

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 and 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Galkandage Sahasra Sandeepa Perera,
No: 32, Chandra Place, Ja-Ela

SC (F/R) No. 335/2018

Petitioner

Vs.

1. Mr. Harsha Guruge,
District Scout Commissioner,
“Geeth”, Station Road, Seeduwa.
2. Mr. Meril Gunathilake,
Chief Commissioner-Scout
Sri Lanka Scout Association,
No: 65/9,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.
3. Secretary,
Ministry of Education,
“Isurupaya”, Battaramulla.
4. Principal,
Christ King College,
Thudella, Ja-Eela.
5. Mr. S. A. Amarasinghe,
Assistant Chief Commissioner,
Chief of the Interview Board.
6. Mr. G.B. Orcus,

Leader Trainer, Secretary
National Training Team,
Member of the Interview Board.

5th and 6th above named
Both of
Sri Lanka Scout Association,
No: 65/9,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

7. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

8. The Ceylon Scout Council,
No: 65/9,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

Added Respondent

Before:

Buwaneka Aluwihare, PC. J.
Murdu N.B. Fernando, PC. J.
E.A.G.R. Amarasekara, J.

Counsel:

Ms. Himalee Kularathna for the
Petitioner.

Senaka De Saram for the 1st, 2nd, 5th and
6th Respondents.

Ms. Viveka Siriwardena, DSG for the 3rd
and 7th Respondents.

Argued on: 05.02.2020

Decided on: 20.05.2020

Aluwihare PC. J.,

The Petitioner, Galkandage Sahasra Sandeepa Perera was a student of Christ King College, Ja-Ela at the time of filing this Petition, and has first joined Sri Lanka Scout Association as a Cub Scout in 2007 and continued his membership in the Association as a Scout from 2011 onwards. He alleges that the 1st Respondent, the Wattala-Ja-Ela District Scout Commissioner of the Sri Lanka Scout Association has violated the Petitioner's fundamental right to equality before the law and the equal protection of the law, enshrined in Article 12(1) of the Constitution, by maliciously refusing to authorize the Petitioner's application for the President's Scout Award. The Petitioner claims that the 2nd Respondent, the Chief Commissioner of the Sri Lanka Scout Association is complicit in the violation, owing to his refusal to confer the same on the Petitioner.

It must be observed at the outset, that for the conscience of the Court to be satisfied of the merit of any alleged violation of the fundamental rights of a Petitioner, it is an essential pre-requisite as per Articles 17 and 126 of the Constitution, that such infringement or imminent infringement of a fundamental right recognized by Chapter III of the Constitution be resulting from "*executive or administrative action*". Bearing this in mind, the key preliminary objection raised on behalf of the 1st, 2nd, 5th and 6th Respondents, that the Petitioner's application cannot be maintained against them, as their actions do not fall within the sphere of "*executive or administrative action*" as envisaged by Articles 17 and 126 of the Constitution, shall first and foremost be dealt with.

'Executive or Administrative Action' as per Articles 17 and 126

In so far as fundamental rights are concerned, it is only the infringement or imminent infringement of such rights by '*executive or administrative action*' that is considered to be justiciable before this Court in terms of Articles 17 and 126 of the Constitution.

In light of the absence of a definition in the Constitution for ‘*executive or administrative action*’, the existing body of case law points towards the understanding that if an action is to be amenable to the fundamental rights jurisdiction by qualifying as an infringement by ‘*executive or administrative action*’, one of the two following criteria must be met. *Firstly*, such action should either be an action of the State or Government itself, or *secondly*, it should be an action of an organ, agency or instrumentality of the government which is subject to governmental control, and done in the course executing a governmental function.

An examination of the case law points out that in **Wijetunga v. Insurance Corporation of Sri Lanka** (1982) 1 SLR 1, two of the key tests for adjudging which actions amount to ‘*executive or administrative action*’ were discussed, which shall be dealt with in detail later. It was further pointed out that Article 4(d) of the Constitution mandated all organs of the Government to respect and advance the fundamental rights enshrined in Chapter III and that “*action by the organs of the Government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126*” (at page 5 and 6, emphasis added).

As illustrated in Article 4(d) of the Constitution, all the organs of the government are charged with the responsibility of upholding and protecting fundamental rights. It reads as follows:

“The fundamental rights which are by the Constitution declared and recognized, shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided ...” (emphasis added).

In **Wijetunga** (supra) (at page 6) the Court examined the Insurance Corporation Act, No. 2 of 1961 to inquire whether the Sri Lanka Insurance Corporation (SLIC) which is a statutory corporation, was amenable to the fundamental rights jurisdiction. The Court observed; “*thus the relevant question is what is the relationship between the particular Cooperation whose acts are challenged and the State? Is it a Department of Government, or servant, or, instrumentality of the State? Whether the Corporation should be accorded the status of a Department of Government or not must depend on its Constitution, its*

powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions” (emphasis added).

The nature of SLIC’s powers and functions, the degree of Ministerial control over it and its financial resources were discussed and the Court drew the conclusion that, whether either one of the two tests; the functional test or the governmental control test is applied, the Corporation could not be identified with the Government or be regarded as its 'alter ego', or an organ of the State. Thus the court applied the two aforesaid tests and it was held that disciplinary action taken by Sri Lanka Insurance Corporation against its employees do not, therefore, qualify as ‘*executive or administrative action*’.

These two tests underlie the reasoning of the majority opinion of the Court in **Rajaratne v. Air Lanka** (1987) 2 SLR 128 (at page 148), delivered by Atukorale J. where it was held that Air Lanka was an agency or instrumentality of the government as it was “*a company formed by the government, owned by the government and controlled by the government*” (emphasis added). It was held that as Air Lanka was “*brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors*”, for the purpose of carrying out a function once carried out by the government, it is an “*agency or instrumentality of the government.*” It was further observed that the ‘*brooding presence*’ of the government is manifest behind the ‘*veil of corporate personality*’ of Air Lanka, and therefore as an organ or agency of the government, its actions are amenable to the fundamental rights jurisdiction and qualify as ‘*executive or administrative action*’ (at page 149).

In **Rienzie Perera and Another v. University Grants Commission** (1978-80) 1 SLR 128, it was observed by Sharvananda J. (as he then was) that “*Only if it (a wrongful act) is sanctioned by the State or done under State authority does it constitute a matter for complaint under Article 126... In the context of fundamental rights, the 'State' includes every repository of State power*” (at page 138).

Therein it was held that the University Grants Commission (UGC) established by the Universities Act, No. 16 of 1978 was an organ or delegate of the Government. The Court reasoned that as “*the Universities Act has assigned the execution of a very important*

governmental function to the Respondent...it is idle to contend that the Respondent is not an organ or delegate of the Government? (at page 139, emphasis added). The Court further observed that, *“the Minister shall be responsible for the general direction of University education and the administration of the Act and that he could issue directions to the Commission”* (at page 138, emphasis added). Following the rationale of the functional test and the control test it was consequently held that the impugned action of the UGC is amenable to the fundamental rights jurisdiction, as it is an organ or an instrumentality of the government.

In comparative jurisprudence, Indian case law merit study when inquiring into which entities can be categorized as the State, government or its organs. In India, as per Article 12 of the Indian Constitution, for the purposes of the Fundamental Rights Chapter, “the State” includes;

“...the Government and Parliament of India, the Government and Legislature of each of the States and all local and other authorities within the territory of India or under the control of the Government of India.”

It must also be borne in mind, however, that the Indian definition of ‘State’ is broader and embraces the entire gamut of State action and not restricted merely to ‘*executive or administrative action*’. Yet the jurisprudence is helpful in understanding the tests that have emerged to map out what qualifies as ‘*executive or administrative action*’ of the State and its organs.

The Indian Supreme Court, in interpreting the term “*other authorities*” in Article 12 has opined, in the case of Rajasthan **State Electricity Board v. Mohan Lal** AIR 1967 SC 1857, [speaking through Bhargava J.], that if any corporation has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that the corporation is “*State*”. Shah J. concurring, stated that an authority, constitutional or statutory, would fall within the expression “*other authorities*” only if it is invested with the sovereign power of the State, namely the power to make rules and regulations which have the force of law. This test has come to be known as the sovereign power test.

The above test was further broadened by Mathew J. in his separate judgment in **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi** AIR 1975 SC 1331 wherein the government instrumentality or agency test was first formulated. He opined that a corporation would be held to be an agency or instrumentality of the State when it is supported by public money for its operation, but it must be something surpassing mere financial aid to “*an unusual degree of control over the management and policies*”. In addition, it was held that whether the operation of the corporation was for an important public function should also be factored in, before pronouncing a corporation as a State agency.

This broader test of instrumentality or agency propounded by Mathew J. in **Sukhdev Case** (supra) was adopted by Bhagwati J. (as he then was) in **Ramana Dayaram Shetty v. International Airport Authority of India** 1979 AIR 1628. There the test was further expanded by His Lordship and several factors were laid down, which although not in any manner exhaustive, are worthy of consideration in determining whether a statutory corporation is an agency or instrumentality of the Government;

“whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance, whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions.”

Bhagwati J. further stated that, “*Whatever be its genetical origin, it (a corporation) would be an "authority" within the meaning of Article 12 (of the Indian Constitution) if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors.*” Thus the Court observed that the above factors should be considered cumulatively and in light of the particular facts and circumstances of each case.

Bhagwati J. (as he then was) in **Ajay Hasia v. Khalid Mujib Sehravardi and others** 1981 AIR 487, further consolidated the government instrumentality or agency test gathered from the decision in the **International Airport Authority Case** (supra), as follows:

(1) Whether the entire share capital of the corporation is held by the Government. If so it would go a long way to indicate that the corporation is an instrumentality or agency of the Government.

(2) Whether the financial assistance provided by the State is so much as to meet almost the entire expenditure of the corporation. If so, it would be indicative of the corporation being impregnated with governmental character.

(3) Whether the corporation enjoys monopoly status which is State conferred or State protected. If so, it would be a very relevant factor to be taken into consideration as being indicative that corporation is an instrumentality or agency of the Government;

(4) Whether there exists deep and pervasive State control of the corporation which would afford an indication that the corporation is a State agency or instrumentality.

(5) Whether the corporation performs functions of public importance and which are closely related to governmental functions and,

*(6) Whether the corporation is one to which a department of Government has been transferred. If so, it would strongly support the inference that the corporation is an instrumentality or agency of the Government. (vide page 139 and 140 of **Rajaratne** (supra), emphasis added)*

Before venturing on to an application of the above criteria to the case at hand, the following facts must be noted: The Sri Lanka Scout Association (SLSA) –a co-educational Association, is the national Scout organization of Sri Lanka which is recognized as a member by the World Organization of the Scout Movement (WOSM). Therefore, it must be appreciated that the Sri Lanka Scout Association- the local affiliate of its parent organization WOSM, can hardly be identified as an organ or instrumentality of the State of Sri Lanka. However, it must also be noted that the Sri Lanka Scout Association is operated by the Ceylon Scout Council which is a statutory corporation incorporated by Ceylon Scout Council (Incorporation) Act, No. 13 of 1957, and is the statutory body

which requires scrutiny under the tests elaborated above, as opposed to the Sri Lanka Scout Association.

On an application of the above criteria of the government instrumentality or agency test to the present case, it can be observed that as per the Ceylon Scout Council (Incorporation) Act, No. 13 of 1957, the Council's share capital is not held by the State nor is it financed exclusively by the State (its funds being raised almost completely through their membership); in fact there does not appear to be any financial commitment to the SLSA from the State apart from the routine annual government grant; it does not enjoy State conferred monopoly status; its management and policies are not pervasively controlled by the State (except a routine circular issued by the Ministry of Education pertaining to school children and teachers participating in Scouting activities); it does not carry out public functions closely related to any governmental function; and it certainly is not a corporation to which a Department of the Government has been transferred. Hypothetically, if the World Organization of the Scout Movement is disbanded/dissolved, the Sri Lanka Scout Association will also cease to exist, as SLSA is an affiliate body carrying out the objectives of WOSM, and not that of the State.

The Petitioner's contention that the President of the Republic being the Chief Scout is an indication of executive control, holds no merit as it is merely a ceremonial position which the President can decide not to accept, at his/her discretion. The President, if he/she so accepts the Title, becomes the Patron of the Scout Association and appoints the Chief Commissioner, Honorary Chief Commissioners and other higher officials merely upon the recommendation forwarded to him/her by the Association, while the other office bearers are elected by the members at the Annual General Meeting of the Council (vide section 2(1) of the Act).

The provisions of the Act confer the Council with powers to manage, raise and utilize property and funds of the Council, to establish and control Branches of the Association, to enter into arrangements with educational authorities and Departments of the government for promoting the interest of the Association, to determine and pay salaries, pensions and gratuities to its officers and to delegate the powers of the Council to the Committee of the Council (vide section 5 of the Act). Section 7 of the Act clearly indicates

that the Council is accountable to its members as opposed to the State, as yearly progress reports and statements of account are to be presented and approved at the AGM of members. The fact that it is not under government scrutiny is also evidenced by the Audit Report marked 'X' being prepared by an independent auditor and not the Auditor General. All these factors strongly indicate that the Scout Council is a self-regulating statutory corporation independent of the State/government, which is not subject to pervasive control by the government in its management or policies. These circumstances further indicate that neither the Association nor the Council are engaged in functions that are governmental in nature and that they do not possess the sovereign power of the State.

Further, as the 1st, 2nd, 5th and 6th Respondents have stated in paragraph 3 of their statement of objections that, the Application of the Petitioner cannot be maintained by virtue of Section 10 of the Scout Council Act. It states as follows: "*Nothing in this Act contained shall prejudice or affect the rights of the Republic, or of any body politic or corporate or of any other persons, except such as are mentioned in this Act and those claiming by, from or under them*" (emphasis added). These factors elaborated heretofore, disclaim and dissipate the argument that the Sri Lanka Scout Association's actions qualify as 'executive or administrative action'.

It is seen that a cumulative application of the above criteria comprising the broader test of government instrumentality or agency, or the application of the narrower government control test, the functional test or the sovereign power test to the facts of the present case, clearly indicate that the Sri Lanka Scout Council, under which the Scout Association operates, is not an agency, organ or an instrumentality of the State. Consequently, by virtue of not being an organ of the State, it is incapable of performing any executive or administrative action challengeable under Articles 17 and 126 of the Constitution. Therefore, the refusal by the 1st and 2nd Respondents to grant the President's Scout Award to the Petitioner does not qualify, in whatever way it is interpreted, as an 'executive or administrative action' for the purposes of Article 17 and 126 of the Constitution and any other interpretation would, in my view, be a naked violation of the Constitution.

Having established the above, I wish at this juncture to draw a distinction between two finer points. The first, as elaborated heretofore, is where a corporation, whatever may be its origins, does not satisfy the test of ‘*instrumentality or agency*’ of the government and by virtue of which, its actions become not amenable to the fundamental rights jurisdiction. The second is where a ‘*specific impugned action*’ by its nature itself, does not qualify as an ‘*executive or administrative action*’ challengeable under Article 17 and 126, even where it is performed by a public servant or a corporation which indeed qualifies as an instrumentality of the government.

The above distinction can be observed in several cases. In **Rajaratne** (supra), the Court identified Air Lanka as an organ of the government, and the discriminatory deprivation of equal opportunity when recruiting two employees to Air Lanka was recognized as a violation of their fundamental rights guaranteed by Article 12 of the Constitution. However, in **Wijenaike v. Air Lanka** (1990) 1 SLR 293, the Court held that an issue arising out of a purported breach by Air Lanka of a contract of employment with one of its employees, was a matter to be redressed through private law remedies upholding contractual rights, and not Constitutional rights. It was held that the State would be governed by constitutional provisions at the threshold stage, but after the State has entered into a contract, the relations would be governed by the contract. It was held (at page 294) that, “*in the case of a public corporation which is an agency of the government, a breach of contract between an employee and the agency would not per se attract the provisions of Article 12(1)*”.

However, even though in **Wijenaike** (supra) it was observed that the Court would not interfere into private contractual relations of a public corporation which is an agency/organ of the Government, this restriction was further narrowed down by this Court in **Captain Channa D.L. Abeygunewardena v. Sri Lanka Ports Authority** (2017) 1 ABH 214. In that case the Court introduced a further qualifying criterion to the effect that, the contractual relations of a public corporation which is a State’s instrumentality will not be amenable to the Fundamental Rights jurisdiction when it acts in breach of a contract due to bona fide commercial or operational factors, inadvertence or unavoidable circumstances; but Court would interfere and uphold Fundamental Rights enshrined in Chapter III of the Constitution, if the impugned act is a deliberate misuse of a

term/breach of a contract arising from malice, perversity, arbitrariness or manifest unreasonableness.

Similarly, pertaining to acts committed by a public servant this distinction was made in **Vivienne Gunawardena v. Perera and Others** (1983) 1 SLR 305 (at page 322), where it was stated that, “*the State no doubt cannot be made liable for such infringements as may be committed in the course of personal pursuits of a public officer or to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State.*”

However, the present case falls under the first category, as the Sri Lanka Scout Association or the Council as elaborated above, are not amenable to the fundamental rights jurisdiction laid down by the Constitution, by virtue of the fact that they are not organs or instrumentalities of the State. Hence, an examination of the nature of the ‘*specific impugned actions*’ of the 1st and 2nd Respondents as contractual or statutory need not be undertaken.

If indeed an injustice has been suffered by the Petitioner due to the unreasonable refusal of the President’s Scout Award, the appropriate step would be to address such grievance pertaining to internal administrative matters by the redress mechanism provided by the Association itself. As per annexure “R6”, it is observed that the Executive Committee of the Wattala/Ja-ela District Scout Association appointed an Inquiry Committee subsequent to the incident, which looked into the matter and submitted an Inquiry Report with findings to the effect that the President’s Scout Badge was refused because the Petitioner was not sufficiently qualified. But, if the impartiality of such an inquiry is doubtful, the Petitioner could apply to the World Organization of the Scout Movement itself, by making a complaint through the its Ethics Committee, so that the World Scout Bureau may impose sanctions on the infringing persons after an inquiry, as necessary.

For the reasons set out above, I uphold the preliminary objection raised on behalf of the Respondents, that their actions are not amenable to the fundamental rights jurisdiction for the reason that they transcend the limits of ‘executive or administrative action’ for the purposes of Article 17 and 126 of the Constitution. Accordingly, the Petitioner’s Application is dismissed *in limine*.

The learned counsel for the 1st, 2nd, 5th and 6th Respondents, in addition to the preliminary objection discussed in this order, also raised the issue that the Petition is misconceived in law as the Petitioner has failed to cite parties that are necessary to prosecute this Application. In view of the above findings I see no purpose in delving in to the said objection.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO P.C.

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

I agree.

JUDGE OF THE SUPREME COURT