

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

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**S.C. (CHC) Appeal No. 3/2000**

**H.C. (Civil) No. 101/98(1)**

Hon. The Attorney-General,  
Attorney General's Department,  
Hulftsdorp,  
Colombo 12.

## **Defendant-Appellant**

Vs.

1. Lanka Tractors Limited,  
No. 45/100, Nawala Road,  
Narahenpita,  
Colombo 05.
2. Globe Commercial Trading Limited,  
No. 40/1, Dickman's Road,  
Colombo 05.

## **Plaintiffs-Respondents**

**BEFORE** : Dr. Shirani A. Bandaranayake, J.  
Jagath Balapatabendi, J. &  
S.I. Imam, J.

**COUNSEL** : Y.J.W. Wijayatillake, P.C., A.S.G., with Rajitha Perera, S.C.,  
for Defendant-Appellant

Faiz Mustapha, P.C., with Ronald Perera for 1<sup>st</sup> Plaintiff-  
Respondent

Kuvera de Zoysa with Senaka de Saram for 2<sup>nd</sup> Plaintiff-

Respondent

**ARGUED ON:** 16.11.2009

**WRITTEN SUBMISSIONS**

**TENDERED ON:**      Defendant-Appellant      - 19.01.2010  
                            1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs-Respondents      - 08.02.2010

**DECIDED ON:** 30.03.2010

**Dr. Shirani A. Bandaranayake, J.**

This is an appeal from the judgment of the High Court (Commercial) of Colombo dated 28.03.2000. By that judgment the High Court had granted relief in favour of the plaintiffs-respondents (hereinafter referred to as the respondents) in terms of prayers a, b and c of the Plaintiff. The defendant-appellant (hereinafter referred to as the appellant) appealed to this Court in terms of High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read with Section 756 of the Civil Procedure Code and the said appeal was fixed for hearing.

When this matter was taken up for hearing Additional Solicitor General for the appellant, learned President's Counsel for the 1<sup>st</sup> respondent and learned Counsel for the 2<sup>nd</sup> respondent agreed that the appeal could be considered on the following question:

“Whether the undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement marked P7, binds the State.”

The facts of this appeal, as submitted by the learned Additional Solicitor General, for the appellant, *albeit* brief, are as follows:

The respondents instituted action in the High Court of the Western Province against the appellant, seeking to enforce a purported Agreement against the State and claiming the following:

- a. a declaration that the Secretary to the Treasury had acted in breach of clauses 9 and 10 of the purported Agreement annexed to the Plaintiff marked P<sub>7</sub>;
- b. that the Secretary to the Treasury be directed to execute a 99 year lease over a land and premises at Nawala Road, Narahenpita and to hand over the deeds and plans of premises at Olcott Mawatha, Colombo 11; and
- c. for damages in a sum of Rs. 174,540,995/- up to 31<sup>st</sup> March 1998 and continuing damages in a sum of Rs. 1,800,000/- per month with legal interest.

The appellant had filed answer denying that the respondents were entitled to the reliefs sought and stated *inter alia* that,

1. the Ministry of Trade and Commerce had called for offers for the purchase of 60% of the issued share capital of Lanka Tractors Ltd. (the 1<sup>st</sup> respondent),
2. the 2<sup>nd</sup> respondent had offered a sum of Rs. 144 million for the purchase of the said 60% share holding in the 1<sup>st</sup> respondent;
3. the offer of the 2<sup>nd</sup> respondent had been accepted by the Ministry of Trade and Commerce and that 17.5 million shares amounting to 60% of the issued share capital of the 1<sup>st</sup> respondent had been transferred to the 2<sup>nd</sup> respondent; and
4. there was no legal obligation on the State to grant a 99 year lease over the property at No. 45/100, Nawala Road, Narahenpita as that,

- i. the land at No. 45/100, Nawala Road, Narahenpita was admittedly State land;
- ii. in law the only person entitled to authorize the grant of a lease of 50 years or more in relation to the State land is HE the President of the Republic;
- iii. the purported Agreement P<sub>7</sub> was alleged to have been signed by the Secretary to the Treasury Mr. Paskaralingam, who in any event, had no authority to authorize a grant of a 99 year lease.

Learned Additional Solicitor General contended that the trial commenced on 2<sup>nd</sup> March 1999, issues were framed for the parties and the respondents led evidence of several witnesses, but failed to call as a witness, the Chairman of the 1<sup>st</sup> respondent Company, who would have been best placed to give evidence in relation to several allegations in the Plaintiff.

The appellant had led evidence of several witnesses including the Assistant Commissioner of Lands, who gave evidence regarding the requirement that HE the President should authorize the grant of a 99 year lease and the Secretary to the Cabinet, who produced the Cabinet Report and the Cabinet decision thereon relating to the sale of the 60% shareholding of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent, marked D<sub>6(a)</sub> and D<sub>6</sub>, respectively.

The High Court of the Western Province delivered its judgment on 30.03.2000 in favour of the respondents and granted the reliefs claimed under prayers a, b and c of the Plaintiff dated 04.08.1998.

Being aggrieved by the said judgment of the High Court of the Western Province, the appellant sought to appeal to this Court.

The main contention of the learned Additional Solicitor General was on the basis that the learned Judge of the High Court of the Western Province had failed to consider the evidence to

the effect that the grant of a 99 year lease was not recommended to Cabinet and that the Cabinet decision did not authorize the grant of a 99 year lease to the 2<sup>nd</sup> respondent.

The basis for the learned Additional Solicitor General's contention was that, the only person entitled to authorize the grant of a lease of 50 years or more in relation to State land would be HE the President of the Republic and that even if the Secretary to the Treasury had signed the said document P<sub>7</sub>, he had no legal authority to do so as only HE the President is empowered to approve the granting of a 99 year lease of State land.

In support of his contention, learned Additional Solicitor General relied on the decision of the **Attorney-General v A.D. Silva** ((1953) 54 NLR 529) and submitted that a Public Officer cannot bind the State unless expressly empowered to do so. It was also contended that the same principle was recognized and applied in **Dean V The Attorney-General** ((1923) 25 NLR 333), **The Attorney-General v Wijesooriya** ((1946) 47 NLR 385), **Rowlands v The Attorney-General** ((1971) 74 NLR 385) and **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (S.C. (FR) application No. 209/2007 – S.C. Minutes of 21.07.2008).

It was further contended that the document marked as P<sub>7</sub> does not bind the State and does not make the State liable to the respondents in any manner.

It was the contention of the learned President's Counsel for the 1<sup>st</sup> respondent and the learned Counsel for the 2<sup>nd</sup> respondent (hereinafter referred to as the learned President's Counsel for the respondents) that clauses 9 and 10 of the Agreement marked P<sub>7</sub> clearly requires the Government of Sri Lanka to execute a lease Agreement in favour of the 1<sup>st</sup> respondent and that its failure to act in accordance with the aforementioned clauses had caused the respondents to suffer losses. It was further submitted that according to clause 10 of the document P<sub>7</sub>, the Government was obliged to execute a 99 year lease of the land and premises at Nawala Road, within a period of one year, in favour of the 1<sup>st</sup> respondent and to hand over to the 1<sup>st</sup> respondent within six months of the date of execution of P<sub>7</sub>, the Deeds and documents of title relating to the land and buildings at Olcott Mawatha, Colombo 11.

Learned President's Counsel for the respondents further submitted that the appellant's contention that the non-compliance of clauses 9 and 10 of P<sub>7</sub> were due to the fact that,

1. clauses 9 and 10 do not form a valid Agreement enforceable by law;
2. no material consideration has been given for clauses 9 and 10 of P<sub>7</sub>; and
3. enforcement of clauses 9 and 10 of P<sub>7</sub> is against the State and is detrimental to the interests of the public,

cannot be sustained as the said amounts had been paid and the receipt of the said payment had been accepted by the appellant. It was further contended that, the appellant had not adduced any reasons as to why the Government could not fulfill its obligations under the Agreement marked P<sub>7</sub>. It was also contended on behalf of the respondents that, they do not dispute the proposition of law brought forward by the learned Additional Solicitor General on the basis of the decisions in **Attorney-General v Silva** (supra) and **Rowlands v Attorney-General** (supra), but join in issue on the facts and submitted that the Secretary to the Treasury had clear authority and a mandate from the Cabinet to enter into the relevant Memorandum of Understanding (MOU) and as such the same Memorandum of Understanding (MOU) is binding on the State.

The Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies came into being in 1987 in terms of Act, No. 23 of 1987. Under Section 2 of the said Act, the Sri Lanka State Trading (Tractor) Corporation was converted into a limited liability Company known as Lanka Tractors Limited, viz., the 1<sup>st</sup> respondent company in 1991. Thereafter the Government of Sri Lanka, who had held all the shares of the 1<sup>st</sup> respondent, had offered 60% of its shares for sale to the public (P<sub>4</sub>). All the said shares were vested in the Secretary to the Treasury on behalf of the State as, section 2(3) of Conversion of Public Corporations Act, No. 23 of 1987 clearly states that,

“Upon the publication of the Order referred to in sub-Section (2) of the Gazette, the Registrar of Companies shall allot all the shares into which the share capital of the Company is divided to the Secretary to the Treasury (in his official capacity) for and on behalf of the State.”

For the purpose of the said sale of 60% of shares of the 1<sup>st</sup> respondent Company an advertisement was published in the Ceylon Daily News issue of 25.05.1993.

It is important to refer to the said advertisement by the Ministry of Trade and Commerce, which extended an invitation to purchase shares in Lanka Tractors Ltd., which had clearly stated to return the documents in quadruplicate addressed to the Chairman ‘Cabinet Appointed Committee’. The Cabinet Memorandum of 15.07.1993 (D<sub>6A</sub>) made reference to the said advertisement, which read as follows:

“Office of the Ministry of Trade and Commerce,

15<sup>th</sup> July, 1993.

Cabinet Memorandum

Peopalisation of Lanka Tractors Ltd., (Formerly Sri Lanka State Trading Tractor Corporation)

The Cabinet of Ministers at its meeting held on 10.02.93 approved the recommendation made by the Divestiture Committee in its report that both of the shares of Lanka Tractors Ltd., be offered for such by public advertisement. The Divestiture Committee has reported that the award of 60% of shares of Lanka Tractors Ltd.,

be offered to M/s Globe Commercial Trading Co. Ltd., who made the highest offer.

I enclose a copy of the 3<sup>rd</sup> report of the Divestiture Committee and seek approval of the Cabinet for the implementation of the recommendations at paragraph 9 of the report.

Sgd.  
A.R. Munsoor,  
Minister of Trade & Commerce,"

The 2<sup>nd</sup> respondent, who had wanted to make an offer for the said 60% shares of the 1<sup>st</sup> respondent, had obtained the Profile issued by the Assistant Secretary of the Ministry of Trade and Commerce (P<sub>5</sub>).

It is to be borne in mind that the Profile on Sri Lanka State Trading (Tractor) Corporation (P<sub>5</sub>) was prepared by Ernst & Young **for the Government** and on the basis of the said Profile, offers were solicited. The lands referred to above and which were in issue were clearly described under the heading on 'Fixed Assets', which were given as follows:

"The land and buildings shown in the schedule of Fixed Assets above represents the premises at Nawala Road, Narahenpita and Olcott Mawatha, Colombo 11. The Narahenpita premises is presently owned by the Government of Sri Lanka and is expected to be given on a 99 year lease. These premises should be transferred to the Corporation prior to its peopalisation."

Thus it is quite obvious that the Profile, which solicited the offers, included both premises at Nawala Road, Narahenpita and Olcott Mawatha, Colombo 11, and also had stated that such premises should be transferred to the Corporation well before its peoplisation. It also emphasized the fact that the said premises were to be given on a 99 year lease.

The 2<sup>nd</sup> respondent made an offer of Rs. 144.48 million for the said 60% shares of the 1<sup>st</sup> respondent (P<sub>7A</sub>). The 2<sup>nd</sup> respondent's offer being the highest received, the Cabinet appointed Tender Board recommended (D<sub>6B</sub>) that the 2<sup>nd</sup> respondent's offer was the highest and had been well above the valuation of the Chief valuer. In their evaluation, the said Cabinet Appointed Tender Board had stated thus:

#### “EVALUATION

....

The offer made by Globe Commercial Trading Ltd., does not contain any unacceptable conditions, and in terms of both value of the offer, i.e., Rs. 144,480,000/- for 60% of the shares, and the per share price of Rs. 13/76 is above the chief valuer's valuation and is ranked first in the financial offers.

#### RECOMMENDATIONS

- i. 60% of the shares of Lanka Tractors Ltd., be transferred to M/s. Globe Commercial Trading Co. Ltd., for a total consideration of Rs. 144,480,000/-.”

On 28.07.1993 the Cabinet of Ministers, having considered the recommendations of the Cabinet Committee had granted approval for the transfer of 60% of the shares of Lanka

Tractors Ltd., to be transferred to M/s. Globe Commercial Trading Co. Ltd., for a total consideration of Rs. 144,480,000/- (D<sub>6</sub>)."

Learned Additional Solicitor General for the appellant strenuously contended that the report of the Cabinet appointed Committee did not specifically had referred to the two immovable properties.

As referred to earlier, the offers were solicited in terms of the Profile prepared for the Government (P<sub>5</sub>) and the said Profile had clearly referred to both the properties in question. Moreover in paragraph 10 of the Agreement between the Government of Sri Lanka and the 2<sup>nd</sup> respondent, both lands were clearly referred to as the immovable properties in question. It is therefore quite clear that the properties in question included the land and premises at Nawala Road, Narahenpita and the land and buildings at Olcott Mawatha, Colombo 11.

It is of interest to note as to what had taken place after the approval was granted for the transfer of 60% shares of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent by the Cabinet of Ministers. On 16.08.1993, the then Secretary for Trade and Commerce had written to the Chairman/Managing Director of the 2<sup>nd</sup> respondent Company in regard to the said transfer of shares and had stated as follows:

"Sale of 60% shares in Lanka Tractors Ltd.,

I wish to inform you that your offer dated 17<sup>th</sup> June for the purchase of 60% of the shares of Lanka Tractors (Pvt.) Ltd., has been successful.

02. Before transferring the 60% of shares of Lanka Tractors Ltd., to your Company, you are requested to make a full payment of Rs. 144,480,000/-and enter into a Memorandum of

Understanding with the Government of Sri Lanka. A copy of the draft Memorandum of Understanding will be sent to you shortly."

Accordingly the then Secretary to the Treasury, R. Paskaralingam, had entered into an agreement with the 2<sup>nd</sup> respondent, that being the Globe Commercial Trading Limited. It is not disputed that the full consideration of Rs. 144,480,000/- was paid to the Government at the time of signing the Agreement. The respondents had called the signatories to the said Agreement and one Mr. Marian, who was present at the signing of the Agreement. Both of them had stated that the Secretary to the Treasury had signed the said Agreement as representing the Government of Sri Lanka.

As stated earlier, learned Additional Solicitor General took up the position that a Public Officer cannot bind the State unless and otherwise expressly empowered to do so and relied on the decision in **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (supra), which had recognized and applied the decision in **Attorney-General v A.D. Silva** (supra).

In **Attorney-General v A.D. Silva** (supra) the Privy Council had to deal with a matter as to the scope of a Public Officer to act for an on behalf of the Crown, in terms of the Customs Ordinance read with the Interpretation Ordinance. In that matter the plaintiff's case was that, by a notification in the Government Gazette the Principal Collector of Customs, acting for an on behalf the Crown had advertised certain goods for sale by public auction. The said plaintiff had purchased the goods at an auction and thereafter the Principal Collector had refused to deliver the goods. The defendant had pleaded, *inter alia* that there had been no contract binding on the Crown and prayed that the action be dismissed.

The Privy Council had held that the Principal Collector of Customs had neither actual authority under Sections 17 and 108 of the Customs Ordinance nor ostensible authority on behalf of the Crown to sell the goods.

In **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (supra) reference was made to the decisions in **Attorney-General v A.D. Silva** (supra) and **Rowlands v Attorney-General** (supra) in considering the question whether a Public Officer can act in excess of his statutory authority and enter into any agreement or arrangement that would be binding on the State.

Learned Additional Solicitor General for the respondents relied on the following passage in **Vasudeva Nanayakkara's** (supra) decision in support of his contention.

“The question whether a Public Officer can act in excess of his statutory authority and enter into any agreement or arrangement and whether such agreement or arrangement would be binding on the State on a plea based on the ostensible authority of the Public Officer has been fully considered and settled more than half a century ago. It appears that with the passage of time the basic proposition of law in this regard has been forgotten. . . . . The judgment in **A.D. de Silva's** case was followed by the Supreme Court in the case of **Rowlands v Attorney-General** (74 N.L.R. 385). In that case the Court considered the question whether the principle of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance.”

On the basis of the aforementioned decisions, learned Additional Solicitor General for the appellant contended that no representation by the agent as to the extent of his authority, can amount to holding power on behalf of the State and no Public Officer has the right to enter into a contract in respect of the property of the State. It was further contended that a representation by the Public Officer would be binding on the State only if there is a specific provision to that effect in the statute.

Although learned Additional Solicitor General had relied on the aforementioned decisions the question that arises in this appeal is as to whether the undertaking given by the Secretary to the Treasury in terms of the Agreement would bind the State. As stated earlier, the present appeal is based on the transfer of 60% of shares of the 1<sup>st</sup> respondent Company to the 2<sup>nd</sup> respondent, which had taken place after the peoplisation of the 1<sup>st</sup> respondent Company under and in terms of the Conversion of Public Corporations Act, No. 23 of 1987. If one considers carefully the procedure that had been followed since the time the advertisement for the sale of 60% appeared in the Ceylon Daily News on 25.05.1993, it is apparent that every step had been taken with the approval of the Cabinet of Ministers. The Secretary to the Treasury had taken certain actions only on the basis of the approval granted by the Cabinet of Ministers. Article 43 of the Constitution deals with the Cabinet of Ministers and Article 43(1) states as follows:

“There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.”

More importantly Article 43(2) of the Constitution specifically states that the President of the Republic shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers. In terms of the aforementioned, provision has been made for the Cabinet of Ministers to be charged with the direction and control of the Government. It is to be borne in mind that they are also responsible and answerable to Parliament. Referring to the powers vested in HE the President and the Cabinet of Ministers, Dr. J.A.L. Cooray (Constitutional and Administrative Law of Sri Lanka, 1995, pg. 188) had described the authority vested with them, which reads as follows:

“The President is the person who is solely vested under the Constitution with the executive power of the People, including the defence of Sri Lanka. Subject to the powers and functions conferred on the President by the Constitution, the Cabinet of Ministers exercises control and responsibility in respect of the

determination of the general policy as well as in respect of the direction of that policy and the decision-making of the Administration. **The President and the Cabinet of Ministers are thus the central directing authorities of the Republic responsible for the formulation and execution of the national policy”** (emphasis added).

In the aforementioned background, it is quite clear that when an Agreement had been entered into with the approval of the Cabinet of Ministers that would include not only the Cabinet of Ministers but also the Head of the State. In such circumstances, it would not be correct to say that the Secretary to the Treasury had acted in excess of his statutory authority as he had acted on the basis of the decision of the Cabinet of Ministers and had acted on behalf of the Republic of Sri Lanka. It is also to be noted that since it had been a decision of the Cabinet of Ministers, headed by the HE the President it would not be correct to say that there was no approval for the transfer of land on a 99 year lease.

In the light of the above, it would be of importance to refer to the decision in **New South Wales v Bardolph** (1934 52 L.L.R. 455), which decision has been referred to in **Rowlands v Attorney General** (supra) as one of the clearest statements relating to the enforceability of contracts against the Crown. The facts in **New South Wales v Bardolph** (supra) were as follows:

The Tourist Bureau of New South Wales was a department of the Public Service of that State under the control of the Chief Secretary, who was the responsible Minister. It was an industrial undertaking within the meaning of the Special Deposits (Industrial Undertakings) Act 1912-1930. An incident of its work is continued advertising. It is the duty of an officer of the Premier's department to arrange for advertisements relating to the various Government departments. On the authority of the Premier 'as a matter of government policy', this officer

entered into a contract with the plaintiff, a resident of South Australia, for the weekly insertion in a newspaper owned by the latter, of advertisements relating to the Tourist Bureau. The contract, which was for a period which affected more than one financial year, was not expressly authorized by the legislature, nor was it sanctioned or approved by any Order in Council or Executive Minister. Shortly after the making of the contract a change of Government took place and the new Administration refused to use or pay for any further advertising space in the newspaper. Notwithstanding this, the plaintiff continued to insert the advertisements, and at the end of the period named in the contract, brought an action in the High Court against the State of New South Wales for the recovery of the total unpaid amount of the agreed advertising rates. Evatt, J., held that the contract was validly entered into by responsible Ministers of the Crown and that it was enforceable against the State of New South Wales subject to the Parliament's making moneys available to the Executive to discharge liabilities under the contract. On an appeal to the Full Court, decision of Evatt, J., was affirmed and held that the contract was one that of the Crown and subject to the provision by Parliament of sufficient moneys for its performance, was binding on the Crown.

Considering the appeal, Starke J., referred to the authority sanctioned to officers and had stated that,

“The departments of Government enter necessarily into many and various relations with the King’s subjects, and the officers of these departments, through whom these relations are established, represent the Executive – that is, the Crown – (Anson, Law and Custom of the Constitution, 3<sup>rd</sup> ed. ((1908), The Crown, Vol. II, Part II pg. 298). It is well established that an officer of the Crown is not personally liable under contracts made by him for an on behalf of the Crown (**Gidley v Lord Palmerston** ((1822) 3 Brod. & B 275), **Palmer v Hutchinson** ((1881) 6 App. Cases 619) and **Dunn v Macdonald** ((1897) 1 Q.B. 555).

....

It is not every contract made or purporting to have been made by an officer or servant of the Crown on its behalf that will bind the Crown, but only such as are within the authority delegated to that officer or servant. The authority is a matter which ultimately falls for determination in the Courts of law (see **Musgrave v Pulido** ((1879) 5 App. Case 102)).

....

The question then is simply whether a contract made by the Superintendent of Advertising on behalf of the Crown binds it.

An advertising branch in the Premier's Department had been established in New South Wales as one of the ordinary activities and functions of its Government. A superintendent in charge of the branch was appointed, and it was on the ordinary course of his duty to prepare and make contracts for Government advertising. In the present case, he received special instructions from the head of the Government to make the contract sued upon. **A contract made in these circumstances is a Government contract, and in my opinion, binds the Crown**" (emphasis added).

On a careful consideration of the decision in **New South Wales v Bardolph** (supra), it is clear that in the absence of controlling provisions, contracts are enforceable against the Crown if,

- a) The contract is entered into in the ordinary or necessary course of Government administration;

- b) It is authorized by the responsible Ministers of the Crown; and
- c) The payments which the contract is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates.

Evatt, J., however had specifically referred to the 3<sup>rd</sup> point aforementioned (c) and had stated that,

“In my opinion, however, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract . . . . The enforcement of such contracts is to be distinguished from their inherent validity.”

In the present appeal which is under review, as referred to earlier, from the inception, the Ministry of Trade and Commerce had been involved in the Agreement in question. The said Ministry had called for offers, which were to be submitted to a Cabinet Appointed Committee thereby the contract had obtained the sanction of the Cabinet of Ministers, the Profile was prepared for the Government and later the recommendations were approved by the Cabinet of Ministers. If the contract had been entered into with a party on behalf of the Government by an official acting in excess of authority, such a contract would not bind the State as the officer had no authority to perform such an act. However, in the present appeal it is quite clear that the Secretary to the Treasury had acted on behalf of the State as the Cabinet of Ministers had approved the said transaction which was based on the peoplisation in terms of Act, No. 23 of 1987.

This position could be further established by reference to the following aspects.

After the completion of the preliminary steps regarding the transfer of 60% of shares of the 1<sup>st</sup> respondent, referred to above, all based on approvals granted by the Cabinet of Ministers, an agreement was signed **between the Government of the Democratic Socialist Republic of Sri Lanka and Messrs Globe Commercial Trading Limited regarding the transfer of 60% of the shares of Lanka Tractors Limited**. The undertaking given by the Government to the 2<sup>nd</sup> respondent was clearly stipulated in clauses 9 and 10 of the said agreement, which read as follows:

- “9. **The Government shall make available** to the purchasers for the perusal on or before the execution of these presents a statement of the fixed assets of the Company as given in the Profile. **The Government confirms** that the fixed assets are free from lien and/or any encumbrances of whatever nature. The **Government undertakes** that all deeds, documents and survey plans evidencing title in the property of the Company will be handed over to the Purchasers within six (6) months.
10. **The Government** undertakes to execute within a period of one year, a ninety nine (99) year lease in respect of the land and premises at Nawala Road, Narahenpita in favour of the Company and also undertakes that all deeds, documents and survey plans evidencing title in the property to the land and buildings at Olcott Mawatha, Colombo 11 in favour of the Company will be handed over to the Purchasers within six (6) months from the date of execution hereof” (emphasis added).

Section 2(3) of the Conversion of Public Corporations Act, No. 23 of 1987 clearly states that all shares were vested in the Secretary to the Treasury,

“in his official capacity for and on behalf of the State.”

It would be of interest to refer to a letter filed by the learned Additional Solicitor General by way of a motion dated 09.09.2009, which deals with the clauses 9 and 10 of the Agreement (P<sub>7</sub>) in question. A letter dated 22.12.2008 addressed by Dr. Sarath Amunugama, the Minister of Enterprise Development and Investment Promotion to His Excellency the President was attached to this motion. This letter reveals not only the method in which the transaction in question had taken place, but also the attitude of the present authorities towards its finalization. Salient paragraphs of the said letter of 22.12.2008, which emphasizes this position, are given below.

“The sale of the majority stake in LTL was **carried out in the most transparent and competitive manner** in that after failed attempts for obtaining a quotation in the Colombo Stock Exchange on an all or nothing basis for 60% of the stake in the Company the Cabinet appointed sub-Committee called for competitive bids on 25<sup>th</sup> May 1993. For the purpose of privatization a Profile of the Company was prepared by Ernst & Young on behalf of the Cabinet appointed Committee for privatization. This Profile which was for all intention and purpose was a prospectus by the GOSL was provided to all the potential bidders. This document gave the financial performance and the operations of the Company for the past several years. Also details of its two immovable assets namely at No. 343, Olcott Mawatha, Colombo 11 and at 45/100, Nawala Road, Colombo 05.

.....

The foreign investors namely Messrs Beaver Power Limited of United Kingdom with other consortium partners through their local representative signed a MOU with the Government of Sri Lanka on 21<sup>st</sup> January 1994, in pursuant to which it paid a sum of Rupees 144,480,000/- (Rs. 144.4 Mn) as one installment on the same day to acquire the **60% ownership of the Company and Control of the management.**

As per clause 10 of the said agreement (MOU) the Government had an **obligation** to execute a 99 year lease of land situated at 45/100, Nawala Road, Colombo 05. This land is occupied by the Company even prior to the day of the agreement was executed.

Undertaking also given by the Government of Sri Lanka to hand over all deeds, documents and Survey Plans evidencing the title to the property (land) and buildings at Olcott Mawatha, Colombo 11 in favour of the Company within six months from the date of signing the agreement.

The above two undertakings formed the **FUNDAMENTAL CONDITIONS** of the sales agreement (MOU) executed on 21<sup>st</sup> January 1994 between Government of Sri Lanka and the consortium of investors led by globe Commercial Trading Limited.”

It should also be mentioned that the Government of Sri Lanka had taken steps to make a payment as a settlement of dues to Lanka Tractors Ltd. The Cabinet of Ministers had granted approval for a Memorandum dated 26.03.2004 submitted by the Minister of Finance on settlement of dues to Lanka Tractors Ltd., by government of Sri Lanka. The said Cabinet paper,

which was referred to by the learned Additional Solicitor General for the appellant (04/0395/105/037) was in the following terms:

“Approval was granted for the Treasury to advance a sum of Rs. 36,248,761/- against the agreed amount payable to Lanka Tractors Ltd., upon the settlement being finalized, in view of the hardships being faced by the employees. Out of this amount Rs. 29,321,619/- to be paid through the Commissioner of Labour and the balance amount of Rs. 6,927,142/- to be paid to the Company for payment to those workers, who retired under the Voluntary Retirement Scheme.”

In the said letter dated 22.12.2008, the Minister of Enterprise Development and Investment Promotion had suggested to settle this matter, but when inquired at the hearing, learned Additional Solicitor General categorically stated that there is no possibility of a settlement.

On a consideration of the totality of the above, it is abundantly clear that the transaction in question, for the said transfer of 60% of shares of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent had taken place on the approval granted by the Cabinet of Ministers and therefore the undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement P<sub>7</sub> clearly binds the State.

For the reasons aforesaid, the question on which this appeal was considered is answered as follows:

“The undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement marked P<sub>7</sub>, binds the State.”

The judgment of the High Court (Commercial) of Colombo dated 28.03.2000, is therefore affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court