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

In the matter of an application under Articles 17 and 126 of the Constitution.

Mohamed Hashim Mohamed Ziyard,
204, Waragashinna, Akurana.

Petitioner

S.C.(F.R.) Application No. 112/2017.

Vs.

1. Mr. Anura Dissanayake,
Director General,
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

ADDED 1A. Subasinghe Mudiyanselage Gotabhaya Jayarathne,
Director General.

ADDED 1B. Rupasinghe Arachchilage Rohan Ratnasiri
Acting Director General,

ADDED 1C. Sarath Chandrasiri Vithana,
Director General

ADDED 1D. Dissanayake M. S. Dissanayake,
Director General

ADDED 1E. Bulathsinghaarachchilage Sunil Shantha Perera

ADDED 1F. Keerthi Bandara Kotagama
Director General,
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

2. D.A. Asantha Gunasekera,
Director (Lands),
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

ADDED 2A. Chistie Perera,
Director (Lands)

ADDED 2B. Eranthika W. Kualratne.
Director (Lands),
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

03. I.M.U.K. Kumara,
Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 3A. Sugath Weerasinghe
Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

04. D.J.N. Wickramasinghe,
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 4A. J. Palitha Jayasinghe,
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 4B. I. Ranaweera.
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

05. K.G.U.C. Kumara,
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchciyagama.

ADDED 5A. L.R.C. Nethipola,
Block Manager,

ADDED 5B. Kapila Kumara
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 5C. P.W.P. Podimenike,
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

06. D.M. Panditaratne,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 6A. E.M.Ratnalela
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 6B. D. Ranjith Ekanayake,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

07. D. M. Somapala,
Ulukkulama,

Mahabulankulama

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

09. Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

10. Hon. Chamal Rajapaksa,
Minister of Mahaweli,
Agriculture, Irrigation and Rural Development,
No.500, T. B. Jayah Mawatha,
Colombo 10.

Respondents

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BEFORE : **MURDU N.B. FERNANDO, PC, J.**
A.H.M.D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Faisz Mustapha, P.C. with Ms.Thushani Machado for the Petitioner.
Ms. Kanishka de Silva, Balapatabendi SSC for the 1st - 6th & 8th -10th Respondents.
Nuwan Kodikara for the 7th Respondent.

ARGUED ON : 23rd February, 2023

DECIDED ON : 20th October, 2023

ACHALA WENGAPPULI, J.

The Petitioner, *Mohamed Hashim Mohamed Ziyard*, by his petition dated 15th March 2017, invoked the jurisdiction conferred on this Court

under Articles 17 and 126 of the Constitution, alleging infringement of his fundamental rights guaranteed to him under Articles 12(1) and 14(1)(g) by executive or administrative actions of the 1st to 6th and 9th Respondents.

When this matter was supported by the learned President's Counsel for the Petitioner on 03.07.2017, seeking leave to proceed, this Court thought it fit to grant leave only under Article 12(1). Pending hearing of the Petitioner's allegation, the caption to his petition was amended from time to time, in order to substitute several Respondents, in place of the ones who had since ceased to hold office. Relevant sub-paragraphs of the prayer to the petition too were amended to be in line with the reliefs sought against those substituted Respondents. On 30.10.2017, the Petitioner amended his caption by inclusion of the 9th Respondent, the *Mahaweli Authority of Sri Lanka*. On the same day the Petitioner also amended some of the reliefs sought in the prayer to reflect the changes made to the caption. On 27.01.2022, the Petitioner sought to add the Minister of *Mahaweli,* Agriculture, Irrigation and Rural Development, as the 10th Respondent with an amended caption. Latest to the series of amendments to the caption was made on 08.02.2022.

With the amendment made on 05.09.2019, the amended prayer of the petition reads as follows;

i. to declare that the failure to grant the Annual Permit to the Petitioner is an infringement and/or continuing infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution

by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

ii. to declare that the decision to cancel the nomination made in favour of the Petitioner and the subsequent issuance of an Annual Permit to the 7th Respondent is an infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

iii. to declare that the failure to grant an Annual Permit to the Petitioner is an infringement and/or continuing infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

iv. to declare the Annual Permit bearing No. අනු/එව්/නො/CLO/වාණිජ/ 2016/28) dated 29.12.2015 issued in favour of the 7th Respondent in respect of No. 283, *Puttalam Road, Nochchiyagama,* is *null* and *void*;

v. to direct the 1st to the 6th Respondents and 9th Respondent or any one of them to issue an Annual Permit to the Petitioner in respect of No.283 *Puttalam* Road, *Nochchiyagama*.

The added 1D Respondent (hereafter referred to as the 1st Respondent) and the 7th Respondent have filed their Statements of

Objection resisting the Petitioner's application and sought its dismissal with costs. In his Statement of Objections, the 1st Respondent made an attempt to explain away the basis on which the decision to cancel the Petitioner's selection to the disputed commercial property was made and the circumstances that led the 9th Respondent to issue an Annual Permit to the 7th Respondent, in respect of lot No. 283, for the second time.

The Petitioner's complaint to this Court is based on three decisions made to his detriment by the 1st to 6th and 9th Respondents, namely the decision to cancel the nomination already made in his favour, the decision to lease out lot No. 283 to the 7th Respondent and the decision to issue an Annual Permit (P30) in the 7th Respondent's favour. The petitioner therefore contends that these three decisions are arbitrary, capricious, unreasonable, and discriminatory.

At the hearing of this application, learned President's Counsel, who represented the Petitioner, submitted that;

a. the Petitioner's possession of the parcel of land under dispute had been regularised as far back as 2005, when he was selected for the issuance of a lease, which was communicated to him by letter dated 26.10.2007 (P13),
b. in furtherance to the said selection, the Petitioner duly complied with all the requirements set out in the letter P13, by making the relevant payments stipulated therein, including arrears of lease for the year 1999,
c. the Petitioner therefore had entertained a legitimate expectation that he would be issued with an Annual Permit as

indicated to him by letter dated 16.05.2013 (P19), which re-confirmed the legitimacy of his expectation,

In these circumstances, learned President's Counsel for the Petitioner had contended that the 1st to 6th and 8th to 9th Respondents, in making the decisions referred to in the preceding paragraph, have acted arbitrarily, capriciously and unreasonably as they frustrated the legitimate expectation entertained by the Petitioner and thereby infringed his fundamental rights to equality and equal protection of the law, as guaranteed by Article 12(1) of the Constitution. It was also contended by the learned President's Counsel that, in doing so, the 9th Respondent had taken irrelevant considerations into account in frustrating the Petitioner's legitimate expectation, when it considered his eviction from the land by the 7th Respondent, but failed to consider the relevant consideration that the said eviction was carried out when the latter had no valid permit.

In addition, the learned President's Counsel highlighted that the Petitioner was not heard by the 9th Respondent, the *Mahaweli* Authority prior to making a decision adverse to his interests and it failed to give any reasons for taking such a decision. He further contended that the *Mahaweli* Authority is in violation of the statutory provisions contained in Land Development Ordinance and the Regulations made under it, when the said Authority decided to issue an Annual Permit in favour of the 7th Respondent, after cancelling the one that had been issued in 1992.

Learned Senior State Counsel, in her reply on behalf of the 1st to 6th and 8th to 10th Respondents, strongly resisted the Petitioner's application. It was contended by the learned Senior State Counsel that

the 7th Respondent's illegal alienation of lot No. 283 and his failure to develop the same had resulted in the cancellation, not only of his selection to lot No. 283, but also the permit issued to him (1R2). None of these decisions were challenged before any Court by the 7th Respondent and thus remain valid to date. She then submitted, consequent to a complaint filed against the 9th Respondent Authority by the 7th Respondent before the Human Rights Commission, it was revealed that he had engaged in litigation with the Petitioner for over a decade pertaining to his rights to the land under dispute. It was further contended by the learned Senior State Counsel that the claim made by the Petitioner that his possession of the parcel of State land under dispute had been regularised by the 9th Respondent and that therefore he entertained a legitimate expectation to receive a permit in respect of that land, is misconceived in law and described as an attempt to place an incorrect position before this Court.

Learned Counsel for the 7th Respondent adopted a similar line by aligning with the position taken by the learned Senior State Counsel, in advancing a contention that the expectation claimed to have entertained by the Petitioner that he would be granted a permit was not a legitimate one and further submitted to Court that his client had vindicated his rights through Courts over the disputed parcel of State land, when the Petitioner illegally overstayed the lease, and thereafter employed other methods to deny him of his due right, that had been affirmed by Courts.

In view of the submissions made by the learned Counsel in respect of the parties they represent, it is helpful if the factual background relevant to the impugned decisions made by the 9th Respondent, which in turn gave rise to the allegation of infringement of

fundamental rights, made by the Petitioner in the instant application is referred hereafter *albeit* briefly.

The 7th Respondent was in possession of an allotment of State land, in extent of 2.5 perches, situated in *Nochchiyagama* town, facing *Puttalam-Anuradhapura* main road and identified as lot No. 283 of the *Nochchiyagama* Town Plan since 1982. After coming into possession, the 7th Respondent had put up a building on that land. In the year 1987, the 7th Respondent entered into an "agreement" (P2) with the Petitioner and two others. In terms of the said "agreement", the 7th Respondent had "*transferred his rights in the subject matter in dispute*" in favour of the Petitioner and others. The "*subject matter*" referred to in that agreement is the said parcel of State land possessed by the 7th Respondent at that point of time. The 7th Respondent was paid a sum of Rs.225,000.00 by the Petitioner and others as the value of a partly constructed building that stood on that allotment of land. However, the Petitioner came into occupy that allotment only on 31.07.1992 with the commencement of the operation of a grocery store in the said premises under the name and style of "*Akurana Traders*". Since then, the Petitioner had regularly paid assessment rates and other taxes and secured supply of electricity to the premises under his name.

On 30.11.1995, the Petitioner claims that he was surprised to learn that, an *ex parte* Judgment had been entered against him in an action filed by the 7th Respondent in the year 1994 and, as a consequence of which, he was ordered by the District Court of *Anuradhapura* to handover vacant possession to the latter. When the Fiscal came to execute the Writ of Execution, the Petitioner informed the Court official that he was neither served with summons of the action nor was he served with the *ex parte* decree. He thereafter moved the original Court

on 01.01.1996, by making an application under section 839 of the Civil Procedure Code, seeking to set aside the said *ex parte* decree, issuance of a direction of Court to serve summons on him and thereafter permit to tender an answer. The Petitioner was not successful in his application before the original Court and therefore sought intervention of the Court of Appeal against the order of the original Court, dated 11.10.1996, by moving in revision to have it set aside under application No. 712/1996. On 04.03.1997, parties have consensually settled the said revision application before the Court of Appeal by jointly seeking a direction on the District Court to re-inquire into the Petitioner's application by calling the Fiscal as a witness.

The District Court, having complied with the direction of the Court of Appeal and by its order dated 05.11.1998, once again dismissed the Petitioner's application. During that inquiry the Petitioner, his witness and the Fiscal, were heard by the original Court. The Petitioner then preferred an appeal to the Court of Appeal against the said order, in appeal No. CA 1175/98L(F) and also instituted an action against the 7th Respondent in case No. 16423/L on 16.12.1997. In that action, the Petitioner had sued the 7th Respondent for breach of the agreement P2 and claimed back the payment of Rs. 225,000.00 he made to the 7th Respondent, in addition to claiming damages quantified at Rs. 150,000.00 and compensation for improvements in a sum of Rs. 325,000.00. On the application of the Petitioner, Court made order on 28.08.2006 to layby same, on the basis that the appeal No. CA 1175/98(F) of the Petitioner was pending before the Court of Appeal.

Pending the hearing of appeal No. CA 1175/98(F), the 7th Respondent sought to execute the writ, and was successful in obtaining an order in his favour. The Petitioner once again resisted his eviction by

the execution of the said writ after obtaining leave to appeal from the High Court of Civil Appeal of *Anuradhapura*, in application No. NCP/HCCA/LA/04/2010 on 18.10.2010. The 7th Respondent had thereupon sought Special Leave to Appeal from the said order of the High Court of Civil Appeal by moving this Court in SC/HC/CA/LA 376/2010.

The appeal bearing No. CA 1175/(F) was subsequently withdrawn by the Petitioner on the basis that "… *a decision of Mahaweli Authority made in favour of the Appellant*". But the 7th Respondent, pleaded his ignorance of any such decision made by the 9th Respondent. The Court of Appeal, however, dismissed the appeal of the Petitioner after allowing his application. The 7th Respondent too had reciprocated by withdrawing the application No. SC/HC/CA/LA 376/2010, filed by him before this Court, challenging the order of the High Court of Civil Appeal.

While the litigation process referred to above was continuing in multiple fronts between the Petitioner and the 7th Respondent, the 9th Respondent had conducted an investigative survey in January of 2005, in respect of the commercial properties coming under its purview in *Nochchciyagama* Town. During the said survey, officers of the 9th Respondent Authority discovered that some of these commercial properties, which had already been alienated by issuance of permits to its respective lessees, were occupied by third parties and not by its lessees. The purpose of the survey was to regularise the possession of those who were in unlawful occupation of such commercial properties. It was found a total of 39 such lessees, who were issued with permits, have either failed to develop the property or had irregularly alienated them, while others failed to pay annual lease rentals.

Upon these findings, the 3rd Respondent submitted a report to the 1st Respondent, through which he recommended to set aside the selection of all 39 lessees, including that of the 7th Respondent. The findings against the 7th Respondent were that he made an irregular alienation of the land and also failed to develop the commercial property alienated to him. However, no cancellation of his Annual Permit was made until 15.12.2008 (1R6). After the said investigative survey and with the issuance of P13, the Petitioner was informed by the 5th Respondent, that he has been selected to receive an Annual Permit over lot No. 283. It also directed him to make the initial deposit and to pay the lease rental for the year 2007.

In 2013, the Petitioner claims that he "received" a copy of a letter dated 16.05.2013 (P 19), issued by the 5th Respondent, with copies to the Resident Project Manager, Deputy Resident Manager and Unit Manager, stating that the Annual Permit issued to the 7th Respondent was cancelled for violating its conditions and that the selection of the said lessee was accordingly set aside. It also indicated of the Petitioner's selection by the 9th Respondent to receive a permit in respect of the same land (depicted as lot No. 283 of the *Nochchiyagama* Town Plan) with a view to regularising his illegal occupation of same. Importantly, it also indicated that the Petitioner would be issued with an Annual Permit, since he had paid up all annual lease rentals from 1999 to 2013.

It is stated by the Petitioner that few days after he received the letter P19, and with the execution of the writ, he was evicted from lot No. 283 on 23.05.2013 by the Fiscal of the District Court of Anuradhapura and the 7th Respondent was placed in possession of same. The Petitioner had then lodged a complaint to the Human Rights Commission and also informed the 9th Respondent Authority of his

entitlement to that land. He conveyed his grievance to the Presidential Secretariat by lodging several complaints with it.

On 18.02.2017, the Petitioner received a letter from the 4th Respondent dated 15.02.2017 (P30) which indicated that the 9th Respondent Authority, during an inquiry held before the Human Rights Commission, had informed the said Commission of its decision to act in terms of the Court order and therefore decided to cancel the selection it made in his favour. It also indicated that the Hon. Minister of *Mahaweli,* the 10th Respondent, had approved the lease of the disputed parcel of State land in favour of the 7th Respondent and it was also decided to issue a lease to the 7th Respondent once again.

It is against the backdrop of these circumstances; the Petitioner alleges that his rights guaranteed under Article 12(1) had been infringed by the 1st to 6th and 9th Respondents and seeks relief in terms of his prayer. Particularly, the declarations sought from this Court are to the effect that the decisions made by the 1st to 6th Respondents and 9th Respondent; to cancel the nomination made in his favour, failure to grant him an Permit and the issuance of an Annual Permit to the 7th Respondent, are violative of his fundamental rights guaranteed to him under Article 12(1) of the Constitution.

In a petition alleging violation of fundamental rights "*it must not be supposed, or suggested, that the need to obtain leave to proceed under Article 126(2) is a mere formality. The onus is on a petitioner seeking relief to establish a prima facie case*". This pronouncement was made by *Fernando* J in ***Hettiarachchi v Seneviratne*** (1994) 3 Sri L.R. 293 (No.2) and that pronouncement was reconfirmed by a bench of seven Judges in ***Edward Francis William Silva, President's Counsel and three others v Shirani***

Bandaranayake and three others (1997) 1 Sri L.R. 92. At this initial stage, this Court would consider whether the petitioner has satisfied that "… *there is something to be looked into*" and if so, grant leave to proceed, per ***Visuvalingam and Others v Liyanage and Others*** (1984) 1 Sri L.R. 305 (at p.316)**.** In the instant matter the Petitioner was successful in establishing before this Court that he had a *prima facie* case but, only in relation to his claim of violation of rights under Article 12(1) of the Constitution.

The Petitioner, having satisfied this Court of the said initial threshold to obtain leave to proceed, now presents a contention based on the doctrine of legitimate expectation, which he allegedly to have entertained upon a promise or an undertaking made by the 9th Respondent, as reflected in the contents of a letter P13, which was once again confirmed by issuance of P19, but collectively frustrated by a series of subsequent decisions taken by the said Respondent and its officers, commencing with the cancellation of his selection to lot No. 283 by 1R16, and, culminating with the issuance of an Annual Permit 7R17, in favour of the 7th Respondent.

It must be stated that the doctrine of legitimate expectation, both in its procedural and substantive forms, are now part of the public law applicable in this Jurisdiction. However, before I proceed to consider the validity of the Petitioner's contention of frustrating his legitimate expectation, it is helpful if the underlying principles of that doctrine are stated here.

In the Privy Council Judgment of ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** [2016] UKPC 17, made a

pronouncement of the broader principle, as Lord *Neuberger* stated thus; *"[I]n the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the Courts."*

Identifying some of the salient points in relation to legitimate expectation, his Lordship states (at paras 37 and 38);

> *"First, in order to found a claim based on the principle, it is clear that the statement in question must be 'clear, unambiguous and devoid of relevant qualification';*
>
> *Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty;*
>
> *Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement."*

With this introduction, it is relevant at this stage to identify the category of cases under which the Petitioner's case could be considered. The Petitioner expected the 9th Respondent to grant a licence to occupy State land in the form of an Annual Permit. In the case of ***McInnes v Onslow Fane*** [1978] 3 All ER 211, Vice Chancellor *Megarry* dealt with three situations that arise in the consideration of licencing cases which

he termed as application cases, forfeiture cases and expectation cases. He said (at page 218) "*First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing rights or position, as when a member of an organization is expelled, or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organization or a licence to do certain acts. Third, there is an intermediate category which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence holder applies for renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority*." His Lordship then added that "*[T]he intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable.*"

If this classification is adopted in respect of the matter before this Court and if the Petitioner could satisfy that he entertained an expectation which could be accepted by this Court as a legitimate one, then his claim could be considered as one coming under the "*intermediate category*" as the question that arises in the instant application could also be termed as a one involving "*… what it is that has happened to make the applicant unsuitable for the … licence for which he was previously thought suitable*". In the instant matter, however, the

Petitioner does not complain of a situation where he had not been given the promised opportunity to be heard before the 9th Respondent, prior to making a decision adverse to him, and thereby going against an earlier undertaking given to him that it would. If that was the case, then the alleged frustration of the Petitioner's expectation could be termed as frustration of procedural legitimate expectation. What is complained by the Petitioner in the instant application is, after an assurance that he would be issued with a permit, the 9th Respondent desisted itself from issuing one, and therefore that action had frustrated his substantial legitimate expectation to a permit over lot No. 283.

In order to identify the underlying principles of law that were laid down in the judicial precedents both here and abroad over the years in relation to the doctrine of substantial legitimate expectation, I could conveniently rely on the *Judgment* of ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** - SCFR Application No. 444/2012 – decided on 30.07.2019. *Prasanna Jayawardena J* had undertaken an exhaustive survey of the subject applicable principles of law as contained in the collective judicial wisdom contained in the multiple pronouncements made by the English, Indian and Sri Lankan Courts on the doctrine of legitimate expectation. His Lordship thereafter crystallised the several principles enunciated by them in the said judgment.

The Petitioner too had relied on this Judgment in support of his contention that he did establish before this Court that the 9th Respondent gave him a specific, unambiguous and unqualified assurance that he had been selected to receive an Annual Permit in respect of lot No. 283 by issuance of P13, an undertaking which the said

Authority had now recanted its undertaking by cancellation of the said selection and issuing a permit to the 7th Respondent.

In such a situation, *Prasanna Jayawardena J* stated that a Court may, " … *where it determines that the nature of the expectation, and the prejudice caused to that individual or group of persons by the public authority negating it, outweighs the public interest to such an extent that the negation of the substantive legitimate expectation would be unfair or unjust or disproportionate and constitute an abuse of power by the public authority; exercise its power of judicial review and hold that the substantive expectation is a legitimate one which the public authority is bound to fulfil*." His Lordship also stated that " … *the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England*".

When determining the nature of the expectation, this Court would consider what *Bingham* LJ said in ***R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd*** [1990] 1 WLR 1545 and also referred to in ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** (supra). His Lordship stated that "*a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification*'. In ***Perera v National Police Commission and 24 Others*** *2007 [B.L.R.]14,* this Court re-iterated a pronouncement it had made in ***Anushika Jayatileke and Others v University Grants Commission*** (SC Application No. 280/2001 – decided on 25.10.2004), to the effect that " *legitimate expectation derives from an undertaking given by someone in authority and such undertaking may not even be expressed and would have known from the surrounding circumstances.*"

If the Petitioner is successful in establishing the legitimacy of his expectation, then his case could be termed as a one belongs to the "*intermediate category*", per ***McInnes v Onslow Fane*** (supra), in which it was held that "*the applicant has some legitimate expectation from what has already happened that his application will be granted*." In the circumstances, it is also relevant to consider as to the nature of the burden imposed on a petitioner, who claims that the public body had frustrated his legitimate expectation based on a promise it had made earlier on. This was set out in the Privy Council Judgment of ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** [2010] UKPC 32. Sir *Dyson* SPJ states (at para.37) that;

> "*The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation.*"

The question of legitimacy of the expectation was re-iterated in the case ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213 by Lord *Woolf MR*, by stating (at para 57) thus:

> " *… once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements*

of fairness against any overriding interest relied upon for the change of policy. "

The question of legitimacy of the expectation, as stated by the Privy Council in ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** (supra) received further clarification in *De Smith's Judicial Review,* 8th Ed, p. 686, where it is stated " *to qualify as 'legitimate'…*" such a claim must possess certain qualities and, in this context, learned authors listed out ten of them, based on judicial pronouncements, which insisted satisfaction of them by an applicant who seeks judicial review. A similar view was expressed in the text of the book, *Administrative Law – Wade and Forsythe* 10th Ed, p. 449, where it is stated "*it is not enough that an expectation should exist; it must in addition be legitimate*." The Judgment of ***Samaraweera v Peoples Bank and Others*** (2007) 2 Sri L.R. 362, where *Fernando* J stated (at p. 368) that the "*… onus of proving that the petitioner has an outstanding record of performance or that the available staff cannot perform the specific duties is on the petitioner. There is no material before this Court that the petitioner qualified for an extension under the criteria. Hence it is my conclusion that the petitioner has failed to establish that he had a legitimate expectation of being extended in service in terms of the circular*". This pronouncement reflects the application of the said consideration as his Lordship questions the legitimacy of the expectation entertained by the petitioner, in dismissing the application.

In a more recent pronouncement, ***Nimalsiri v Colonel Fernando and Others*** (SCFR 256/2010 – decided on 17.09.2015), *Priyantha Jayawardena* J stated that "*… the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation …"* also indicating the importance of the legitimacy of the expectation. A similar

approach could be found in ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** (supra) as it is stated that " … *the first issue before us is to decide whether the petitioners have succeeded in establishing that they have a 'legitimate expectation' of being absorbed into the Sri Lanka Police Force* ...". The Court of Appeal Judgment in ***Albert and Others v Chief Secretary – Southern Province*** (CA (Writ) Application Nos. 401- 407, and 411 to 413/2015, - decided on 11.10.2016) Surasena J decided "*… all what the Petitioners have established before this Court is that they have had an illegitimate expectation and not a legitimate expectation*." Thus, the legitimacy of the expectation had consistently been insisted upon by the Courts as a necessary precondition before it examines the validity of the reasons adduced by the Respondents in determining whether there was abuse of power, in frustrating such an expectation.

The Petitioner's claim of a legitimate expectation based on the letter P13, was controverted by the Respondents collectively. They have relied on factual considerations that impinge on the legitimacy of the expectation claimed to have entertained by the Petitioner. When the parties made claims based on factually contradictory positions, the following pronouncement made by *Marsoof* J, in ***Ravindra v Pathirana and 11 Others*** *2008 [B.L.R.] 177*(at p. 180), becomes relevant;

> "*[P]proceedings initiated under Article 126* of *the Constitution have to be decided on the basis of evidence led by way of affidavit and the relevant provisions do not provide for the varicosity of the statement made in the affidavits been tested through cross examinations. In the circumstances, when conflicting positions are taken up, the Courts are called upon to make determination of fact based*

mainly on inferences that can be drawn from affidavits. Sometimes this could be a very difficult exercise."

It is already noted that the Petitioner's claim of legitimate expectation of an Annual Permit in respect of lot No. 283, issued by the 9th Respondent, is primarily founded upon the contents of letter P13, by which his selection to receive such a permit for the said commercial property was communicated to him. The said letter is dated 26.10.2007 and titled as "Regularisation of Unlawful Possession – 2005". It conveyed to the Petitioner that his selection for that particular lot was made after an inquiry and the Petitioner was required to make an initial deposit of Rs.48,000.00 before a stipulated date and he must also to pay lease rental for the year 2007. Since the Petitioner placed heavy reliance on the contents of P13, in support of his claim of legitimate expectation, it is helpful, if the contents of P13 are reproduced below in its entirety.

"අවසන් දැන්වීම

මගේ අංකය:- බීඑම්/එස්/එල්/බදු
ශ්‍රී ලංකා මහවැලි අධිකාරිය,
කොට්ටාශ කළමණාකාර කාර්යාලය,
නොච්චියාගම
දිනය **2007.10.26**

M.T.M. රියාද්

2005 අනවසර නියමානුකූල කිරීම - වාණිජ ඉඩම්

ඉහත කරුණ සඳහා පැවැත් වූ පරීක්ෂණයෙන් ඔබ අනවසරයෙන් භුක්ති විඳින වාණිජ ඉඩම් අංක 283 සඳහා ඔබට තේරීමක් ලබා දී ඇත.

ඒ අනුව අදාළ මුලිකය සහ 2007 වසරේ බදු මුදල් ගෙවා වාර්ෂික අවසර පත්‍රයක් ලබා ගැනීමට ඒකක කළමණාකාර මගින් දැනුම් දී ඇතත් එය ඉටුකර ගෙන නොමැත.

ඒ නිසා ඔබ විසින් ගෙවිය යුතු මූලිකය වන රු. 48.000/- මුදල ද, 2007 වසර සඳහා වන බදු මුදල වන රු. 7200/- ද, ගෙවා 2007 නොවැම්බර් 25 වන දිනට ප්‍රථම වාර්ෂික අවසර පත්‍රය ලබාගැනීමට මෙයින් දන්වමි.

එසේ කිරීමට ඔබ අපොහොසත් වන්නේ නම් ඔබගේ තේරීම අවලංගු කිරීමට කටයුතු කරන බවද, තේරීම අවලංගු කලහොත් ඔබට මෙම ඉඩම් සම්බන්ධව නැවත

පරීක්ෂණයකට ඉදිරිපත් විය නොහැකි බවද දන්වන අතර තේරීම අවලංගුකල පසු ඉදිරි නීත්‍යානුකූල පියවර ගැනීමට සිදුවන බවද දන්වමි.

අත්සන
2007.10.30
(පී.එම්.එම්. බී. අභයරත්න)
කොට්ඨාශ කළමණාකාර,
නොච්චියාගම"

If at all, the only reference to an 'undertaking' that could be found in the contents of P13, is in the sentence where it conveys that, after an inquiry, the Petitioner had been "selected" for lot No. 283, which he occupies without any permission granted by the 9th Respondent. Remaining part of P13 warns the Petitioner of his continued failure to comply with the directions that had been issued up to that point of time and, it further alerts him to the consequences which would follow, if he fails to fulfil them any longer. The letter P13 is specific on the condition that if he fails to fulfil what was required of the Petitioner before the stipulated deadline the 9th Respondent had set up, his selection to receive a permit for lot No. 283 would be cancelled. In the circumstances, can it be said that the P13 is "*a promise which is 'clear, unambiguous and devoid of relevant qualification"*? With due respect to learned President's Counsel, who submitted that it is so, I must confess that I am not convinced of the acceptability of that submission as a correct representation of the contents of P13 for I do not think that the contents themselves do not qualify P13 to be treated as a letter conveying a promise or an undertaking, which is clear, unambiguous and devoid of relevant qualification. Even if, for the sake of argument, it is accepted that P13 as a clear and unambiguous promise for issuance of an Annual Permit, could it be then considered also as a promise which is devoid of any "*relevant qualification*"? I am not convinced that the answer is in the affirmative. The very act of setting up a deadline for

the Petitioner to comply with, by the 9th Respondent had set out as mentioned in P13, itself disqualifies the said letter being treated as "*a promise which is 'clear, unambiguous and devoid of relevant qualification*". Particularly, the condition of regular payment of annual lease rentals, is a qualification that the Petitioner must satisfy each successive year, making him entitled to possess the parcel of State land for that particular year. That particular condition would continue to be in force, even if he is issued with a permit.

On the other hand, if the Petitioner was to entertain even an expectation on P13, he must first fulfil all the required criterion set out therein by the 9th Respondent in P13. The Petitioner did not make the deposit and the lease rental for the year 2007 before the said deadline of 25th November 2007. The Judgment of ***Galappaththy v Secretary to the Treasury*** (1996) 2 Sri L.R. 109, refers to an instance where the petitioner sought to challenge a decision by the treasury to impose import taxes upon importation of a motor vehicle. The petitioner had a permit to import a motor vehicle under concessionary tax scheme. *Ranaraja* J, rejected the contention that petitioner's legitimate expectations were summarily disappointed, on the basis that he " … *cannot therefore claim that he had a legitimate expectation to a benefit under Circular P1 when he himself had breached its conditions.*"

The Petitioner also relied on the letter P19, as an instance of re-confirmation of the undertaking made by the 9th Respondent by issuance of P13. In fairness to the Petitioner, although he merely relied on P19 only as a re-affirmation of the 'undertaking' already made in P13, that document of course did contain a statement which could be construed as resembling of a 'promise or an undertaking' as

it stated " මේ අනුව නොවිවියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි". It also contained that the 9th Respondent had accepted annual lease rental from the Petitioner from the year 1999. This action might lend support to the Petitioner's claim to the limited extent that, at least, he entertained an expectation that he would eventually be granted a permit and had acted in that expectation.

In the circumstances, it is apparent that the Petitioner's expectation on the so-called undertaking contained in P13, in itself does not qualify to be treated as a legitimate one and therefore does not make qualify as an expectation that should be protected by Court. However, since the Petitioner also relied on P19, as a document by which the 3rd Respondent had re-confirmed the alleged 'undertaking' it had made in P13, I would take this statement on its face value for the moment, with the intention of dealing with the contents of P19 in more detail during the latter part of this Judgment, and proceed to consider the Petitioner's application whether, in the totality of circumstances referred to above, he could have entertained an expectation that could be accepted as a legitimate one.

The disputed commercial property, being a parcel of State land, must be alienated by the State following lawful procedure as set out in Chapter III of the Land Development Ordinance. Section 20 of the Ordinance states that the selection of persons to whom State lands could be alienated under the Ordinance, shall be made at a Land *Kachcheri*, subject to subsections (a) and (b), while section 21(2) makes it

obligatory on the part of the Government official to call for applications for the lands proposed to be alienated at that Land *Kachcheri*.

In this instance, however, the selection of the Petitioner was made, not as a result of a selection made after an inquiry upon an application presented to a Land *Kachcheri* by him, but apparently only on the basis of him being in *de facto* occupation of lot No. 283, when the officers of the 9th Respondent Agency conducted an investigative survey of the commercial properties under its purview in *Nochchiyagama* town in January 2005. During that survey, the Petitioner had claimed total responsibility for the development of the said parcel of State land by operating his business activity in the building he himself had construct on it.

Consequent to the findings of the said survey, the 7th Respondent was notified by the 9th Respondent to attend an inquiry on 22.02.2005, by pasting a notice on the said premises in terms of the law, as it was *prima facie* evident that the 7th Respondent had alienated the State land that had leased out to him to the Petitioner, and thereby violated its conditions. The 7th Respondent did not turn up for the inquiry and, in the circumstances, the 3rd Respondent recommended to the 1st Respondent that the selection of the 7th Respondent in respect of lot No. 283 be set aside, and the permit issued to him is cancelled. The permit 1R1 was cancelled by the 9th Respondent and on 15.12.2008, the 7th Respondent was informed of the said cancellation by 1R6.

The 7th Respondent was prompt in his reply by which he protested against the said cancellation of his permit, accusing the 9th Respondent of making a decision over a matter before the Court of Appeal, pending for its determination. Having referred to the letter

7R11, by which he was informed that until the pending litigation is over no further action could be taken in respect of lot No. 283, the 7th Respondent accuses the 3rd Respondent, in 1R7, that the latter had maliciously and in collusion with the Petitioner made the said cancellation and therefore he would institute contempt of Court proceedings against him for making an administrative decision disregarding the fact that the matter already under litigation. This seems to be the first instance where the 9th Respondent became aware that the other party to the litigation, instituted by the 7th Respondent, was none other than the Petitioner himself.

Thus, it is evident from the above considerations that the starting point of the administrative process, which culminated with selecting the Petitioner to be issued with an Annual Permit in respect of the State land he illegally occupied and the issuance of P13 in confirmation of the said selection, commenced with the said investigative survey conducted in January 2005 by the officers of the 9th Respondent. The report 1R2 also contained a statement of fact that, in addition to reporting his illegal occupation of the said lot, it was the Petitioner who constructed the building on that land and runs a grocery store. The officers, who were not privy to the activities conducted on that parcel of State land at any time prior to their inspection, had accepted and relied on that claim. It is natural for the Petitioner to make such a claim, since he needed to impress upon the officers, of same as a qualifying factor, if they were to make a selection for issuance of a permit. It is not clear whether the Petitioner, at that particular point of time had relied on the 'agreement' P2 as well, in order to further impress the officers on the fact that the 7th Respondent had transferred all his rights to him. He may well have

done so, as an attempt to explain away the basis of him coming into illegal occupation of lot No. 283.

When the officers visited lot No. 283, the Petitioner was in possession of the same but had no permit over that lot. The Petitioner was therefore found to be the *de facto* illegal occupier of lot No. 283, instead of the 7th Respondent, who should be in its possession, being the lawful lessee, in whose favour an Annual Permit had been issued. It was therefore evident to the officers that the 7th Respondent was in clear violation of the conditions stipulated in the permit P7A/7R5, particularly with the express prohibition regarding the alienation of the State land referred to in that permit in any form. In the absence of any material to indicate any contrary position (as the 7th Respondent did not participate at the ensuing inquiry), the 3rd Respondent had rightly made his recommendation to set aside the selection of the 7th Respondent and to cancel his permit P7A/7R5.

Similarly, the selection of the Petitioner to the said lot No. 283 made by the 9th Respondent Authority too could be understood in the circumstances. Since the purpose of the investigative survey was to regularise the illegal occupancy of its commercial properties in *Nochchiyagama* town and at the time of the said inspection, it was found out it was the Petitioner, who was in occupation of lot No. 283, but without a permit. The Petitioner also claimed that he had put up a building in which he conducted his business activities. The officers were satisfied that the Petitioner was responsible for the development work carried out on the land. It must be noted here that, at that point of time, the officers of the 9th Respondent Authority were only concerned with regularising illegal occupation of State land and the selection of the Petitioner for issuance of a permit was made purely on that basis.

While the administrative process that commenced with the investigative survey carried out in 2005 to regularise the illegal occupation of State land continued at one end, it was revealed from the pleadings that the 7th Respondent had instituted an action over ten years before the said survey, in the District Court of *Anuradhapura* (case No. 15034/L), seeking eviction of the Petitioner from lot No. 283. The 7th Respondent had obtained a judgment in his favour on 08.02.1995, after an *ex parte* trial. The Writ of Execution was issued by the District Court on 28.11.1995. When the Fiscal sought to evict the Petitioner on 30.11.1995, that attempt was thwarted by Petitioner's acquaintances, who gathered in large numbers and thereafter occupied the premises under the said writ. The Petitioner then moved the District Court to vacate the said *ex parte* decree and the Writ of Possession. On 11.10.1996, the District Court refused the Petitioner's application after arriving at a finding that the summons of action and the *ex parte* decree, in fact were served on the Petitioner. The Court had thereby effectively rejected his claim of not serving either the summons or the decree personally to him and his plea of total ignorance of the litigation against him. The Petitioner, however, asserts to this Court that he became aware of the said action only when the fiscal made an attempt to evict him.

The Petitioner moved in revision of the said order before the Court of Appeal in C.A.R.A No. 712/1996. At the inquiry before that Court, the parties consented to set aside the impugned order and to re-inquire into the said claim of the Petitioner, before the original Court, by calling the Fiscal, who served processes of Court. At the conclusion of the re-inquiry, which was held consequent to the order of the Court of Appeal, the original Court, with its order dated 05.11.1998, once again held that the summons of action and the *ex parte* decree were in

fact served on the Petitioner. This time the Petitioner preferred an appeal against the said order before the Court of Appeal in CA 1175/98(F) and was pending its hearing in January 2005. This was the status of the process of litigation between the Petitioner and the 7th Respondent, when the officers of the 9th Respondent authority conducted the investigative survey in 2005 and decided to issue a permit to the Petitioner, based on the findings of that survey.

This being the factual situation, it is necessary to consider the legal status of the Petitioner at the point of conducting the said investigative survey. His two-fold legal status at the time of the said investigative survey could be described in the following manner. Firstly, as already noted, he was the *de facto* illegal occupier of lot No. 283, as found out by the officers of the 9th Respondent. This was the primary criterion adopted by the 9th Respondent to select him for issuance of a permit, along with the fact of claiming credit for its development. Secondly, the Petitioner was also a Judgment Debtor of the 7th Respondent, who, by then had a valid Judgment and a decree against him, issued by a competent Court, declaring the latter's entitlement to evict the former. With the said Judgment and decree, the Petitioner's status had transformed from a lessee to an illegal occupier of a land, to which the 7th Respondent had a valid permit. Similarly, as far as the 9th Respondent is concerned too, the Petitioner was an illegal occupier of a State land, who occupied same without a valid authority.

It is thus clear that, in January 2005, the Petitioner was very much aware as to his status both factually and legally, *vis a vis* lot No. 283 and the 7th Respondent (although the former was yet to withdraw the appeal preferred against the finding of the original Court against him). Whether the Petitioner had disclosed this important aspect of his

possession of lot No. 283 to the officers of the 9th Respondent authority in 2005 is not borne out either by his petition or by any of the documents tendered along with it. The 1st Respondent does not claim that his officers were informed of the litigation history that exists between the Petitioner and the 7th Respondent and of the status of the Petitioner, being a Judgment debtor, when they conducted the investigative survey. However, it is evident from the conduct of the officers, who made the recommendation to select the Petitioner to be issued with a permit, that they were not aware of the pending litigation over the possession of lot No. 283 that had been pending against the Petitioner nor of his status as a Judgment Debtor.

Then a question arises as to how does the failure of the Petitioner to inform of the pending litigation to the officers of the 9th Respondent becomes a relevant factor in the selection made in favour of him, as a prospective recipient of an Annual Permit in respect of lot No. 283?

Consideration of this question requires a brief reference, at the very outset of this segment of the Judgment, as to the circumstances under which the 7th Respondent came to possess lot No. 283. The 7th Respondent claims that in 1982 on a mere verbal authorisation of the officers he occupied lot No. 283 and made annual lease rentals. Despite the fact that the 7th Respondent came to possess the said lot in the year 1982, only in 1992 he was issued with an Annual Permit by the 9th Respondent Authority in respect of the said lot. The 7th Respondent had paid annual lease rentals up to 1994, until the 9th Respondent authority declined to accept any payments from him on account of the litigation he commenced in May 1994. On 06.02.1996, the 7th Respondent was informed by the Deputy Manager (Land) of the 9th Respondent authority, in replying to a complaint made by the former over this issue

to the Minister of Land, that until the conclusion of the pending action, no further action on the land could be taken (7R11). The letter further directed the 3rd Respondent to report back to the Authority, once the Court case is over. This is a clear indication that the 9th Respondent Authority was of the considered view that it should not make any decisions in respect of lot No. 283, when it had already become subject matter of a litigation, initiated by the 7th Respondent.

The process of litigation referred to in 7R11, ended only on 15.01.2013, when the Petitioner decided to withdraw his appeal that was pending before the Court of Appeal in CA 1175/98(F), making the *ex parte* Judgement and decree of case No. 15034/L issued against him final and binding. However, contrary to the position indicated to the 7th Respondent by 7R11, the 9th Respondent authority did make decisions in respect of the subject matter of the litigation that was pending before the Court of Appeal. The 9th Respondent made the decision to select the Petitioner to be issued with an Annual Permit over the identical subject matter in January 2005, as conveyed to him by P13 in 2007. Clearly, when viewed against the said backdrop of circumstances, the 9th Respondent had applied two different standards when dealing with the Petitioner and the 7th Respondent. However, this complaint could validly be made only if it was made known to the 9th Respondent that the other party to the litigation referred to in 7R11, was the Petitioner himself. The 9th Respondent or any of its officers were not made parties to that action and therefore had no formal notice of the same or as to the parties in that litigation. Clearly, there was no material available, which would suggest even inferentially that the 9th Respondent was aware that the other contesting party to the said litigation instituted by the 7th Respondent was the Petitioner himself.

This was primarily due to the fact that the Petitioner either failed to disclose that fact to the officers who conducted the investigative survey or had willfully suppressed that fact, for the fear that it might result in an adverse ruling. Either way, it is evident that the Petitioner did not make a full disclosure of the relevant material to the officers who visited *Akurana Traders* in 2005, conducting an investigative survey with a view to regularise the illegal possession of its commercial plots, despite his expectation of a favourable ruling as to his possession of lot No. 283.

Moving on to the latter part of the question referred to in the preceding paragraph as to how that suppression had affected the decision-making process of the officers of the 9th Respondent Authority could be answered in the following manner.

It is clear from the recommendation made by the 3rd Respondent to the 1st Respondent (1R16) that the suppression of the fact of a pending litigation by the Petitioner to the officers who conducted the investigative survey had eventually resulted in a situation of having made an administrative decision by the 9th Respondent, which in effect contradicts a pronouncement that had already been made by a competent Court, as to the party who is entitled to possess lot No. 283. In the letter 1R16, the 3rd Respondent, after stating that the 7th Respondent had instituted action before the District Court against the Petitioner, recognises the fact that the 7th Respondent had thereby sought to resolve an issue that had arisen due to an informal alienation he himself had made over lot No. 283. The 3rd Respondent then appraises the 1st Respondent of the resultant effect of the decisions thus far made by stating;

" එනමුත් මෙම අධිකරණ තීන්දුව ලබදී තිබියදී ඩී. එම්. සෝමපාල යන අය නමින් ලබාදී තිබූ අවසරපත්‍රය අවලංගු කිරීම සඳහා අංක : ආර්.පී.එම්/ වි/ එල්/ සී 20 / 14/ 45 හා 2005.09/29 දිනැතිව කරන ලද නිර්දේශයන්ට අනුව අවසරපත්‍රය සහ තේරීම් පසෙක තැබීම අධ්‍යක්ෂ ජනරාල් විසින් අංක : එල්/ 04/ එච්/ ර.ඉ.පොදු 21 හා 2008.06.17 දිනැතිව අනුමත කර ඇත."

This is a clear indication as to the effect that the suppression of the Petitioner of the pending litigation from the officers of the 9th Respondent had resulted in the decision making process, which the 1st Respondent noted by stating that the cancellation of the selection of the 7th Respondent was made after the Judgment of Court was pronounced. Similarly, the 3rd Respondent describes in his observations to the Human Rights Commission (1R14), that the said cancellation had led to a tangled situation ("ගැටලු සහගත තත්වය") and indicated that he sought legal advice to resolve the said issue. Both these statements are allusive remarks made by the officers to denote the position that the 3rd Respondent would not have recommended the selection of the Petitioner to lot No. 283 by 1R3 to the 1st Respondent, if he was fully appraised of the fact that the 7th Respondent, who at that point of time, had already obtained an order of Court in his favour, which made him entitled to evict the Petitioner from lot No. 283. This apprehension could be understood as a realisation of the fact that the 9th Respondent had not considered or failed to consider the actual status of the Petitioner and his possession, when its officers made the selection. Indeed, the two-fold legal status of the Petitioner *vis a vis* the lot No. 283, was a very relevant considerations on which the selection of the Petitioner was very much dependent upon, as the subsequent events unfolded. When making the selection of the Petitioner to receive a permit, the 9th Respondent had admittedly considered only one aspect of the former's legal status, whereas it should have considered both.

In the context of the legal status, learned President's Counsel submitted that the eviction of the Petitioner was wrong, as at the point of the said eviction, the 7th Respondent had no valid permit in his favour to conform any right or interest over lot No. 283. It could well be that this also is a factor among several others, that had troubled the 3rd Respondent, when he referred to a "ගැටලු සහගත තත්වය" in 1R14, as an abridged reference to the knotty issue.

Under the given set of the circumstances, as revealed in the instant matter, and in view of the complex interplay of the different legal principles that ought to have been given due recognition in the decision-making process of the 9th Respondent, it is necessary that I make at least a passing reference to them before proceeding any further in this Judgment. It is not necessary to consider them in depth, in the absence of any submissions of any party regarding same.

One of the grounds on which the 9th Respondent decided to cancel the selection of the 7th Respondent to lot No. 283, was that he had illegally "alienated" the said lot. The 7th Respondent came to possess the said lot in 1984 allegedly on a verbal assurance given by the 9th Respondent, in lieu of a land he had surrendered to the State for a road widening project. The 7th Respondent then allowed the Petitioner and two others to occupy lot No. 283 in December 1987. The Annual Permit 7R5 was issued to the 7th Respondent only on 08.09.1992, which contained a condition that lot No. 283 should not be alienated in any form. This condition binds the 7th Respondent from the date of the permit. When the 7th Respondent allowed the Petitioner to occupy lot No. 283, there was no condition binding on him that it should not be alienated. In ***Lebbe v Samoon*** (1968) 71 NLR 452, Alles J held (at p. 455) thus, "*If the permit had been issued to the defendant containing the conditions*

referred to in P1 it would have been open to the authorities to cancel the permit in view of the defendant non residence, but having failed to issue a permit, I do not think it is open to them to evict the defendant on that ground."

The Petitioner asserted to this Court that the 7th Respondent had "*transferred his rights in the subject matter in dispute*", namely his rights over lot No. 283, upon an agreement marked as P2. This was the consistent position of the Petitioner since the commencement of the dispute which he maintained in almost all of his correspondence that were annexed to his petition. The said agreement P2, that had been entered between the 7th Respondent and the Petitioner and his two associates in 1987, contains a clause which states that "…*do hereby surrender possession of the said part or portion of the building constructed by me and the right of possession of the said land lot No. 283, together with all my rights, claim, and demand whatsoever, as lessee of the said lot No. 283, unto the said purchasers …*".

It is on the strength of this clause only the Petitioner consistently claimed that the 7th Respondent had "*transferred his rights in the subject matter in dispute*" to him. It is not clear whether the Petitioner did in fact relied on P2, when the officers of the 9th Respondent conducted their investigative survey in 2005, but it could be reasonably deduced that he would have done so, as an attempt to explain away the basis on which he came into possess lot No. 283. If the cancellation of selection of the 7th Respondent was made by placing reliance on the clause from the said agreement P2, that had been reproduced above, that decision cannot be validated, in view of the provisions of Section 2 of the Prevention of Frauds Ordinance. Section 2 of that Ordinance declares no such agreement shall "*be in force or avail in law*" unless the statutory provisions contained in subsections 2(a) and 2(b) are complied with.

Clearly, the agreement P2, being an instrument affects an interest, or an incumbrance affecting land, was not notarially executed and therefore did not conform to the provisions of Section 2.

However, when the permit was eventually issued to the 7th Respondent, he had already handed over possession of lot No. 283 to the Petitioner, after having the land 'leased' out to the latter for a period of seven years, as pleaded in his plaint to the District Court of *Anuradhapura.* The permit 7R5 specifically prohibited the 7th Respondent from alienation of lot No. 283 in any form including by subletting and, by his own admission in the said plaint, that factor alone would have made his permit liable to be cancelled, if that position was discovered by the 9th Respondent in 2005.

In instituting action against the Petitioner in case No. 15034/L before the District Court of *Anuradhapura*, the 7th Respondent sought *inter alia* a declaration from Court that he is the lawful permit holder to the lot No.283 and eviction of the Petitioner therefrom. At the time of institution of the said action, the 7th Respondent had a valid permit issued by the 9th Respondent, which remained valid up until the Judgment was pronounced. The legal status of a permit holder was considered by *Gratian* J in ***Palisena v Perera*** (1954) 56 NLR 407, where his Lordship held (at p. 408) that;

> *" This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.*
>
> *It is very clear from the language of the Ordinance and of the particular permit P1 issued to the plaintiff that a*

> *permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser has prevented him from even entering upon the land does not afford a defence to the action; it serves only to increase the necessity for early judicial intervention."*

The description used by *Gratian* J to describe the nature of title of a permit holder, to the land in respect of which it was issued, was that such a person has "*… a sufficient title which he can vindicate against a trespasser in civil proceedings*." Thus, when the District Court entered Judgment in favour of the 7th Respondent in case No. 15034/L, the Court only found that he had "*a sufficient title which he can vindicate against a trespasser in civil proceedings*" and therefore was entitled to evict the Petitioner, who by then became a trespasser. It must also be noted that when the District Court pronounced its judgment in that matter, the 7th Respondent in fact was in possession of a valid permit. If the Petitioner did challenge the validity of the permit of the 7th Respondent, on the basis of P2, after presenting himself before the District Court, the result would have been different.

The ownership of lot No. 283, remained in the State and it was only alienated to the 7th Respondent on an Annual Permit subject to the conditions stipulated therein, and such alienation enabled the latter to be in possession of the same and to take its produce. Thus, the Court, in holding in favour of the 7th Respondent, merely asserted his entitlement only to the extent described in ***Palisena v Perera*** (supra). Therefore, the Judgment of the said action does not confer to the 7th Respondent any

other concomitant attributes of ownership in relation to lot No. 283, other than the ones specifically granted by the said permit.

It is correct to state that by the time the Petitioner was evicted, the permit issued to the 7th Respondent (1R1) was cancelled and therefore his right to be in possession of lot No. 283, granted by the 9th Respondent by way of a permit had extinguished. But the said eviction was made on the strength of Judgment entered in favour of the 7th Respondent, as per his rights on the date of the action. The significant time gap that had elapsed between the Judgment and its execution was a result of the time taken to conclude the appellate proceedings initiated by the Petitioner. The fact that the said Judgment was delivered after a trial held *ex parte*, a fact emphasised by the Petitioner, does not relegate same into a pronouncement of a lessor validity that could be disregarded by the Petitioner. The finding of Court that the summons of action as well as the *ex parte* decree was in fact served on him confirms of his willful refusal to participate in the action against him. The fact that the trial proceeded *ex parte* was due to the actions of the Petitioner and therefore he must accept the consequences it entails.

The Petitioner too had no permit issued to him in respect of lot No. 283, and therefore had no "*sufficient title which he can vindicate against*" the 7th Respondent to regain his lost possession. The 9th Respondent, not being a party to the litigation between the 7th Respondent and the Petitioner, obviously was not bound by the said Judgment. After the 7th Respondent was placed in possession by the Court after evicting the Petitioner, the 9th Respondent could have considered the option of recovery of possession of lot No. 283, from the 7th Respondent, who now was placed in possession of a State land by an order of Court, but occupying same without a valid permit. By then, the

Petitioner's status too had changed with the issuance of P13 by the 9th Respondent, who granted permission to occupy lot No. 283, despite an already made pronouncement by a Court of law that he is a trespasser. The 9th Respondent, made the said decision without being privy to the nature of the litigation that exists between the 7th Respondent and the Petitioner,

It appears that, the 9th Respondent was reluctant to initiate any legal action against the 7th Respondent, at that particular point of time, in order to recover possession of lot No. 283. This could be perhaps due to the realisation that it had adopted a course of action, contrary to the position, indicated to the 7th Respondent in 7R11, by selecting the Petitioner to receive an Annual Permit and accepting lease rentals from him, despite the pending litigation. Letter 7R11, conveyed to the 7th Respondent that until the pending action is decided, 9th Respondent would not take any further action for renewal of his permit. When the 9th Respondent cancelled selection of the 7th Respondent to lot No. 283, on the basis of illegal alienation, the latter had already instituted action in 1994 to regain possession against his lessee and when it made the selection of the Petitioner in 2005, there was a Judgment of Court, ordering the Petitioner's eviction.

Earlier on in this judgment, it was already noted that the Petitioner's legal status at the time of his selection could be described as twofold. In relation to the 9th Respondent, he was a *de facto* illegal occupier of lot No. 283, while also being a Judgment Debtor in relation to the 7th Respondent and was subjected to a writ of execution, validly issued by the District Court in respect of lot No. 283. When the investigative survey was carried out in January 2005, and the officers of the 9th Respondent Authority found out that the Petitioner was in illegal

occupation of lot 283, it could also be contended that a permit holder of a lot, could institute action to regain his lost possession. This is a situation where any permit holder might find himself in. If that in fact the case is, it was unreasonable for the 9th Respondent to deny such a permit holder of his entitlement to the limited ownership of the land it had already granted under the permit, in favour of a trespasser.

This seems to be the one among many reasons, that the Petitioner's selection was set aside, after it was revealed that there had been a litigation and he was evicted from the lot he occupied, by an order of Court. In 1R15 the 3rd Respondent used the term that the 7th Respondent had taken action to "regularise" ("නිරවුල්") the informal alienation, by making reference to the act of eviction of the Petitioner after an order of Court. The relevant sentence from 1R15 is reproduced below;

> " ඩී.එම්. සෝමපාල මහතාට නීත්‍යානුකූලව බැහැර කරන ලද ඉඩම පසුකාලීනව ඔහු විසින් නිරවුල් කර ගැනීමට කටයුතු කරනු ලැබුවත් සියාද් නැමති අය මෙම ඉඩමේ භුක්තිය දරා සිටි හෙයින් ඔහු ඉඩමෙන් ඉවත් නොවූ බැවින් ඩී.එම්. සෝමපාල යන අය අනුරාධපුර දිසා අධිකරණයේ සියාද් යන අයට විරුද්ධව අංක 15034/එල් යටතේ නඩු පවරා ඇත. එම නඩු නියෝගය අනුව ඩී.එම්. සෝමපාල වෙත භුක්තිය භාර දී ඇත."

It seems that the decision to set aside the 7th Respondent's selection was made after it became evident that the 7th Respondent had leased it out and taken legal action to evict the overholding lessee. The 9th Respondent seems to have considered the institution of a case by the 7th Respondent as an action taken to rectify the situation created with his informal alienation. This is reflected from the statement " ඩී.එම්. සෝමපාල මහතාට නීත්‍යානුකූලව බැහැර කරන ලද ඉඩම පසුකාලීනව ඔහු විසින් නිරවුල් කර ගැනීමට කටයුතු කරනු ලැබුවත් ... "

Learned Senior State Counsel for the 1st to 6th and 8th to 9th Respondents however contended that the validity of the decision of the 9th Respondent to set aside the selection of the 7th Respondent for lot No. 283, was never challenged before a Court of law. I could agree with the learned Senior State Counsel on her submission on this point, but the actions of the 9th Respondent, when viewed in the proper context, clearly indicate, that the said Authority, without conceding to the 'error' it had made in setting aside the 7th Respondent's selection without considering his effort to secure possession, sought to correct the resultant problematic situation by reversing its decision to set aside the selection made in 2005, and thereafter to grant an Annual Permit afresh in favour of the 7th Respondent, under the powers vested in the 10th Respondent.

The "ගැටලුකාරී තත්වය" referred to by the 3rd Respondent, is an apt description of the situation the 9th Respondent Authority had encountered. This was primarily due to the fact that, when the investigative survey was carried out in January 2005, the Petitioner had not disclosed to the officers of the 9th Respondent that he is the defendant in the action instituted by the 7th Respondent, and there is an eviction order against him. The illegality of the Petitioner of occupying the parcel of State land does not confine to the interests of the 9th Respondent but also extends to the interests of the 7th Respondent as well. The 7th Respondent has had a valid permit, which conferred him certain rights over the parcel of land during its validity.

The 9th Respondent only considered the illegality of the occupation against its interests but failed to recognise the illegality of the said occupation against the interests of its own lessee, who by then had obtained a declaration as to the illegality of the occupation by the

Petitioner on that parcel of State land. It needs to be highlighted once more that this failure could directly be attributed to the non-disclosure or suppression of that very fact by the Petitioner to the officers who conducted the investigative survey on behalf of the 9th Respondent.

All these factors become relevant to the instant application because of their influence and contribution to the decision made by the 9th Respondent, in making the selection of the Petitioner to receive an Annual Permit in respect of lot No. 283 and setting aside the selection of the 7th Respondent. The recommendation made by the 1st Respondent to the Secretary to the *Mahaweli* Ministry (1R15) indicated that the 7th Respondent's selection to lot No. 283, was set aside due to making an informal alienation of that land, in violation of the conditions stipulated in the permit. It also indicated that since the 7th Respondent had subsequently been restored to the possession of the said lot upon a Judgment of Court by evicting the Petitioner, and since the appeal against said Judgment was dismissed, the latter's selection to the said lot was set aside. This was done, in order to re-issue a permit to the 7th Respondent, who had now been placed in possession of the said lot by an order of Court. This is also the position of the 9th Respondent had taken, when the 7th Respondent complained to the Human Rights Commission under references HRC/AP/656/15/2013(W), per 1R13 and also in relation to the complaint of the Petitioner to that Commission under reference HRC/AP/350/S (1R14). The Petitioner did not attach any documents to indicate the outcome of the inquiry conducted by the Human Rights Commission, over his complaint under the said reference.

Thus, the contents of 1R14 and 1R15 clearly indicate the underlying considerations taken into account by the 9th Respondent in

setting aside the selection made in 2005 in favour of the Petitioner. One such factor was the fact of restoration of the 7th Respondent back into possession of lot No. 283 by an order of Court. With making the said decision to set aside the selection of the Petitioner, the 9th Respondent made an attempt not to have an administrative decision which was in direct conflict with a judicial decision, which became binding both on the Petitioner as well as the 7th Respondent. Therefore, it is clear that the 9th Respondent's decision to set aside the Petitioner's selection to lot No. 283 was made upon the realisation that in the first place, it should not have made the selection of the Petitioner back in 2005, in view of the pending litigation between the two contesting parties in respect of the same parcel of land. In fairness to the 9th Respondent, it must be noted that although it was aware of a litigation instituted by the 7th Respondent, it would not have been known that the other party to that litigation is the Petitioner.

Interestingly, the 1st Respondent also conveyed to the Secretary of *Mahaweli* Ministry that an internal investigation would be initiated into the circumstances that led to the selection of the Petitioner in 2005. In fact, the Resident Project Manager issued a directive on Chief Internal Auditor calling for a complete report as to the inquiry conducted to regularise the illegal occupation of the Petitioner to the said lot (annex 4 to 1R15). This shows that the failure to consider the effect of the pending litigation over lot No. 283, had resulted in the subsequent setting aside of the Petitioner's selection to that particular lot.

Thus far in this Judgement, I have considered several aspects that had a direct bearing on the legitimacy of the expectation the Petitioner, which he claims to have entertained with the issuance of P13. These aspects include the contents of P13 and P19 and their effect, the

litigation history between the Petitioner and the 7th Respondent and, finally, its relevance and the effect on his selection to receive a permit. I have also considered in detail the two grounds on which he was selected to receive a permit, namely occupation and development of lot No. 283, and the legal status of the Petitioner in relation to the occupation of the land and its development.

In addition to the failure to disclose regarding pending litigation against him, the Petitioner had apparently suppressed yet another factor, which also had a bearing on his selection to receive an Annual Permit on lot No. 283. It was noted that the officers of the 9th Respondent made a remark in 1R2, that the Petitioner had "*constructed a permanent building and operates a business enterprise in it*." Obviously, this information must have been provided to the officers by the Petitioner himself. However, in his petition, the Petitioner does not make any averment on developmental activity he carried out on that parcel of State land. Of course, he states therein that he obtained the electricity supply to the grocery store. Why this particular factor becomes relevant in the present analysis is, it is evident from the letter informing the 7th Respondent of the cancellation of his permit (1R6), that one of the reasons the 9th Respondent decided to set aside the 7th Respondent's selection to receive a permit was his failure to develop the commercial lot allocated to him. When the 7th Respondent allowed the Petitioner to occupy lot No. 283 in December 1987, there was in fact a building standing on that lot and that had admittedly been constructed by the former. Contrary to the claim of the Petitioner that he did put up the building, the informal agreement P2 also indicate that he paid the 7th Respondent a sum of Rs. 225,000.00, as the value of the building that stood on that lot in 1987.

When dealing with the legitimacy of an expectation, *Wade*, having posed the question (supra, at p. 449) "*how is it to be determined whether a particular expectation is worthy of protection?*", proceeded to answer same by identifying several considerations a Court could take into account in that regard. Listing as the fifth consideration (at p.450), it is stated that "*... the individual seeking protection of the expectation must themselves deal fairly with the public authority*". Similar view is taken in *De Smith* (supra) as it is stated (at p.692) "*the representation must be preceded by full disclosure*."

Both these texts quoted the Judgment ***R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents ltd and Others*** [1990] 1 All ER 91, to illustrate the point. This was an instance where the Revenue authority had reportedly made known its view on taxation policy applicable to index-linked bonds, which it need not have done. When the Revenue authority decided to resile from its stated policy i.e. "*not to challenge as disguised interest the indexation uplift*" of such bonds, "*provided that the bonds paid a commercial rate of interest in addition to the indexation uplift*", the applicants sought to quash that decision seeking judicial review on the basis, that the Revenue authority had abused its powers by frustrating their legitimate expectation formed on the stated policy.

Bingham LJ held (p.110 *f*) "*If it is to be successfully said that as a result of such an approach the Revenue has agreed to forgo, as has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgement, be ordinarily necessary for the tax payer to show that certain conditions had been fulfilled*". In this context, his Lordships further stresses the point that, therefore, "*… it is necessary that the taxpayer should have put all his cards*

face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling …".

The requirement of an applicant, who expects a ruling of a public body, must "*put all his cards face upwards on the table*" in turn is based on a more fundamental principle, which *Bingham* LJ (p. 111 *a*) describes thus; "*The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen … Fairness requires that its exercise should be on the basis of full disclosure*".

Thus, it is clear that the Petitioner did not ""*put all his cards face upwards on the table*" when the officers of the 9th Respondent Authority conducted an investigative survey with a view to regularise illegal occupation of State lands in *Nochchiyagama* town in 2005, but expected a ruling from them in his favour that he was in occupation of the State land and he had developed the land. In respect of the development of the property as well, the Petitioner was selective in making available the required information. He apparently had claimed full credit to developing the lot by erecting a building on it and had his business of a grocery store house in it. In the process he had suppressed that it was the 7th Respondent who put up that building and he merely occupied it after securing electricity supply to that building.

This factor takes away the validity of any claim seeking to legitimise the expectation entertained by the Petitioner on P13, even if it is accepted as an undertaking that is '*clear, unambiguous and devoid of relevant qualification'*. He clearly suppressed his actual status as a Judgment Debtor, who was to be evicted by an order of Court. He also

shielded the development activity carried out by the 7th Respondent from the officers, who made an investigative survey.

Connected to P13, the document P19 too is a document relied upon by the Petitioner to substantiate his claim of the expectation he said to have entertained on P13, as it contains a re-confirmation of the 9th Respondent's earlier undertaking to issue an Annual Permit.

Perusal of the document P19 reveals that it had been issued in an official letterhead indicating that it had been issued by the Office of the Resident Project Manager – System H and is titled "අදාල අයගේ දැන ගැනීම සඳහා" and "නොවිවියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය සනාථ කිරීම". The letter P19 is dated 16.05.2013, and signed by one *P.W.C. Mohotti,* as the Project Manager. P19 indicates that it was copied to the Resident Project Manager, his deputy and the Block Manager. Having described the circumstances that led to the selection of the Petitioner to receive an Annual Permit for lot No. 283, the letter P19 then states "... මේ අනුව නොවිවියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි "

Judging by the persons to whom P19 was copied to, it appears to be an essentially an internal official communication. Surprisingly, it also has the title "අදාල අයගේ දැන ගැනීම සඳහා", depicting its purpose to inform the Petitioner's entitlement to lot No. 283 to the world at large. The Petitioner claims that he "received" the said letter P19, but it was neither addressed to him nor was it generated on his initiative and issued on request. The most striking feature in P19 is that it confers legal ownership of lot No. 283 to the Petitioner, whereas the 9th Respondent was yet to alienate the said lot, in favour of the Petitioner

by issuance of an Annual Permit. The relevant part of P19 reads thus " මේ අනුව නොච්චියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි ". This is when, the Judgment in case No. 15034/L had already made a determination that " උප ලේඛණගත ඉඩමේ නිසි අවසර පත්‍ර ලාභියා පැමිණිලිකරු බවට තීරණය කරමි. ඒ අනුව විත්තිකරු සහ ඔහුගේ සේවක නියෝජිතාදීන් ඉවත්කර පැමිණිලිකරුට සාමකාමී බුක්තිය ආපසු ලැබිය යුතු බවට තීරණය කරමි.".

Clearly, the function of making a decision to alienation of State lands is not conferred or delegated to the then Resident Manager, who decided to issue P19 under his signature. The act of inclusion of the above quoted statement in the said letter and thereby conceding to the 'legal ownership' to the disputed parcel of the State land in favour of the Petitioner, is clearly an act well beyond the powers and functions of its author and therefore had been issued without having proper legal authority to do so. The Resident Manager could only have issued a confirmation of the selection of the Petitioner in respect of lot No. 283 and the fact that he had paid his annual lease rentals up to the time of its issuance, as these factors could be well supported on the available material before him and therefore lies well within his powers and functions. But, for some reason, best known to that particular officer who issued P19, he had made such a declaration of the Petitioner's legal status in relation to lot No. 283, challenging the Judgment of a competent Court, which decided against the Petitioner's interests in respect of the same parcel of land. The relevant pronouncement made in the Judgment of the District Court is "උප ලේඛණගත ඉඩමේ නිසි අවසර පත්‍ර ලාභියා පැමිණිලිකරු බවට තීරණය කරමි." The Resident Manager declares that "අනුව නොච්චියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් ..." and confers right over and above the

said Judgment by making the said declaration. When the said declaration made by the then 3rd Respondent in P19 it was in direct conflict with the said determination of Court, which became final and binding on the Petitioner, after the withdrawal of his appeal. This act clearly amounts to a collateral attack on that Judgment.

It is not clear as to the circumstances that prompted *Mohotti* to issue P19 at that particular juncture, as the Petitioner was already appraised of a 'decision' made by the 9th Respondent in his favour. The Petitioner was so convinced of his entitlement to a permit, subsequent to that 'decision" and he had even withdrawn his own appeal, exposing himself to the risk of being evicted by Court. The 1st Respondent, in his Statement of Objections denies existence of letter P19 and no office copy of P19 was found, tendered to Court, or at least referred to in the same, leading to the reasonable inference that the said letter had been issued only to the Petitioner by the person who issued same. If P19 was issued on the strength of same 'decision' the Petitioner speaks of, then that 'decision'; in the absence of any documentary evidence confirming the fact that such a 'decision' had ever been made by the 9th Respondent, it is reasonable to infer that the existence of that 'decision' is only known to *Mohotti* and the Petitioner. Letter P19 was issued on 16.05.2013 and confirms that the Petitioner had paid annual lease rentals without default ("... වාර්ෂික බදු මුදල් නිහයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් "). However, the Petitioner had tendered three receipts issued by the 9th Respondent in confirmation of payment of lease rentals marked P20. The receipt No. 275124 of 07.05.2013 indicates that the Petitioner paid arrears of lease rentals for the years 2004, 2012 and 2013 inclusive of the fines for such defaults. It could well be that the payments were made just nine days prior to the issuance of P19 in order to facilitate the

Petitioner to be issued with P19. If that is the case, most probably it is, the effect of P19 is therefore reduced to a mere personal communication between them and had been issued without any authority and therefore cannot be binding on the 9th Respondent. How a Court should consider such an 'undertaking' or 'an assurance' had already been dealt in the Judgment of ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** (supra), where it was held; " … *the law, as it presently stands, is that an assurance given ultra vires by a public authority, cannot found a claim of legitimate expectation based on that assurance."*

This Court, in making the said pronouncement, was mindful of the uncertainty it might create in such claims and added;

> *" … it has to be recognised that there may be many instances where a petitioner who relies on an assurance given by a public authority or one of its officials, reasonably believed that the public authority or official who gave it to him was acting lawfully and within their powers. It is also often the case that an individual who deals with a public authority will find it difficult to ascertain the extent of its powers and those of its officials. In such cases, much hardship will be done to an individual who bona fide relies on an assurance given to him by a public authority or one of its officials and is later told the assurance he relied on and acted upon, sometime with much effort and at great cost to him, cannot be given effect to because of a flaw regarding its vires. In such instances, the principle of legality comes into conflict with the principle of certainty and, the law as it stands now, is that the illegality of the assurance will defeat the value of*

> *certainty which contends that the assurance should be given effect. However, that outcome can cause grave prejudice to an individual, for no conscious fault of his own."*

It is evident from the segment that I have quoted above, if the Petitioner were to be considered a victim of an undertaking or an assurance given *ultra vires* by a public body, then he must qualify to be termed as "*an individual who bona fide relies on an assurance given to him by a public authority…"* for then only it could be said that the "*outcome can cause grave prejudice to an individual, for no conscious fault of his own."* When the Petitioner complains of an unenviable situation which he finds himself in, such as this, and if the material indicate that the Petitioner had a hand and contributed to such a situation, then, I do not think he could be considered as "*an individual who bona fide relies on an assurance given to him by a public authority…"* and therefore, the concern expressed by Court that the "*outcome can cause grave prejudice to an individual, for no conscious fault of his own "* has no application. In the circumstances, the document P19 would not render any assistance to the Petitioner's claim of entertaining a legitimate expectation, he had formed upon receipt of P13, as an instance of making a reconfirmation of the undertaking given in it.

Connected to the issue of the legitimacy of expectation, claimed to have been entertained by the Petitioner, his conduct too has a bearing in determining his application seeking relief from this Court. *De Smith* (at p. 694 under foot note 143) stated " … *appropriate conduct of course be taken into account in the decision of Court as to whether, in its discretion, to award the applicant a remedy*". Adaptation of this principle is reflected from the process of reasoning adopted by the English Supreme Court,

In the matter of an application by JR38 for judicial review (Northern Ireland) [2015] UKSC 42. This was an instance where the applicant sought judicial review, alleging that, subsequent to a request made by the Police, publication of a photograph in a newspaper, which depicted him participating in a disorderly and riotous conduct with the others, is violative of his right to privacy guaranteed under Article 8 of the European Convention of Human Rights. At the time of taking the said photograph, the applicant was only 14 years age and therefore was afforded special statutory protection as to his identity. The divisional Court, by majority decision dismissed the applicant's application and he preferred an appeal. The Supreme Court, having taken note of the fact of taking and use of a photograph of an individual would *prima facie* lie within the ambit of Article 8 of the said Convention, nonetheless, decided to dismiss the appellant's appeal on the basis that the act of publication could be justified in the circumstances. The Court, in dismissing the appeal, did weigh the competing interests of the appellant and interests of the public and applied the test of proportionality, since the police published the photographs only as the last resort. The Court, having observed that, "*after a painstaking approach taken by the police service to the objective of identifying young offenders*" did not yield any information, then referred to the conduct of the appellant, which contributed to the impugned publication of his photograph, in following terms; "*… it is ironical that the appellant and his father were shown the photograph that was later published. Had they identified the appellant; no publication would have occurred*".

A similar approach was adopted by Lord *Denning* in determining the appeal of ***Cinnamond v British Airport Authority***

[1980] 2 All ER 368. This refers to an instance where six car-hire drivers were prohibited by the Airport Authority to enter the *Heathrow* Airport for any purpose other than as a *bona fide* airline passenger. This was done by the Authority after repeatedly prosecuting them under its byelaws, which prohibited anyone loitering at the Airport. The six- car hire drivers have sought to quash that prohibition before the original Court but were unsuccessful. In dismissing their appeal, Lord *Denning* said in relation to the issuance of the said letter " *… I would hold that the airport authority was perfectly in order, and within its rights, in writing the letter of 23rd November 1978 in which it prohibited these car-hire drivers from entering the airport until further notice. Mark you, only until further notice. If they show an intention to abide by the law in the future, if they are ready to give an undertaking, there is no doubt that the prohibition will be withdrawn. That has not happened. We have been told that, despite Forbes J's decision, these six car-hire drivers have been going on in the same way even since that decision in April 1979 until this very day".* In view of the above, it is relevant to consider the conduct of the Petitioner in applying for relief from this Court.

This aspect of the Petitioner's claim of frustration of his legitimate expectation became relevant in view of the approach taken by the Courts as indicative from the Judgment of the Privy Council in ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** (supra), where Lord *Carnwath* made the pronouncement that (at para 108); "*[T]he initial burden lay on an applicant to prove the legitimacy of his expectation, and so far as necessary his reliance on the promise.*" In the preceding section of this Judgment, the aspect of the Petitioner's claim which dealt with the legitimacy of his expectation was considered and,

in view of the Petitioner's unusual conduct, I now turn to consider whether he had discharged the remaining part of his initial burden, which dealt with the aspect of "*… his reliance on the promise*".

It is already noted that the learned President's Counsel had placed heavy reliance on the 9th Respondent's act of issuing P13 and depicting it as an instance of a clear undertaking made in favour of his client, the Petitioner. However, it is evident from the conduct of the Petitioner, that he was not so convinced of the said 'undertaking' contained in P13, despite his claim before this Court that it conveyed an undertaking by the 9th Respondent to fulfil his expectation to an Annual Permit in respect of lot No. 283. The document P13 is dated 26.10.2007 and contains a tag indicating that it had been issued as "*final notice*" and directed the Petitioner to make the initial payment along with the yearly lease rental for 2007 on or before 25.11.2007. Plainly it is indicative of the fact that the Petitioner had chosen to disregard the earlier communications that were meant to convey his selection to receive a permit.

It also specifically conveyed to the Petitioner that his continued failure to comply with its directions would make him liable to be set aside from his selection to lot No. 283. Undeterred by these warnings and not being convinced of the nature of his selection to receive a permit, the Petitioner opted not comply with the directions issued on P13. This is clearly an indication to the degree to which the Petitioner accepted his selection to receive a permit and the obvious doubts he entertained over the question whether the compliance of the said directions would in itself make him entitled to receive a permit to the said land. However, when he eventually made a payment, the deadline set up by P13, had already lapsed.

Nonetheless, the available material points to the conclusion that at some point of time the Petitioner did entertain a serious expectation that the 9th Respondent would issue an Annual Permit in his favour. This is indicative from the proceedings of the Court of Appeal on 15.01.2013, in CA 1175/98(F), by which the Petitioner invoked appellate jurisdiction of that Court seeking to set aside the order of the District Court pronounced on 05.11.1998 for the second time, rejecting his application to set aside the ex parte judgment (P18). Seeking permission of the appellate Court to withdraw his own appeal against the said order, learned President's Counsel, who represented the Petitioner before that Court, submitted that the said application was made "*in view of a decision of the Mahaweli Authority made in favour of the Petitioner.*" Obviously, by then the Petitioner was convinced that the 9th Respondent had made a 'decision' favourable to him and after legal advice, instructed his Counsel to withdraw his appeal. He was aware that after the said appeal is withdrawn, the finding of the District Court, impugned by the said appeal, becomes binding upon him, in relation to the 7th Respondent and over the lot No. 283.

The only document the Petitioner had in his possession at the point of withdrawing his appeal which is indicative of an 'decision' taken by the 9th Respondent, was P13. But the conduct of the Petitioner amply demonstrated that he did not entertain any expectation on that particular 'decision. Therefore, it could safely be assumed that it is not the document that contained "*a decision of the Mahaweli Authority made in favour of the Petitioner*" and generated confidence in his mind to such a degree to decide to withdraw his appeal. The other 'decision' made in favour of the Petitioner was contained in document P19, which was yet to be issued when the appeal was withdrawn, as it is dated 16.05.2013.

The withdrawal of his appeal itself is an indication of the degree of reliance the Petitioner had placed on that particular 'decision', for him to ignore the probable exposure to risk of being evicted from lot No. 283, if that 'decision' is not implemented by the 9th Respondent.

What then is this 'decision', which generated such a strong confidence in the mind of the Petitioner to such a degree that he decided to withdraw his appeal challenging eviction from lot No. 283, disregarding its obvious consequences?

No explanation offered by the Petitioner as to this favourable 'decision' that led him to withdraw his appeal. In his petition, the Petitioner merely states that he "… *moved to withdraw the appeal on the basis that the Mahaweli Authority had made a decision*" in his favour. The cancellation of the 7th Respondent's selection to lot No. 283 in December 2008, also did not contribute in any way to boost up the confidence of the Petitioner had in P13, to make up his mind to withdraw his appeal thereafter. He waited another five years, and strangely acted on this favourable 'decision', presumably made somewhere in 2013, to instruct his Counsel to withdraw his appeal and thereby bringing the litigation he had with the 7th Respondent to a terminal point.

This is evident from the available material that, despite the issuance of P13, the Petitioner had relentlessly pursued all legally available options seeking to prevent his eviction from lot No. 283, by the 7th Respondent upon execution of writ issued by the Court. In doing so, the Petitioner had acted well within his rights, and sought intervention of appellate Courts against the multiple rulings made by original Courts that are adverse to his interests.

The Statement of Objections of the 1st Respondent also does not indicate the existence of any other favourable 'decision' made by the 9th Respondent, except to the one already conveyed to him through P13. Therefore, the circumstances referred to above indicate that the Petitioner's decision to withdraw his appeal was not made on the strength of either P13 or P19, and obviously was based on some other 'decision' said to have been made by the 9th Respondent, sometime in and around 2013.

Strangely, the very 'decision' on which the Petitioner had actually entertained his expectation, was not made available for consideration of this Court. This failure on the part of the Petitioner resulted in a situation where this Court was placed in a position that it cannot decide whether that particular 'decision' upon which the Petitioner had acted on, could be equated with a specific 'undertaking' of issuance of a permit, whereby he could legitimately expect the 9th Respondent to act on that undertaking. It is also not clarified by the Petitioner whether it is a 'decision' communicated to the Petitioner orally or in the form of a document, as well as the identity of the individual, who would have made that 'decision' on behalf of the 9th Respondent, in his petition.

Judging by the conduct of the Petitioner, it is evident that he had placed implicit faith on the said 'decision' and acted on that particular 'undertaking' to his detriment when he decided to withdraw his appeal on the strength of that 'decision'. In ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** (supra), even if the applicant had relied on the promise made by an authority and acted on it to his detriment, the Court insisted that "*If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too*". In this instance too, the Petitioner had acted to his

detriment, by placing reliance of that 'decision'. The documentary evidence does provide ample proof of it. However, that 'decision' or the person who made it is shielded by the Petitioner from this Court and to the Respondents, denying them an opportunity to place their standing on same. In the absence of any positive indication to an actual 'decision' made by the 9th Respondent, as indicative by the contents of the contemporaneous records that were made available in the form of documentary evidence tendered to this Court by the 1st Respondent (who should have made such 'decision' in the first place), it is reasonable to infer that if at all there is a 'decision' then it could well be a one made by a stranger. If this 'decision' is made by 3rd party, claiming to represent the 9th Respondent, it is not possible for the Petitioner to bind the 9th Respondent by placing any reliance on such a 'promise' irrespective of the fact that of his strong belief in it. *De Smith* (supra) states (at p. 689) " *[A] legitimate expectation must be induced by the conduct of the decision maker. The representation by a different person or authority will therefore not found the expectation."*

Clearly, the Petitioner had relied on that particular 'decision' of the unknown entity and founded his expectation on same, as indicative by his act of withdrawing of his appeal. But the Petitioner failed to prove that there was such a 'decision' on which he formed his legitimate expectation, instead he sought to establish that he relied on P13, to entertain an expectation but his own actions violating its conditions indicate that he did not entertain any serious expectations on P13, after it was issued.

It must be noted in this context that the deceptive conduct of the 7th Respondent also had not escaped the attention of this Court. He deliberately made out a false claim in his Statement of Objections

stating that he was totally unaware of any decision made by the 9th Respondent cancelling his selection to lot No. 283 in 2008, until the year 2013. In his affidavit, the 7th Respondent, states under oath that "… *until 2013 I was not aware about the fact that my permit had been cancelled and or suspended by the Mahaweli Authority* …". However, the 1st Respondent, in his Statement of Objections, tendered a letter dated 15.12.2008 (1R6), by which the 7th Respondent was informed of the decision to cancel his permit. On 29.12.2008, the 7th Respondent, through his Attorney-at-Law, writes back to the 3rd Respondent in response. In that letter (1R7), the 7th Respondent states that the appeal No. CA 1175/98 was still pending, and it was wrong for the 9th Respondent to cancel his permit by way of an administrative decision and it was made contrary to letter issued to him (7R11). Clearly, the 7th Respondent had deceived his Attorney-at-Law, who drafted the Statement of Objections that had been filed on his behalf before this Court, to include such an averment, depicting a totally false claim. This deliberate act of deception practiced by the 7th Respondent demands unreserved condemnation of this Court.

However, since it is the Petitioner who came before this Court, alleging that his legitimate expectations were frustrated, after careful consideration of the available material, I am inclined to agree with the contention of the 1st to 6th and 8th to 10th Respondents, as well as of the learned Counsel for the 7th Respondent that the Petitioner had failed to establish the legitimacy of the expectation he had entertained.

One of the complaints of the learned President's Counsel for the Petitioner was that no opportunity was provided for his client to place any material for the consideration of the 9th Respondent Authority, before it made the decision to cancel the selection made in his favour to receive a permit in respect of lot No. 283. In effect, this contention is

founded upon rules of natural justice. In ***Secretary of State for the Home Department v AF (No 3)*** [2009] UKHL 28, para 72, Lord *Hoffmann* noted that the purpose of the *audi alteram partem* rule "*… is not merely to improve the chances of the tribunal reaching the right decision … but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told*." And in ***R (Osborn) v Parole Board*** [2013] UKSC 61, para 68, Lord Reed endorsed a normative understanding of the duty to act procedurally fairly:

> *"[J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken*."

However, the case of ***Cinnamond v British Airport Authority*** (supra), too refers to an instance where the applicants sought judicial review on the basis that the Airport Authority ought to have given an opportunity to them, so that they could be heard and, if such hearing was granted, they could have given reasons to why the prohibition issued by the Airport Authority should be modified. They cited a passage from Wade (4th Ed, p.455), which reads thus "*… in the case of a discretionary administrative decision, such as a dismissal of a teacher or the expulsion of a student, hearing his case will soften the heart of the authority and alter their decision, even though it is clear from the outset that punitive action would be justified*". This passage was cited before their Lordships, in order to counter the respondent's submissions that affording a

hearing would not have make any difference to the prohibition already made.

Delivering his Judgment on this appeal, Lord *Denning* held that (at p.374),“ *[I] can see the force of that argument. But it only applies where there is a legitimate expectation of being heard. In cases where there is no legitimate expectation, there is no call for hearing*.” Similarly, in the instant application too, in view of the fact that the Petitioner had failed to establish the legitimacy of his expectation, the denial of an opportunity of being heard before an adverse order is made, therefore is not a requirement that would have tainted the decision taken by the 9th Respondent.

The premise on which the Petitioner had sought reliefs from this Court is by making a complaint of violation of his fundamental right to equality, guaranteed by Article 12(1) of the Constitution, despite him placing heavy reliance on certain public law principles in support of his contention. The specific relief he seeks in respect of the Annual Permit issued in favour of the 7th Respondent 7R12 is its annulment, which is a public law remedy available to him. In ***Perera v Prof. Daya Edirisinghe*** (1995) 1 Sri L.R. 148, *Mark Fernando* J observed that under the 1978 Constitution “*… there is no doubt that Article 12 ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4(d)”* and added that “*[T]he fact that by entrenching the fundamental rights in the Constitution, the scope of the writs has become enlarged is implicit in Article 126(3), which recognises that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right.”*

In ***Chandrapala v The Commissioner of Elections and three Others*** *2006 [B.L.R.]7,* this Court quoted *Bhagwati* CJ from the Judgment

of ***Royappa v State of Tamil Nadu*** (A.I.R. 1974 S.C. 555) where it was stated that;

> *"[E]quality is a dynamic concept with many aspects and dimensions, and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14."*

In the circumstances, if the Petitioner could establish that the 9th Respondent had frustrated his legitimate expectation to an Annual Permit in respect of lot No. 283, on the strength of the promise made in P13 with P19, then the said frustration, in the absence of any acceptable justification by the said Respondent, would amount to abuse of power and thereby may have given rise to a situation where it could be said the actions of the 9th Respondent were violative of the fundamental rights guaranteed to him under Article 12(1). Therefore, the Petitioner's contention will have to be considered in the light of the jurisprudence of this Court pronounced on the principles on equality.

However, since the Petitioner was unable to satisfy this Court in respect of the legitimacy of his expectation which he claims to have entertained after the issuance of P13, the consideration of the question

whether there was any infringement of the fundamental rights guaranteed to him under Article 12(1) by one or more of the officers of the 9th Respondent Authority, in frustrating his substantive legitimate expectation to a permit "*is so unfair*" and "*will amount to an abuse of power*" (per ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213), does not arise for consideration.

In view of the above reasoning, I hold that the Petitioner had failed to establish any violation of his fundamental rights under Article 12(1) and therefore his application for a declaration of such a violation by this Court should be refused.

The petition of the petitioner is accordingly dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT