

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

In the matter of an Application under and in
terms of Article 17 read with Article 126 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.

Sri Lanka Telecom PLC,
Lotus Road,
P.O. Box 503,
Colombo 01.

Petitioner

SC FR Application No. 194/2016

Vs.

1. Telecommunications Regulatory
Commission of Sri Lanka,
276, Elvitigala Mawatha,
Colombo 08.
2. Dialog Broadband Network (Pvt.) Ltd.,
No. 475, Union Place,
Colombo 02.
3. Hon. Attorney General,
Attorney General's Department
Colombo 12.

Respondents

BEFORE

:

K. Sripavan, C.J.
Upaly Abeyrathne, J.

COUNSEL

Faisz Musthapha, PC. with Chanaka de Silva,
Aruna Samarajeewa and Niranjana
Arulpragasam instructed by G.G. Arulpragasam
for the Petitioner.

Romesh de Silva, P.C., with Sugath Caldera and
Buddhika Illangatilake instructed by Sanath
Wijewardane for 1st Respondent.

K. Kanag-Isvaran, P.C., with Avindra Rodrigo,
Lakshmanan Jeyakumar and Nimesha de Silva
instructed by M/s. F.J. & G. de Saram for the 2nd
Respondent.

Viraj Dayarathne, Senior Deputy Solicitor
General for the 3rd Respondent.

ARGUED ON : 12.07.2016

WRITTEN SUBMISSIONS FILED ON : 09.08.2016 by the Petitioner
09.08.2016 by the First and the Second Respondents

DECIDED ON : 07. 10.2016

K. SRIPAVAN, C.J.,

The Petitioner in this application seeks, inter alia,

- (a) a declaration that the fundamental right of the Petitioner under Article 12(1) of the Constitution has been violated by the First Respondent by making a recommendation contained in the letter dated 05.01.2016 referred to as **X1** in the Motion dated 12.05.2016 marked **P22** ; and
- (b) an Order quashing the decision of the First Respondent to recommend the issuance of the proposed integrated transmission network licence and communicated by letter dated 05.01.2016 referred to as **X1** in the Motion dated 12.05.2016 marked **P22**.

The basis upon which the Petitioner seeks the aforesaid reliefs are contained in Paragraph 56 of the Petition dated 09.06.2016. When the application was taken up for support the learned President's Counsel for the First Respondent raised two Preliminary Objections to the maintainability of the Application in the following manner:-

- (i) The Petition does not disclose an infringement of the Fundamental Rights of the Petitioner; and
- (ii) The Application is not properly constituted in that the Hon. Minister of Telecommunications has not been made a party.

Learned President's Counsel for the 2nd Respondent too raised a Preliminary Objection as follows:-

- (i) The Court is without jurisdiction to entertain the Petition because there has been no violation of the Fundamental Rights of the Petitioner and the recommendation spoken of in the Petition is a result of a statutory

process undertaken by the Telecommunications Regulatory Commission in terms of Section 17 of the Act upon an application for a renewal of the licence by the Second Respondent which enables the Petitioner to participate which the Petitioner did not make use of.

The Court having heard the parties, directed to file written submissions within three weeks. However, both the First and the Second Respondents moved for further time to file written submissions.

The Motion dated 12.05.2016 marked **P22** and referred to as **X1** in the reliefs sought by the Petitioner was one filed in the Court of Appeal Writ Application No. 289/15. One of the Paragraphs of the said Motion reads as follows:-

“AND WHEREAS, the 1st Respondent by its letter of 5th January 2016 informed the Petitioner that “the Commission has decided to recommend the issuance of the licence of Dialog Broadband Networks (Pvt) Ltd to the President” (as per Section 17(2) of the Act) and called upon the 2nd Respondent to make payment of the licence fee of Rs. 800,000,000/= together with NBT and Stamp Duty payable thereon.”

Two of the grounds urged by the Petitioner in Paragraphs 56(j) and 56(m) are as follows:-

- (i) the decision to recommend has been made in violation of the principles of natural justice as the Petitioner has not been granted a hearing despite filing objections.....; and
- (ii) the said decision is ultra virus the powers of the First Respondent in as much as it is in violation of Section 17 of the Telecommunication Regulatory Commission Act for the reason that an expired licence cannot be lawfully renewed/modified.

The submission of the learned President’s Counsel for the Petitioner is that midway through the argument in the Court of Appeal Application No. 289/15, the Second Respondent Company filed a Motion dated 12.05.2016 marked **P22** and annexed

to the Motion, a copy of the letter dated 05.01.2016 marked **X1** which is significantly four months anterior to the said Motion.

It is the duty of this Court to consider whether Section 17 of the Sri Lanka Telecommunications Act No. 25 of 1991 as amended by Act No. 27 of 1996 has been complied with. If a recommendation has in fact been made without following the procedure laid down in the aforesaid Act, it would make the decision so arrived null and void.

In *Jayawardena Vs. Dharanai Wijayatilake* (2001) 1 S.L.R. 132, the Petitioner alleged that the First Respondent had no power to cancel his appointment and in any event the cancellation was without cause or inquiry and hence invalid. Fernando, J. observed as follows:-

*“It is accepted today that powers of appointments and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice. [Bandara Vs. Premachandra]. I am of the view that this Court can, and indeed must, take judicial notice of the fact that, generally, a person holding an office which is public in character, is not removed without legal authority, without cause, without complying with the audi alteram partem rule and without notice. **Since the Petitioner was not treated in accordance with “these essential requirements of justice and fair play” he was denied the equal protection of the law.**” (emphasis added).*

When an argument was put forward on behalf of the First Respondent in Jayawardena’s case that a Writ of Certiorari was the proper remedy for a breach of natural justice and not a Fundamental Rights Application, Fernando, J. noted that some fundamental breaches of the law will result in denying the protection of the law and the case is plainly covered by the language of Article 12(1) of the Constitution.

The Indian Supreme Court in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal* (AIR 1975 SC 266) held that the denial of an opportunity of being

heard before a person could be blacklisted, violated equal protection of the law. In the case of *W.K.C. Perera Vs. Prof. Daya Edirisinghe* (1995) 1 S.L.R. 148, Fernando J. emphasized the fact that by entrenching fundamental rights in the Constitution the scope of writ jurisdiction has become enlarged, is implicit in Article 126 (3), which recognizes that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right.

The cases cited above show the tendency to incorporate the Principles of Administrative Law to equal protection of law embodied in Article 12(1) of the Constitution. In fact, in *Wickramatunga Vs. Anuruddha Ratwatte* (1988) 1 S.L.R. 201 Amerasinghe, J. stated that where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, there was no justification in law for holding that only one of the available remedies can be availed of and the other consequently stands dismissed.

Thus, this Court has to decide in the first instance as to whether Section 17 of the Act No. 25 of 1991 as amended by Act No. 27 of 1996 has been complied with prior to the recommendation referred to as **X1** in the Motion dated 12.05.2016 marked **P22** was sent. As I observed in *Noble Resources International (Pvt) Ltd. Vs. Hon. Ranjith Siyambalapatiya* (S.C. F.R. 394/15 – S.C. Minutes of 24.06.2016) it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law, the Court cannot close its eyes and allow the actions of the State or the Public Authority go unchecked in its operations.

The only Preliminary Objection of the First Respondent that needs consideration is whether the application is not properly constituted in that the Hon. Minister of Telecommunications has not been made a party. The reliefs sought by the Petitioner are directed against the First Respondent and not against the Hon. Minister. Since no relief is sought against the Hon. Minister, he need not be made a party to this application. The Preliminary Objections are overruled. The Petitioner in my view has established a prima facie case of alleged violation of its Fundamental rights by the First and the Second Respondent.

Court therefore grants leave to proceed for the alleged violation of the Petitioner's Fundamental right enshrined in Article 12(1) of the Constitution by the First and the Second Respondents.

CHIEF JUSTICE

U. ABEYRATHNA, J.

I agree.

JUDGE OF THE SUPREME COURT