

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

In the matter of an Application under and in terms of Article 12 (1), 14 (1)(g), 17 and 126 of the Constitution of the Republic of Sri Lanka

SC (F/R) Application No.
402/2016

1. Laboratory Equipment Co. (Pvt) Ltd,
No. 126/3/1,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
2. Ruwindi International Trade (Pvt) Ltd,
No. 126/M/4,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
3. Proso Manpower Tours & Travels (Pvt) Ltd,
No. 126/18, Ground Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
4. Inter Marine C&F (Pvt) Ltd,
No. 126/2/28,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

5. Monsell International (Pvt) Ltd,
No. 126/19/B, Ground Floor,
Sri Baron Jayatileka Mawatha,

YMB Building, Colombo 1.

6. Expo Cargo Links (Pvt) Ltd,
No. 126/3/19, Sri Baron Jayatileka
Mawatha,
YMB Building, Colombo 1.
7. Sripala Shipping (Pvt) Ltd,
No. 126/3/2,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
8. S. Saverimuttu and Co,
No. 126/3/3/, 3rd Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
9. Demiyan Sunil Abeyratne Abeyratne &
Co,
No. 126/2/18, 2nd Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.
10. Treven Edward Weinman,
Trust Freight Systems,
No. 126/2/6,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

11. Stanley Wijesinghe,
S.W. Cargo Service,
No. 126/3/5,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

12. Mahathanthri Rathnasiri,
Rathnasiri Ruhunu Hostel,
No. 126/4,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

13. J.P.M. Fernando,
Libosree Agency,
No. 126/16,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

14. M.R. Priyantha Fernando,
Nirmala Agencies,
No. 126/B~7C,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

15. Swani Maria Pillai,
Management Accountants,
No. 126/3/23, 3rd Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

16.K.N.V.K. Tennakoon,
Eagle Freight,
No. 126/1/10B,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

17.I.A.M. Sugandika Indurugalla,
Ceylon Express International,
No. 126/1,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

18.S.M. Sachchithanandam,
V.M. Perempalam & Co.
No. 126/1/2/, 1st Floor,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

19.R.P. Priya Nilaksha Perera,
LAK SEE Photo Traders,
No. 126/B/37 and No. 126/B/1A,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

20.Priyadarshani Fernando nee T.M.
Nicholas,
Priyaa Trading Company,
No. 126/3-22,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

21.K.P.L. Amarasinghe,
Sasiri Associates,
No. 126/5/1,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

22.M.A.J. Lekhnath,
Kunchana Opticians,
No. 126/8/B,
Sri Baron Jayatileka Mawatha,
YMB Building, Colombo 1.

PETITIONERS

Vs.

1. Ceylon Electricity Board,
No. 50, Sir Chittapalam A Gardiner
Mawatha,
Colombo 2.

2. General Manager,
Ceylon Electricity Board,
No. 50, Sir Chittapalam A Gardiner
Mawatha,
Colombo 2.

3. Public Utilities Commission of Sri Lanka,
6th Floor, BOC Merchant Towers,
St. Michael's Road,
Colombo 3.

4. Director General,
Public Utilities Commission of Sri Lanka,
6th Floor, BOC Merchant Towers,
St. Michael's Road,
Colombo 3.

5. Colombo Young Men's Buddhist Association,
No. 126/B/1A,
Sir Baron Jayathilaka Mawatha,
Colombo 1.

6. Major General Harsha Weerathunge,
General Manager,
Young Men's Buddhist Association,
No. 126/B/ 1A,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

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

RESPONDENTS

<u>Before:</u>	Buwaneka Aluwihare PC. J Priyantha Jayawardena PC. J L.T.B. Dehideniya. J
Counsel:	Harsha Fernando with N. Noorden for the Petitioners
	Viraj Dayarathna SDSG with Rajitha Perera SSC for the 1 st -4 th and 7 th Respondents
	Harsha Amarasekera PC with Neomal Pelpola for the 5 th and 6 th Respondents
Argued on:	26.02.2018
Decided on:	12.10.2018

Aluwihare PC. J.,

The Petitioners have come before this Court challenging the removal of existing electricity meters and the fixation of new meters at their respective business premises situated in Colombo Young Men's Buddhist Association—the 5th Respondent. These new meters have been installed pursuant to an arrangement arrived between the 5th and the 1st Respondent—the Ceylon Electricity Board, to provide a Bulk Electricity Supply to the said premises. Approvals and license in this regard have been granted by the 3rd Respondent—the Public Utilities Commission of Sri Lanka, and the Petitioners claim

that the totality of these events and their consequences have resulted in a violation of their Fundamental Rights under Article 12 (1) and 14(1)(g) of the Constitution.

On the day of the hearing, the learned President's Counsel for the 5th and 6th Respondents raised a preliminary objection on time bar. In what follows, I will address this preliminary objection while setting down, at the same time, the relevant facts of the case.

The Petitioners are long standing tenants of the 5th Respondent—the YMBA. Prior to 2016, the tenants have directly received their electricity from the CEB. This gave rise to a situation where the YMBA building being wired in an *ad hoc* manner over the years, jeopardizing the safety of the building. As demonstrated by the document marked “6R(3)(b)”, these concerns have been shared by the Petitioners as well. Pursuant to a fire inspection that was carried out in January 2014, the 5th Respondent management decided to obtain a bulk electricity supply connection which would replace the individual connections tenants had with the CEB.

In order to obtain a bulk electricity supply, the 5th Respondent was required to obtain a certificate of exemption from the 3rd Respondent to hold a license for distribution and supply of electricity within the YMBA building. The 5th Respondent applied, went through the procedure, and was granted the said certificate of exemption in 2014. This was notified to the public in terms of section 21 (2) of the Sri Lanka Electricity Act No. 20 of 2009, by way of newspaper advertisement dated 15th August 2014 published in all three languages (marked “3R10(a)”, “3R10 (b)”, “3R19 (c)”) and by way of a Gazette notification (marked “6R6(a)”) dated 28th November 2014.

According to the 5th Respondent, between 2014 and 2015, the management of the YMBA had taken steps to inform the tenants of the plan to obtain permission from the 1st and the 3rd Respondents to distribute and supply electricity within the YMBA premises. They have produced to this Court an affidavit marked “6R3(a)” by Thantrige Thakshila Srinath Perera who was the Maintenance and Purchasing Executive of the 5th Respondent, to support their stance. Additionally, they state that after obtaining the certificate of exemption and after entering into a contract in April 2015 with

Illukkumbura Industrial Automation (Private) Ltd for the installation of the electrical distribution system, the 5th Respondent took steps to inform the tenants of the plan to remove the existing electricity meters with the CEB and replace them with the YMBA meters. The 5th Respondent has attached copies of notices convening meetings on 18th February 2016 and 3rd November 2016 and the attendance sheets of the said meetings which bear the signatures of several petitioners (“6R(4)(b), 6R4(d)”). While these documents prove that meetings took place on the said dates with the participation of tenants, I am unable to conclude as to whether the decision to install new meters was in fact discussed during these meetings. In the counter-objections, the 1st Petitioner strictly denies that they were informed of such plans at the meetings.

The removal of the meters took place on 4th July 2016. However, prior to that, the Petitioner have from time to time sent letters of complaints to the 1st and 3rd Respondents objecting to the removal of their meters. The first of these has been sent on 27th April 2016 (“P2”). Thereafter, on 12th July 2016 (“P3(A”), 1st of September 2016 and on 9th September 2016 (marked “P8” and “P8A”), Petitioners have sent further complaints to the 3rd Respondent.

The crux of the petitioner’s grievance is that the YMBA is charging a rate higher than the rate which they originally paid for when they received electricity directly from the CEB. They claim that the applicable CEB rate is the Industrial Purpose and General-Purpose Tariffs category where a charge of Rs. 18.30 is made per unit for less than 290 units and Rs. 22.85 per unit for more than 290 units. The Petitioners contend that the 5th Respondent has charged them at a higher rate, Rs. 26. 31 per unit. They *inter alia* also challenge that the monthly invoices sent to them do not indicate the monthly billing period, the units consumed by the tenants or a breakdown of the calculation.

As an extension of this argument, they contend that these undesirable consequences would not have ensued if the 1st and the 3rd Respondents did not grant a certificate of exemption to 5th Respondent to install a bulk meter supply at the premises. Therefore, they contend that the 1st and the 3rd Respondents’ act of granting the certificate of exemption to the 5th Respondent has violated their fundamental rights.

In terms of section 10 read together with section 9A of the Sri Lanka Electricity Act No. 20 of 2009, the Public Utilities Commission is vested with the power to issue a Certificate of Exemption, exempting a person or a category of person from obtaining a license to distribute or supply electricity to any premises. The said Exemption is only granted to persons or category of persons who wishes to engage in community-based electricity generating project on a non-commercial basis.

In terms of section 9A of the Act, when issuing a Certificate of Exemption, the Commission must have regard to;

- (a) the process adopted for generation of electricity;
- (b) the quantity of electricity proposed to be generated;
- (c) the number of persons among whom the electricity generated is to be distributed;
- (d) the location of the plant to be used for the generation of electricity; and
- (e) any other criteria that the Commission may consider appropriate,

Once approved, the Commission must publish in the Gazette, the names of any person or category of persons who have been exempted from obtaining a licence for the distribution of electricity. Furthermore, such certificate of exemption could only be issued for a specified period and must further be subject to terms and conditions which the Commission may impose.

The Petitioners challenge that the 3rd Respondent has granted a certificate of exemption in bad faith and for extraneous consideration without verifying whether the 5th Respondent has the necessary expertise to carry out the task of distributing and supplying electricity. Nevertheless, over and above the assertion that “*the Petitioners verily believe that the exemption has been granted by PUCL for extraneous consideration and in bad faith contrary to the objectives of and provisions of the Sri*

Lanka Electricity Act No. 20 of 2009" in paragraph 24 of their Petition, the Petitioners have not adduced any evidence to sustain this claim.

In any event, based on the documentary proof produced by the 1st, 3rd and the 5th Respondents, which I have previously referred to, I have no reason to believe that the 1st and the 3rd Respondents have colluded or acted illegally to grant the 5th Respondent a certificate of exemption. The 5th Respondent applied for the said certificate as far back as in 2014. Prior to granting the said exemption, the 3rd Respondent had followed the statutory procedure to satisfy itself that the 5th Respondent has the necessary means and expertise to carry out the distribution and supply ("3R7(b)"). They reviewed the 5th Respondent's application and approved the same by way of a Commission paper marked "3R8". Gazette notification of this grant and newspaper advertisements informing the same in all three languages have been published in 2014 ("3R10(a)", "3R10 (b)", "3R19 (c)" and "6R6(a)"). Furthermore, the 3rd Respondent has specified a series of conditions and terms which the 5th Respondent must obey after obtaining the certificate of exemptions. Accordingly, it is clear that the 3rd Respondent has followed the statutory process when discharging its duties and functions under Section 9A and 10 of the Electricity Act.

Similarly, the 5th Respondent has followed the correct procedure when preferring the application under section 10 of the Electricity Act, and has exercised due diligence in liaising with entities best equipped to install the electricity meters. ("6R7(c)"). In the face of these factors, I fail to observe how the Petitioners could claim that the 3rd Respondent and 1st Respondents' conduct resulted in an alleged violation of their fundamental rights.

Even if this Court was to give the benefit of the doubt to the tenants that they may have not been aware of the shift towards the bulk supply in 2014, by their own admission, the first steps to remove the CEB meters had taken place on the 4th of July 2016. The documents marked "P2", "P3(A)", "P8" and "P8A" which are letters of complaints sent by the several petitioners to the 1st and 3rd Respondents bear the dates 27th April 2016, 12th July 2016, 1st of September 2016 and on 9th September 2016.

Furthermore, the Petitioners have produced to this Court several invoices issued by the 5th Respondent for electricity consumption. I observe that the first of such bills has been issued in June 2016 and the latest is dated September 2016.

Accordingly, it is very clear that the series of events which the Petitioners are complaining of, unfolded for more than 2 years, with the most proximate event taking place in September 2016. Even if this Court were to agree with the fact that the Petitioners may have realized the magnitude of the project at a later point, they could have still invoked the jurisdiction by October 2016—which would have brought their claim within the mandatory one-month period in terms of Article 126 (2) of the Constitution.

The Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and must be complied with. (See **Edirisuriya Vs. Navaratnam** [1985 1 SLR 100] It has also been observed in **Illangaratne Vs. Kandy Municipal Council** [1995] BALJ Vol.VI Part 1 p.11 that “*[...] it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge.*”.

In a fit case, however, the Court would entertain an application made outside the time limit of one month **provided an adequate excuse for the delay could be adduced**. If the Petitioners could demonstrate that an exceptional circumstance prevented them from approaching the Court or that the lapse was not due to their fault, this Court could take cognizance of such applications notwithstanding the delay.

“Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application were the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner.” (**Alawala v The Inspector General of Police** (SC F.R. 219/2015) SC Minutes 15. 02. 2016)

However, in the present case, the Petitioners have failed to adduce any explanation for failing to come before this Court prior to 2nd November 2016. This Court also has before itself a letter (marked “6R4(e)”) which is a letter written by the 9th Petitioner in December 2016 to the 1st Respondent consenting to remove the Electric meter installed in their premises and agreeing to adhere to the instructions given by the 3rd Respondents in the reconnection of the meters. Accordingly, I do not think that the Petitioners after deciding to proceed in a particular course can, in the absence of any reasonable grounds, invoke the fundamental rights jurisdiction to alter that course to produce a result they desire.

The Petitioners’ most serious grievance, as I adverted to above, is the tariff rate. They contend that the 5th Respondent is charging them a rate higher than the rate set for the “*Category G1 of the Industrial Purpose and General Purpose Tariff*.” They have complained to the 3rd Respondent of the same by way of letters marked “P6” and “P8”. These complaints have been duly noted by the 3rd Respondent and it has communicated to the Petitioners that their complaint is under review (document marked “P8A”).

However, contrary to their claim, the tariff rate for “Category G1 Industrial Purpose and General Purpose” is only applicable to individual tariff customers and not to those falling under the bulk electricity supply scheme. In terms of section 30 (2) of the Sri Lanka Electricity Act No. 20 of 2009, the tariff rate for bulk transmission is decided by the 3rd Respondent in accordance with a cost reflective methodology which permits the bulk supplier to recover all reasonable costs incurred in the carrying out of the activities authorized by the license.

The relevant guidelines are produced marked “3R1”. These guidelines take into account *inter alia* the ‘average purchase cost of electricity, average direct maintenance costs of standby generation, average direct operating cost of standby generation, average direct maintenance costs for electricity distribution system, adjustment for losses and regulatory levy.’

The Respondents state that the tariff rate for the 5th Respondent bulk meter supply was determined pursuant to data submitted by the 5th Respondent of the last three months

electricity consumption in the premises. (marked “3R2”) Accordingly, the 3rd Respondent approved an interim tariff to be made applicable from June 2016 to November 2016. The 5th Respondent was permitted to charge subject to a ceiling tariff of Rs. 27. 58/kWh.

In the invoices attached by the Petitioners, I observe that, the 5th Respondent has adhered to the 3rd Respondent’s conditions and has not exceeded that limit. In any event, as evinced by documents 6R9(a), 6R9(b) and 6R9(c), this rate will only be made applicable till the 5th Respondent is able to submit a final tariff charge. However, they are being prevented from determining a final tariff rate as a section of tenants have resisted the removal of their individual meters and have obtained an interim order towards this end.

On this point too, I see no compelling ground to intervene as it does not appear that the 3rd and the 5th Respondents are acting fraudulently. I do however agree with the Petitioners that the 5th Respondent’s monthly invoices should include the billing period, number of units consumed by each tenant and the manner in which calculations are done pursuant to their tariff rate.

This is not merely an act of prudence but a contractual obligation as condition 19 (2) (b) and (6) of the Certificate of Exemption No. EL/EX-D/14/07 clearly require the 5th Respondent to “publish the tariff schedule as directed by the Commission” and to ensure that the tariff schedule shall “contain such detail as shall be necessary to enable any consumer to make a reasonable estimate of the charges to which it would become liable for purchases of electricity.” I observe that it is only the latest invoice produced to this Court (September 2016) that carries these characteristics.

In my opinion, the Petitioners are justified in raising these concerns. I emphasize that these matters ought to be resolved by the 5th respondent once they are able to determine a final tariff rate and implement their project properly. I also urge the Respondents to consider introducing a final tariff rate that does not drastically deviate from the tariff rate for ‘Category G1 Industrial Purpose and General Purpose’.

However, it must be noted that such concerns fall outside the fundamental rights jurisdiction of the Court. The Petitioners have failed to establish any derogation or failure by the 1st and the 3rd Respondents' in discharging their duties. Their grievances are strictly directed towards the 5th Respondent. This jurisdiction is not the correct platform to canvass the grievances which the Petitioners have with their landlord.

Accordingly, I am of the view that the Petitioners' application is filed out of time and is misconceived and should be dismissed *in Limine*. The interim order preventing the removal of the remaining electricity meters is hereby revoked.

Application dismissed.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC.

I agree

Judge of the Supreme Court

Justice L.T.B. Dehideniya

I agree

Judge of the Supreme Court