

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

In the matter of an application under and  
in terms of Articles 17 & 126 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka

**SC. FR. Application No. 24/2013**

Kalidasage Roshan Chaminda  
Wijewardhana,  
No. 179/9, Udupila,  
Delgoda.

**Petitioner**

**Vs.**

1. Kurunegala Plantations Limited,  
No. 80, Dambulla Road,  
Kurunegala.
2. S.K. Nillegoda,  
Chief Executive Officer,  
Kurunegala Plantations Limited,  
No. 80, Dambulla Road,  
Kurunegala
3. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondents.**

\* \* \* \* \*

**Before** : **Mohan Pieris,PC, C.J.**  
**Priyasath Dep, PC. J. &**  
**Eva Wanasundera, PC,J.**

**Counsel** : Manohara de Silva PC. with Pubudini Wickremaratne for the  
Petitioner.

Mrs. Shahieda Barrie, SSC. for the Respondents.

**Argued On**  
**Preliminary Objections** : **18-03-2014 & 16-07-2014**

**Written**  
**Submissions filed** : By the Petitioner on 26-05-2014  
By the Respondents on 19-05-2014

**Decided On** : **03-09-2014**

\* \* \* \* \*

**Eva Wanasundera, PC.J.**

At the commencement of the hearing of this case after granting Leave to Proceed on 05.04.2013, Court suggested a settlement which was not arrived at, by the parties. This Court heard Counsel for the parties on 18.03.2014 when a preliminary objection was raised by the Senior State Counsel appearing for the Respondents. The hearing on the preliminary objection was resumed on 16.07.2014 and Court directed parties to file written submissions on the preliminary objection.

The Respondents submitted that the complaint against the Respondents does not fall under the category of 'executive and administrative action' to bring it within the fundamental rights jurisdiction contemplated in Article 12(1) of the Constitution but is essentially a matter of contract. The thresh-hold issue to be decided is whether the matter before Court is within the category of "contract" or "executive and administrative action".

The facts before Court would lead the way to a certain extent. The 1<sup>st</sup> Respondent, Kurunegala Plantations Ltd. (hereinafter sometimes referred to as 'KPL') called for tenders for the lease of a rocky site to operate a quarry and the Petitioner was awarded the tender. He entered into a lease agreement on 02.12.2009 with KPL for 3 years and paid the full amount of lease for 3 years. KPL agreed to grant a period of one more month to obtain the necessary permits/approvals to operate the quarry and for the construction of the road to the site. The Petitioner obtained the approval of the Geological Survey and Mines Bureau which issued an Industrial License on 11.01.2011; the approval of the Central Environmental Authority which issued an Environmental Protection License on 07.04.2011 and the approval of the Department of Archaeology on 01.12.2010. As the approvals to quarry had not been obtained, the Petitioner could not have legally started quarrying within one month from 02.12.2009. The Petitioner complains that the Superintendent of the Estate who is an employer of the KPL did not allow him to quarry. He could not have legally started work due to the delay in obtaining the aforementioned licences. Could the delay be attributed only to the KPL or to the Petitioner himself or to both parties? Admittedly quarrying was delayed by 1 year and 8 months. The Petitioner entered the site de-facto on 08.08.2011.

At the end of the 3 years and 1 month commencing from 02.12.2009 the Petitioner demanded from the 1<sup>st</sup> Respondent KPL to extend the term of the contract which the 1<sup>st</sup> Respondent refused to do for reasons set out in his statement of objections. It is at this point that the Petitioner invoked the jurisdiction of this Court and complained of the infringement of the Petitioner's fundamental rights guaranteed under Act 12(1) of the Constitution by the Respondents, on the basis that the 1<sup>st</sup> Respondent has refused to extend the lease agreement for a period of 3 years commencing from 08.08.2011.

The reliefs prayed for by the Petitioners in his petition are, to make order directing the 1<sup>st</sup> Respondent to act under Clause 22 of the lease agreement and take steps to extend the lease agreement for a period of 3 years from 08.08.2011 or to make order to pay the Petitioner the amount corresponding to the lease rental for 1 year and 8 months and to grant interim order restraining the Respondents from ejecting him from the land and/or to restrain the Respondents from calling for fresh tenders. The agreement is a contract. The reliefs prayed for are based on the clauses in the contract. In summary, the Petitioner is praying that this Court orders the Respondents to perform their obligations laid down on the agreement which is the contract between both parties.

The Petitioner's submissions with regard to the delay in obtaining the licenses prior to the commencement of quarrying operations seems to be referable to the actions of the Superintendent of the Attanagalle Estate at that particular time, who did not allow the Petitioner access to the land. It appears that Superintendent had entertained personal ill-will towards the Petitioner. The 1<sup>st</sup> Respondent has thereafter dismissed that particular Superintendent from service and appointed another Superintendent who obeyed the instructions given by the Respondents and allowed the Petitioner to carry out the survey of the rock on 08.08.2011. The Petitioner states that the Respondents have acted arbitrarily and delayed the survey and entry to the site of the quarry.

It is important to see that Clause 22 of the Agreement is with regard to extensions by mutual discussions and agreement of the parties and not only at the instance of one party. The 1<sup>st</sup> Respondent was exercising its contractual right under the provisions and/or conditions of the lease agreement entered into by both parties when it did not extend the lease period included in the agreement. Yet, it is to be noted that the Petitioner could not proceed to actually commence quarrying due to different problems created by the Superintendent of the Estate within which the rock was situated. It is to be noted that the Superintendent at that time was not complying with even the orders of the 1<sup>st</sup> Respondent even though he was a servant/agent of the 1<sup>st</sup> Respondent. Needless to say several steps could have been taken by the 1st Respondent to avoid

trouble to the Petitioner prior to the commencement of quarrying which was not strictly included in the contract.

The Counsel for both parties have made submissions to decide on the preliminary objection. The law pertinent to this area in particular, i.e. whether the actions of the State entity, having entered into a contract and/or when entering into a contract, comes under the wing of 'executive or administrative action' or whether the actions of the state should be regarded as only confined to the conditions embodied in the realms of contract between two private parties.

In this context I leave aside the relevant Indian judgments submitted by both parties and consider the following series of Sri Lankan judgments on which the law has developed to date regarding similar cases.

1. Roberts Vs. Ratnayake 1986, 2 SLR 36
2. Wijenaikie Vs. Air Lanka 1990, 1 SLR 293
3. Gunaratne Vs. Ceylon Petroleum Corporation 1996, 1 SLR 315
4. Wickrematunga Vs. Anuruddha Ratwatte and others 1998, 1 SLR 201
5. Wickremasinghe Vs. Ceylon Petroleum Corporation 2001, 2 SLR 409

It is common ground that the actions of the Respondents per se fall within the definition of 'executive and administrative action' as they come under the purview of a Ministry. The Respondent's point of contention is that "what is challenged in this application is eventually a matter of contract and does not fall within executive and administrative action falling within the fundamental rights jurisdiction of the Supreme Court".

In ***Roberts Vs. Ratnayake***, it was held that by a majority decision that, "an act done in pursuance of a term or condition contained in a contract could found a complaint of an infringement of the right embodied in Article 12(1) only where such term or condition has a statutory origin or has at least a statutory flavor. The state has to be treated in the same way as any other ordinary party to a legally binding contract and where the rights and obligations of the parties to such a contract fall to be determined by the ordinary law

of contract, then the provisions of Article 12(1) of the Constitution has no application and cannot be invoked.”

**Wijenaike Vs. Air Lanka**, followed **Roberts Vs. Ratnayake** decision. It was held that *“Acts of State at the threshold stage or stage of granting a contract would be governed by Constitutional provisions but subsequent acts in the field of contract would not be so governed unless the power or obligation was statutory”*.

Thereafter, the decisions in the Supreme Court abstained from following the aforementioned reasoning. In **Gunaratne Vs. Ceylon Petroleum Corporation 1996, 1 SLR 315**, the Petitioner complained of an infringement of Article 12(1) of the Constitution owing to a summary termination of a dealership agreement, in terms of a termination clause in the relevant contract. An objection was raised that the termination of the agreement was not ‘executive and administrative action’ as it was an act done in the exercise of a contractual right to terminate the contract, **which was signed and concluded** drawing a contrast to the Roberts Vs. Ratnayake case where it was observed that it was only **at the threshold stage** that it could be regarded as executive and administrative action. Justice Mark Fernando did not accept this contention but held as follows:-

*“The principle of equality embodied in Article 12 does not make any exception, in regard to contracts in general, or particular types of contracts, or the stage at which a contract is. Indeed, the proviso to Article 12(2), as well as Article 12(3), militate against the contention that contracts are excluded. As for the submission that action taken after a contract has been entered into ceases to be executive or administrative action, that would give rise to a host of anomalies. That submission, while acknowledging that discrimination (e.g. on the ground of race, religion, or political opinion) at the stage of awarding or granting a contract, dealership or licence, can be remedied under Article 126, leaves it open, soon thereafter, to cancel that same contract, dealership or licence on the very same grounds doing indirectly that which could not have been done directly.”*

In ***Wickrematunga Vs. Anuruddha Ratwatte and Others 1998 -1 SLR 201***, again, it was held, after considering many Sri Lankan cases and Indian cases by Justice A.R.B. Amarasinghe, that *“Law in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct. In the context, whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements, in particular to those set out in Article 12 **even in the sphere of contract**; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, **the aggrieved party cannot be confined to his remedy under the law of contract.**”*

Amarasinghe, J. rejected the dichotomous approach of *pre and post contract* and further stated that in the sphere of contracts, public authorities and functionaries have to conform to the constitutional requirements and in particular those set out in Article 12. He said *“They cannot in my view avoid their constitutional duties by attempting to disguise their activities as those of private parties”*.

In ***Wickremasinghe Vs. Ceylon Petroleum Corporation 2001, 2 SLR 409*** case, the Ceylon Petroleum Corporation unilaterally terminated a dealership agreement, as per a clause in the contract that provided for a unilateral right to terminate the contract. It was held in the case that, *“since the termination of the agreement is challenged on the basis of an infringement of the right to equality guaranteed by Article 12(1) of the Constitution, **the legality of the termination has to be reviewed not in the light of the law of contract but in the domain of the Constitutional in Article 12**”*. Sarath N Silva CJ. observed in that case that *“Therefore the impugned termination of the Dealership agreement by P4 should be reviewed in these proceedings **not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action by the agency of the Government** and the constitutional guarantee of equality which should guide the exercise of power under the agreement.”*

In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been continuously made aware by the Petitioner of the fact that the Superintendent of the Estate at the commencement of the Petitioner's effort to organize matters to commence quarrying, was obstructing the Petitioner without any reason. The Respondents had turned a blind eye to the Petitioner's complaints until he made a complaint to the Police of the area when the Superintendent of the Estate threatened him with death when he entered the site with the Surveyor. It is only after this incident that the Superintendent had been summoned by the Respondents. It is surprising to observe that it had taken 8 months from 09.01.2011, the date of the Police complaint till 08.08.2011, for the Respondents to issue a letter in writing, directing the new Superintendent to allow the Petitioner to enter the Estate and commence the preliminaries prior to quarrying. It is observed that the Respondents could have acted on the complaints much earlier than they finally did. The survey plan 7787A marked P10 had been done after the date of the lease agreement. Lease agreement is dated 02.12.2009. Survey specifying the area was done on 13.03.2010 after 3 months, according to P10. It would appear that the Respondents have acted in a very irresponsible and arbitrary manner taking advantage of the fact that the 1<sup>st</sup> Respondent had already collected the lease rental and according to the contract the 1<sup>st</sup> Respondent was at an advantage. They had not addressed the issue as public officers of the State coming under the purview of the Ministry of State Resources and Enterprise Development. It would appear they had acted arbitrarily right along and with no care towards the counter party of the agreement. When the Petitioner requested that he be given an extension of the lease period beyond the 37 months for which the lease was agreed upon, the 1<sup>st</sup> Respondent had refused to extend the same seemingly acting in an arbitrary manner.

I am of the opinion that the 1<sup>st</sup> Respondent's refusal to extend the lease period should be reviewed not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action. The refusal to extend the lease period by the 1<sup>st</sup> Respondent is an act of agency of the Government and the Constitutional guarantee of equality should guide the exercise of power under the agreement. Every instance of unfairness to an individual will not give rise to a justiciable grievance under the ideology of the rule of law and equality under



the law but the party which is seemingly more powerful in this instant case, after the conclusion of signing the contract, being a state entity should not have abused the power in its hands. The conduct of the Respondents seem to be arbitrary even though mala fides has not been pleaded in the petition.

In the circumstances, I over-rule the preliminary objection and hold that the main matter be argued on merits.

**Judge of the Supreme Court**

**Mohan Pieris,PC, C.J.**

I agree.

**Chief Justice**

**Priyasath Dep, PC. J.**

I agree.

**Judge of the Supreme Court**