup> Respondent arising from the transfer. It is the contention of the learned President's Counsel for the Petitioner that as the judicial process on the grievance of the 8<sup>th</sup> Respondent has therefore been completed, the 1<sup>st</sup> Respondent is *estopped* from considering the issue of the transfer of the 8<sup>th</sup> Respondent.

A consideration of this issue requires this Court to examine the complaint of the 8<sup>th</sup> Respondent to the Labour Tribunal as well as the 1<sup>st</sup> Respondent, in order to ascertain if the complaints are identical. In order to understand the nature of the complaint to the Labour Tribunal, this Court examined the Order of the Labour Tribunal marked 'P29'. The following sections of 'P29' reflect, in the view of this Court, the nature of the complaint:

"ഉല്ല്പളികൾ കിയൻഞ് അക്കദാരൻ ലേക്ക് നമന്തനേ സേവയ അനുമതിക്ക ലേക്ക് ആക്ക് കര ആക്കി ഭവം. <sup>19</sup>

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<sup>19</sup> Page 1 of 'P29'.

ඉල්ලමිකරු කියන්නේ සිසිදු පරිජ්‍යාත්‍යායකින් තොරව සාධාරණ ගේතුවක් රැකිහිටි තම මාරු කිරීම අසාධාරණ බවයි. මාරු කිරීමේ ලිපිය එම වගයෙන් ඉල්ලමිකරු පක්ෂය විසින් ලක්ෂණ කර ඇත. 1999.11.04 දිනැති වම ලිපියේ සඳහන් වන්නේ ඉල්ලමිකරු වහාම ක්‍රියාත්මක වන පරිදි වාතිප ආංශයට ලිපිකරුවෙකු ලෙස මාරු කළ බවයි. ඉන් පසුව ඔහුට එම දින 1999.11.25 දිනැති වෛද්‍යනා පත්‍රයක් ඉදිරිපත් කර තිබේ. ඒම අනුව ඔහුට වෛද්‍යනා 2 ක් ඉදිරිපත් කර ඇත.

1. එස්. එච්. එන්. රිඹාන් නමැති පාරිභෝගිකයාගෙන් දුරකථන 5 ක් ලබා දීම සඳහා අල්ලස් ලබා ගැනීමට උත්සාහ කිරීම.
2. ඒ මගින් ඉ ලංකා වෙළිකොම් ආයතනය මහජන අප්‍රකාශයට පත් කිරීම.<sup>20</sup>

1999.11.09 දිනැති එම මගින් ඉල්ලමිකරු තමාට දුන් මාරුව සේවය පහත හෙළුමක් බැවින් විය පිළිගත නොහැකි බව දැන්වා ඇත. සේවය පහත හෙළුම නිසා විය හාරගත නොහැකි බව ද දැන්වා ඇත. ඒ දින ලිපිය මගින්ද ඉල්ලමිකරු වියට වරෘද්ධත්වය පල කර ඇත. කෙසේ වෙනත් ඉල්ලමිකරුට දුන් මාරුව වෙනස් කර නැති බව වගාන්තරකරු විසින් ඉල්ලමිකරුට විවා ඇති 1999.11.18 දිනැති ලිපියෙන් පෙනේ. ඉල්ලමිකරු සඳහන් කර ඇත්තේ තමන්ට ස්ථාන මාරුව හාරගත නොහැක්කේ අලෙවි සහකාර කළමනාකරු වගයෙන් පත් ව ඇති තමාගේ සේවය පහත හෙළුමක් සිදු කර ඇති නිසා බවය. වබැවින් වම මාරුව අවලංගු කරන ලෙස ඔහු මෙම ලිපි මගින් ඉල්ලා තිබුණි. වහෙන් වගාන්තරකරු සඳහන් කර ඇත්තේ ඉල්ලමිකරු විසින් වම ස්ථාන මාරුව පිළිගත යුතු බවත්, විකි ඇති උපදෙස් අනුව ක්‍රියා කළ යුතු බවත්ය.<sup>21</sup>

ඉල්ලමිකරු එහි ඉල්ලමිපතුයේ සඳහන්කර ඇත්තේ තමන්ගේ සේවය අනුමතික ලෙස පහ කර ඇති බවයි. වහෙන් අනුමතික ලෙස පහ කිරීමක් සිදු වුයේද යන්න පිළිබුව තිරන්ය කළ හැක්කේ වගාන්තරකරු මෙහිදී කටයුත කළ අන්දම සළකා බැලිමෙනි.

ඉල්ලමිකරු සඳහන් කරන පරිදි තමන් අලෙවි සහකාර කළමනාකරු ලෙස පත් කළ පස නැවත ලිපිකරුවෙකු ලෙස මාරු කිරීම අසාධාරණය. වගාන්තරකරු කියන්නේ

<sup>20</sup> Page 3 of 'P29'.

<sup>21</sup> Page 3 of 'P29'.

ඉල්පුමිකරට දී තිබුණේ මිශ්‍රකරු පත්වීමක් බවය. කෙසේ වෙනත් ඔහුගේ මාරු කිරීම සාධාරණ ද නැදුද යන්න පිළිබඳව තිරණයක් ගැනීමේ අයිතිය ඉල්පුමිකරට නැත. ඔහු ඒ සම්බන්ධයෙන් සැකිමකට පත් නොවන්නේ නම් කළ යුතුව තිබුණේ ස්ථාන මාරුව නාර ගෙන ඉන් පසු පැමිණිලි කිරීමය. වගුන්තරකරු කියන්නේ ස්ථාන මාරුව පිළිනොගැනීම මගින් ඔහු වරදක් කර ඇති බවය. වගුන්තරකරුගේ තියෝග පිළිගැනීම ඉල්පුමිකරු බඳු සිටන බව සැලකිය යුතු වේ. වගුන්තරකරුගේ තර්කය පරිදි ඔහුට ද ඇති පත්වීම වෙනත් තනතුරක්ද නැදුද යන්න පිළිබඳ තිරණය කළ හැකිසේ ඒ සම්බන්ධයෙන් පැවැත්වන පරිජ්‍යනයේදීය. ඒ පිළිබඳ තිරණයක් ගැනීම සඳහා ඉල්පුමිකරු බලභාරියකු වෙත පැමිණ්ලක් ඉදිරිපත් කළයුතුවේ. වගුන්තරකරුගේ තියෝග පිළිගැනීමට ඔහු බඳු සිටන බව සැලකිය යුතුවේ.<sup>22</sup>

අනුමතික ලෙස දේශීය අවසන් කළ බව කිව හැකිසේ වගුන්තරකරු අසාධාරණ ලෙස ක්‍රියා කර ඇත්නම් පමණකි. ඔහුට වෝදනා පූරුෂක් නිඛුත් කර ව්‍යාගයක් පවත්වා තිරණයක් දීමට වගුන්තරකරු කටයුතු කර තිබුණු බවින් අනුමතික ලෙස දේශීය අවසන් කිරීමක් කළ බව වෝදනා කළ නොහැක.<sup>23</sup>

ඉල්පුමිකරු කියන පරිදි ඔහුගේ මාරුව අසාධාරණ යැයි තර්ක කිරීමට ඉඩ ඇත. ඉල්පුමිකරු කියන පරිදි ඔහුට දුන් තනතුර නොතකා පහළ ග්‍රේනියකට ඔහු එන් කිරීම සාධාරණ නොවන බව බැඳු බැල්මට පෙනේ. වහෙන් විය පහළ තනතුරක් නොවන බවට වගුන්තරකරු තර්ක කරන බවද අමතක කළ නොහැක.<sup>24</sup>

වගුන්තරකරු ඔහුට ගාහය්ව පරිජ්‍යනයට සහභාගිවන ලෙස අර් 12 මගින් 2002.02.21 දිනද දන්වා ඇති බවන්, වහෙන් ඉල්පුමිකරු එයද නොතකා රට සහභාගි නොවීම මගින් නා ස්ථාන මාරු තියෝගය අනුව වාර්ථා නොකිරීම මගින්ද ඔහු තිතාමතාම දේශීය අතහැර ගොස් ඇති බව ඉදිරිපත් ව ඇති සෘජු අනුව තිරණය කරයි.<sup>25</sup>

ඉහත දැක්වූ සියලු කරුණු අනුව පැහැදිලි වන්නේ ඉල්පුමිකරුගේ දේශීය වගුන්තරකරු විසින් අනුමතික ලෙස නො අවසන් කර නැති අතර ඉල්පුමිකරුගේ ක්‍රියාකලාපය අනුව ඔහු දේශීය අතහැර ගොස් ඇති බවය. වගුන්තරකරුගේ තිකිඹු

<sup>22</sup> Page 6 of 'P29'.

<sup>23</sup> Page 7 of 'P29'.

<sup>24</sup> Page 8 of 'P29'.

<sup>25</sup> Page 9 of 'P29'.

මහතා දැන්වන පරිදි කම්කරු විතිග්‍රහය සහාවෙන් සහනයක් ලබාගැනීම සඳහා ප්‍රධාන සුදුසුකම වන්නේ වගුලත්තරකරු විසින් ඉල්ලම්කරුගේ සේවය අවසන් කිරීමය. මෙහිදී ඉල්ලම්කරුගේ සේවය කිසිදු අත්දමකින් අවසන් කර නැති බව සියලුම සාක්ෂි අනුව තහවුරු ව ඇත. ඉල්ලම්කරුගේ ඉල්ලම්පතුය ඉදිරිපත් කළ පත්‍රවාරි 5 දින වන වට ඔහුගේ සේවය අවසන් කර නොතිබූ බව පත්‍රවාරි 17 දින ඉල්ලම්කරු ගාහයේ පරිජ්‍යනයට පෙනී සිටිමෙන් තහවුරු වේ. එබැවින් විතිග්‍රහය සහාවෙන් සහනයක් ලබා ගැනීමට ඉල්ලම්කරුට අයිතියක් නැතිබව තිරණය කරමි. ඒ අනුව ඉල්ලම් පතුය තියුණු කරමි.”<sup>26</sup>

As borne out by the above, the complaint of the 8<sup>th</sup> Respondent to the Labour Tribunal was one of demotion, transfer and the consequences thereof, which is identical to the complaint of the 8<sup>th</sup> Respondent to the 1<sup>st</sup> Respondent, as contained in ‘P3’. It is therefore clear to this Court that the complaint made to the 1<sup>st</sup> Respondent and the application made to the Labour Tribunal arises from the same issue; that the complaints are identical; and that the relief sought from the Labour Tribunal and the 1<sup>st</sup> Respondent – i.e. ‘reinstatement’ in the same post held prior to the transfer – is identical.

With regard to the said objection, the 1<sup>st</sup> Respondent, in its recommendation marked ‘G’ states as follows:

*“With regard to the complainant filing the case before the Labour Tribunal and the LT dismissing the same. It can be stated that the same set of facts and the circumstances can give rise to a breach of contract and a breach of fundamental rights. Assertion of one right does not extinguish the other.”*

<sup>26</sup> Page 10 of ‘P29’.

This Court does not disagree with the above observation of the 1<sup>st</sup> Respondent. However, the preliminary objection that was raised by the Petitioner was not that the 8<sup>th</sup> Respondent cannot seek relief from different fora. That is a right available to the 8<sup>th</sup> Respondent and this Court will not interfere with that right. However, a litigant who chooses to seek the identical relief from different fora arising from the same incident, whether it is framed in the form of a violation of fundamental rights or a violation of the contract of employment, must understand that once one of his preferred forums grants or refuses relief, he cannot pursue his cause in the rest of the fora to which he has complained. That is a risk that a litigant must take.

In any event, the Petitioner's argument was that the 1<sup>st</sup> Respondent is *estopped* from ruling on the identical issue since the Labour Tribunal has already determined that the transfer and what followed thereafter did not tantamount to constructive termination and that the 8<sup>th</sup> Respondent had vacated his post. Even though the 1<sup>st</sup> Respondent misdirected itself and did not determine the issue complained of in 'P3', the issue that arises from the said objection of the Petitioner is that the 1<sup>st</sup> Respondent ought to have terminated proceedings before it, once it was informed that the Labour Tribunal has determined the said issue.

This Court is of the view that once the Labour Tribunal pronounced its Order, the 8<sup>th</sup> Respondent is *estopped* from continuing to agitate the same issue before the 1<sup>st</sup> Respondent, and the 1<sup>st</sup> Respondent is *estopped* from considering the same issue. "*Issue estoppel*" is a principle of law which prevents re-litigation of disputes before Courts. It applies to facts directly decided by Courts, and those matters which form part of the decision which

were necessary to making the finding of fact or law. When a judgment of a Court is final and conclusive, it decides the issues in dispute before it once and for all, and cannot be disputed by the same parties again. These principles of law exist as a matter of public policy so that disputing parties are prevented from re-agitating the same disputes and to ensure that finality is brought to disputes between the parties.

In New Brunswick Railway Company v British and French Trust Corporation Ltd<sup>27</sup> the House of Lords set out the rationale for the above in the following manner:

*"The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."*

The learned President's Counsel for the Petitioner has drawn the attention of this Court to the judgment of the Supreme Court in Wijenaike v Air Lanka Limited and Other.<sup>28</sup> In that case, the petitioner had been informed by his employer that he had vacated his post. The petitioner had challenged the termination of his services by way of an application to the Labour Tribunal under Section 31B of the Industrial Disputes Act. The petitioner had also filed an application under Article 126(1) of the Constitution. On the question of whether the petitioner could have invoked the fundamental rights jurisdiction

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<sup>27</sup> 1939 AC 1 at pages 19-20.

<sup>28</sup> (1990) 1 Sri LR 293.

and whether the petitioner should have pursued the application before the Labour Tribunal, Kulatunga, J held as follows:

*"This is a question which must be decided in each case having regard to the conditions of employment and the intention of the relevant statute. If the remedy sought arises purely from the contract based on the consent of parties Articles 12 (1) and 126 have no application, in which event the dispute must be resolved by an ordinary suit provided by private law, even if the dispute involves an allegation of discrimination.*

*Even though it may be a government agency, Air Lanka is a company duly incorporated under the Companies Ordinance. Our attention has not been drawn to any provision of that Ordinance or of any other statutory provision which govern the petitioner's contract of employment with Air Lanka; nor have I been able to discover any such provision. I am, therefore, of the view that the petitioner's grievance has to be resolved by a private law remedy such as the application he has already made to the Labour Tribunal. An inquiry by the Labour Tribunal is also beneficial to both parties who are entitled to the rights of an ordinary suit, of calling witnesses and of confrontation and cross-examination of testimony at such inquiry on all the points in dispute. I am also of the view that this would promote the due and orderly administration of justice by Courts and Tribunals established by law. Any other view would encourage the proliferation of applications before the Supreme Court which are not within its jurisdiction merely because the aggrieved parties or Counsel advising them may feel that the remedy under Article 126 is convenient or expeditious."* (emphasis added)

Although the complaint of the 8<sup>th</sup> Respondent to the 1<sup>st</sup> Respondent was one of transfer, this Court is of the view that the above passage would be applicable in order to demonstrate why the 1<sup>st</sup> Respondent should not have proceeded once the order of the Labour Tribunal had been delivered.

This Court therefore takes the view that the 1<sup>st</sup> Respondent could not have proceeded with the inquiry arising from the complaint 'P3' after it was brought to its attention that the Labour Tribunal has determined the identical issue. This Court therefore upholds the final argument of the learned President's Counsel for the Petitioner and takes the view that the recommendation of the 1<sup>st</sup> Respondent marked 'G' is liable to be quashed by a Writ of Certiorari, on this ground too.

In the above circumstances, this Court proceeds to issue the Writ of Certiorari prayed for in paragraph (b) of the prayer to the petition. This Court does not make any order with regard to costs.

Judge of the Court of Appeal