

IN THE SUPREME COURT OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under
Article 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka

Gamlakshage Sunil Seneviratne
Dikhena,
Pitigala.

PETITIONER

S.C. F.R. Application No.
476/2012

Vs.

1. Shelton Gunasekera
Assistant Investigation Officer
Ceylon Electricity Board
Head Office
Colombo 02
2. H.A.A. Perera
Electrician, Ceylon Electricity Board
Head Office
Colombo 02
3. Divisional Electrical Engineer,
Ceylon electricity Board
Ambalangoda
4. Electrical Engineer
Ceylon electricity Board
Piliyandala
5. Ceylon Electricity Board
Piliyandala Branch
Piliyandala
6. Ceylon Electricity Board
Head Office
Colombo 02
7. Inspector of Police Udayakumara
Police Station
Pitigala

8. Police Constable 12911 Jayalath
Police Station
Pitigala
9. Police Constable 20616 Ananda
Police Station
Pitigala
10. Sergeant 24672 Lal Ananda
Police Station
Pitigala
11. Deputy Inspector General of Police
Southern Province
Galle
12. Inspector General of Police
Police Headquarters
Colombo 01
13. Hon. Attorney General
Attorney General's Department
Colombo 12
14. Director General,
Public Utilities Commission
06th Floor, B.O.C. Merchant Tower
St. Michael's Road
Colombo 03

RESPONDENTS

BEFORE: **BUWANEKA ALUWIHARE, PC, J**
SISIRA J DE ABREW, J
ANIL GOONERATNE, J

COUNSEL Harsha Fernando with Ruwan Weerasinghe
for the Petitioner instructed by K. V. Lal Shantha.
Varunika Hettige, Senior State Counsel for the
Respondents.

ARGUED ON: 13.07.2015

WRITTEN SUBMISSIONS: 24.08.2015

DECIDED ON: 16.12. 2016

ALUWIHARE, PC, J.

The Petitioner in this case seeks a declaration that his fundamental rights guaranteed by Articles 12 (1), 13 (1) and 14 (1) (g) of the Constitution have been infringed by the Respondents. Supreme Court granted leave to proceed for the alleged infringement of the aforesaid Articles by the 1st and the 6th Respondents. In addition, this court proceeded to grant interim relief to the Petitioner by restoring the supply of electricity to the premises concerned.

The Petitioner, a businessman, at the time relevant to the present application was engaged in running a hotel under the name “Dickhena Hotel” and was also engaged in selling furniture, at an outlet under the name “Sujeewa Furniture Shop” in Pitigala.

He asserted that, he had obtained loans from commercial banks to infuse money into his business and had to make repayments on a monthly basis. The Petitioner had further asserted that being a father of three children, he had also to meet family commitments, as one of his daughters was studying medicine in Bangladesh and another child was studying for the Advanced Level examination.

On the 9th June, 2012, in the middle of the night the Petitioners building had caught fire and when he came out of the building he had seen some Police officers and several others, trying to douse the fire by attacking the flames with sand and wet sacks etc. As the Police officers warned the people, of the danger of using water to extinguish the fire in the event of an electricity leakage, the people gathered there had tried to sever the electricity connection by prising out

the ‘cutout’ next to the electricity meter with the aid of sticks. The Petitioner states that, even though they had managed to extinguish the fire, having battled to douse it for about 1 ½ hours, he had sustained damage amounting to about Rupees four hundred thousand.

The Petitioner, distressed by this incident, had informed the Electricity Board and according to his petition, he had told the official who answered the phone, about the destruction and damage caused to the electricity meter, and how the damage to the same had come about. He had also requested the Electricity Board to take steps to restore the supply of electricity.

The response he received from the official who answered the phone had been, to re-fix the “cut out” and use power, if electricity were available up to the Meter. Further the official had added, that their responsibility is only to supply electricity up to the Meter and they cannot respond as and when the Petitioner wanted them to come.

Consequent to the advice given by the official of the Electricity Board, the Petitioner says he re-fixed the ‘cut out’ and continued to use the power as he had to run his business. The Petitioner states, however, that the electricity meter, even at that time was dangling.

The Petitioner states that, in spite of informing the Electricity Board of the grave situation, there was no response by the Board. Petitioner had produced the call details (P5) and the same reflects that the Petitioner had called the Ceylon Electricity Board and the duration of the call had been approximately 4½ minutes. The Petitioner asserts that the Electricity Board took no interest or serious note of the predicament he was in, as the result of the fire. The Petitioner had also reported the fire to the Pitigala Police on the same day and had lodged a formal complaint.

Nine days after the fire, on the 18th of June, 2012, the 1st Respondent accompanied by two Police officers (8th and 9th Respondents) had visited him, and the 1st Respondent had wanted to check the premises alleging that they were tapping electricity illegally, to which the Petitioner responded, that he had only followed the instructions given by the Ceylon Electricity Board.

Having checked the premises, the 1st Respondent had questioned him as to why the Electricity meter was slanted and had warned him that it was a serious fault. In response, the Petitioner had told the 1st Respondent, that no one visited the scene after the fire, despite the fact that the Ceylon Electricity Board was informed on several occasions of the damage caused to the housing of the electricity meter. The Petitioner had vehemently denied that he tapped electricity, illegally and that there was no need for him to resort to such a conduct either.

The 1st Respondent had then told the Petitioner that he was going to take the Petitioner into custody and that it was a non-bailable offence. He had told the Petitioner further that if he pleaded guilty to the charge he would ensure that the Petitioner got off, on payment of a nominal fine.

Then the 1st Respondent had also added that he would disconnect the other meters as well, but there were ways and means of avoiding such a situation. The words so used by the 1st Respondent in Sinhala according to the Petitioner were “මම තමුසෙට දැන් අත් අඩංගුවට ගන්නවා” තමුසෙට අප ලැබෙන්නේ නැහැ“ මේ මිටරයි අනිත් මිටර සියල්ලම කප දානවා” තමුසෙ නිවැරදි කාරයි කිවිවෙක් උසාවයේ නඩුව අවසන් වනතුරු තමුසෙට අප ලැබෙන්නේ නැහැ“ වරද පිළිගත්තොත් සුර් ද්‍රවයක් ගහළ ගෙදර යන ව්‍යිහාර මම වැඩ සළක්වා දෙන්නම දැන් අනිත් මිටර සියල්ලම කපනවා“ ඒවා බෙරාගත්ත නම් කුම සහ විධ තිබෙනවා

The Petitioner then had pleaded with the 1st Respondent not to place them in a difficult situation and told the 1st Respondent that he would abide by his wishes.

At this point the 1st Respondent had gone inside the shop with the Petitioner and had demanded one hundred thousand rupees from him. The 1st Respondent, according to the Petitioner had stated further that he would leave the other three meters intact, but if the payment of Rs.100, 000 were not made by the 1st of August, however, he would take steps to disconnect the other three meters as well.

The Petitioner had consented to plead guilty and also to pay the 1st Respondent the amount demanded, by the 1st of August.

After the discussion referred to above the 1st Respondent had come out of the building and had disconnected and removed the meter that was dangling from the wall and had taken it along with him.

The Petitioner then had been placed under custody by the two Police officers (8th and 9th respondents) on the instructions of the 1st Respondent.

The Petitioner complains that he was not informed of the offence with which he was charged, at the point of arrest and was detained at the Pitigala Police Station overnight and produced before the Magistrate, Elpitiya on the following day.

The Petitioner had been charged in terms of Section 49 (1) of the Sri Lanka Electricity Act No.20 of 2009. The Charge Sheet (P7A) alleged that he had been consuming electricity fraudulently, by removing the meter from the wall and

positioning it at an angle, thereby preventing the correct amount of electricity consumed being recorded.

The Petitioner states, as agreed with the 1st Respondent, he pleaded guilty to The aforesaid charge and he was fined Rs.10, 000/- and was directed to pay a further sum of Rs.351,010/- as the loss caused to the state.

The Petitioner asserts that a certificate stating the damage caused to the State was not annexed to the charge sheet and as such the Petitioner's position is that there was no any proof of the damage caused to the State.

Proceedings of 19th July, 2012 in case No. 74738 (P7) in Magistrate's Court, Elpitiya, show that the Magistrate was informed of the loss caused to the State and the Magistrate has not referred to any document or a certificate containing the loss, nor is the alleged loss mentioned in the charge sheet.

Then on the 1st August, 2012, according to the Petitioner, the 1st Respondent had come to his business premises and had asked him whether the petitioner would pay the sum agreed upon, in Sinhala “ මට අරක දෙන්න ප්‍රවෙන්ද ” meaning, whether the Petitioner would agree to part with the money agreed upon.

The Petitioner had responded by asking him as to how, he could pay him a hundred thousand rupees, having already paid a fine of Rs.10, 000 and a further sum of Rs.351, 010. The Petitioner had also rebuked the 1st Respondent, for committing such dastardly acts, when he knew very well that, he (the Petitioner) had not done anything wrong.

The 1st Respondent then had left the premises without uttering a word according

to the Petitioner.

The 1st Respondent, however, had returned to the premises a few hours later accompanied again by two police officers, the 9th and 10th Respondents, and a few others from the Ceylon Electricity Board. The 1st Respondent had, intimated to the Petitioner that they had come to disconnect the other three meters as well, and had challenged the Petitioner to do whatever he could.

The Petitioner had then questioned the 1st Respondent as to what right he had to disconnect the electricity supply to another building. In spite of his protest, the 1st Respondent had disconnected the supply of electricity by severing the connection of the other three meters. The petitioner claims that he was not in arrears to the CEB as he had paid all his dues.

It was contended by the learned counsel for the Petitioner, that the act of disconnecting the supply of electricity was illegal and was done maliciously and for no other reason. It was submitted on behalf of the Petitioner, that the petitioner had to face numerous hardships due to the loss of power supply and the Petitioner had to engage a generator by paying Rs.15, 000/- per day, to carry on his business activities. The learned counsel on behalf of the Petitioner stressed that, had the 6th Respondent Board visited the premises soon after the fire, the Petitioner would not have been placed in this unfortunate situation. The Petitioner had lodged two complaints with the Pitigala Police with regard to the conduct of the 1st Respondent (P10 and P11).

Counsel also submitted the petitioner had pleaded guilty to the charges against him in the magistrates' court, under duress.

K. G. Sarath and S. K. Chandrarathna have sworn affidavits in support of the Petitioner's case (P13 and P14, respectively). Both of them had witnessed the fire that engulfed the business premises of the Petitioner. Both of them have

sworn to the fact that, the neighbours who helped to douse the fire, used sticks to poke at the electricity meters in order to disconnect the electricity and in their attempt to do so, the electricity meter came out of its housing and it was dangling from the wall.

The Petitioner had asserted that the 1st Respondent, an Assistant Investigation Officer of the Electricity Board was mainly responsible for acts which were illegal and capricious, in violation of his fundamental Rights. According to the Petitioner the 2nd Respondent was also an employee of the 6th Respondent Board and accompanied the 1st Respondent and was associated with the 1st Respondent in all his actions. The Petitioner alleges that the 3rd, 4th and 5th Respondents are collectively responsible for the violation of his fundamental rights. The 1st Respondent alone had filed a response to the Petitioner by way of an affidavit dated 18th July, 2014.

The 1st Respondent had annexed an affidavit of one Piyadasa, Electrical Superintendent attached to the Consumer Service Centre, and had stated that upon perusal of the “Electricity break down” Register, no person by the name of G. L. S. Seneviratne (the Petitioner) had reported a breakdown of the supply by a fire due to an electrical fault at “Dikhena Hotel”, the business establishment of the Petitioner.

Let alone, recording a fault in the Register, when the Petitioner telephoned the Board regarding the fire the Petitioner was rudely told off by an official of the Ceylon Electricity Board that the Board cannot respond by calling over according to the whims and fancies of the Petitioner. The Petitioner by producing the detailed telephone records had demonstrated that he was connected through his phone with the Ceylon Electricity Board and the

connection had lasted 4½ minutes. In this context, I am of the view that no reliance can be placed on the affidavit filed by Piyadasa R1.

Ironically the 1st Respondent in his affidavit alleges that the Petitioner ought to have “informed the CEB properly” or “called over at CEB’s premises to lodge the required complaint or made it in writing, explaining the incident”. Here is a man whose business premises had been gutted and expecting a person in such a traumatic condition to make a written complaint, only shows the callous disregard by an official of the 6th Respondent Board, towards one of his customers. The discouraging response the Petitioner received from the Ceylon Electricity Board official who answered his telephone call, would have deterred the Petitioner from taking up the matter with the Ceylon Electricity Board again. I am of the view that the Ceylon Electricity Board owes a greater duty of care to its consumers as they have no one to turn to when it comes to the supply of electricity. The manner in which the consumer was treated in this instance is regrettable.

The 1st Respondent merely says that he went to inspect the premises of the Petitioner, as he received a “telephone call” to the effect that the Petitioner was misusing electricity by angling the meter. Apart from the bare assertion, however, the 1st Respondent had not filed any document or record to substantiate the receipt of that complaint. The 1st Respondent had said that on the second occasion also he received another telephone call to the effect that the Petitioner was again misusing electricity. Here again apart from the 1st Respondent’s assertion *ipse dixit*, he had failed to substantiate the receipt of the telephone call.

Going by the version of the 1st Respondent, the first detection had been made on the 18th July, 2012 and action had been instituted against the Petitioner before

the Magistrate's Court on 19th July, 2012 the day after, and the Petitioner had pleaded guilty as referred to earlier. The Petitioner in his counter affidavit filed on 16th September, 2014 had taken up the position that when the 1st Respondent visited his premises, he inspected all other meters fixed at the premises as well and did not find any fault with any of them other than, that the meter had got damaged by the fire. The second detection had been just 12 days after that, according to the 1st Respondent. If that assertion by the 1st Respondent were correct, then the Petitioner had tampered with the meters after the 1st detection, after he was fined by the Magistrate Rs.10, 000/- and after he had been ordered to pay a further sum of over three hundred and fifty thousand rupees as damages caused to the Electricity Board.

Regard being had to common cause of natural events and human conduct I am of the view that it would be reasonable to presume, that it was extremely unlikely that the Petitioner would have resorted to tampering with the electricity meters after such a stiff penalties had been imposed on him.

With regard to the case filed in the Magistrate's Court, the 1st Respondent states that the "damage" certificate was filed. The proceedings of that case filed by the Respondent, however, does not contain the "damage certificate" which supports the Petitioner's version that the "damage certificate" was not filed.

The 1st Respondent in his affidavit had made a general denial with regard to the other allegations made. In the face of the specific allegation made by the Petitioner regarding the solicitation of a bribe of Rs.100, 000, there is no specific denial of the said allegation by the 1st Respondent nor the allegation that he came back on 1st August to the Petitioner's business premises to demand, what was solicited.

As held in the case of *Velmurugu*, 1981, 1SLR 406, the degree of proof required in an allegation of violation of a fundamental right is the balance of probability. In this context when one considers the material placed before this court by the Petitioner, he had in my view established the alleged violation of Article 12 and 14 (1) (g).

Upon perusal of the proceedings before the Magistrate's Court it appears that the proceedings have been instituted by the Officer-in-Charge of Pitigala Police. It is not clear from the material placed before this court, whether the Petitioner was placed under arrest by the 1st Respondent or by the two police officers (8th and 9th Respondents) who accompanied him. As leave to proceed had been granted only against the 1st Respondent and the 6th Respondent Board, it would not be possible to make a specific finding on Article 13 (1) as against the other Respondents in respect of whom leave to proceed had been granted. However, it is evident that the Petitioner had been arrested by an organ of the state, and I hold the arrest is illegal and therefore was violative of Article 13 (1) of the Constitution.

As stated by Justice Wanasundera in the case of *Jayanetti Vs. The Land Reform Commission and others* 1984 2 SLR 172 at 184 "*Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 combines the English Law doctrine of the rule of law with the equal protection clause of the 14th amendment to the US Constitution. We all know that the rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge acts of the state from whichever organ it emanated and compel it to justify its legality. It was not confined only to Legislation, but intended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12*".

In the instant case no material has been placed before the court on behalf of the 6th Respondent Board with regard to the allegation leveled against one of its employees namely the 1st Respondent whose conduct is impugned in these proceedings.

No doubt the 6th Respondent Board has every right to take action against illegal tapping of electricity or any other act obnoxious to the provisions of the relevant Act. I am of the view, however, it is the bounden duty of the 6th Respondent Board to put in place a mechanism so as to provide a smooth and efficient service wherein complaints are promptly attended to without discrimination and consumers who are not at fault are not harassed or subject to duress. The 6th Respondent Board is a state organ and a public utility that produces and supply electrical energy. Electrical energy in the present context, is indispensable for human life and the society would be put to severe hardships if these services are not made available. The large scale production of the said source of energy and the supply of the same is the virtual monopoly of the 6th Respondent Board save for the limited role played by LECO (Lanka Electricity Company). Any deficiency in service would lead to severe hardships on the society. To provide a service to all consumers without any discrimination and to provide safe and adequate service in a timely manner are the recognised duties of a public utility.

As Justice Sharvananda expresses the view that *“The powers of a public authority are essentially different from those of private persons. The whole conception of unfettered discretion, is inappropriate to a public authority, which is vested with powers solely in order that it may use them reasonably in the public interest”*. (Fundamental Rights In Sri Lanka A Commentary)

In the instant case, when the 1st Respondent was informed by the Petitioner of the fire that occurred at the premises and the damage to the electricity meter, he misused the discretion vested in him to the detriment of the Petitioner. He had

every opportunity of ascertaining the veracity of the Petitioner's version before taking any action. I can only conclude that rather than follow this basic procedure he chose to do otherwise to exploit the Petitioner's helpless position by demanding a bribe of Rs 100,000; greed before service.

Petitioner had averred in his Petition that one of his children were studying in the advanced level class. Depriving the Petitioner, of electricity would be disruptive of his family life, his personal life and his business.

It appears to me that it was for this reason that the Petitioner caved into the demands of the 1st Respondent.

Considering the above, I hold both the 1st and the 6th Respondent have violated the fundamental right of the Petitioner enshrined in Articles 12 (1) and 14 (1) (g) of the Constitution.

Although, Lord Diplock in the Privy Council decision in the case of *Maharaj v. The Attorney-General of Trinidad and Tobago*, No. 2 - [1979] A.C. 385, explained liability (*contravention of constitutional rights*) in the following words:

“This is not vicarious liability it is a liability of the State itself. It is not a liability in tort at all, it is a liability in the public law of the State which has been newly created”

I wish, however, to quote with approval the pronouncement made by Justice Fernando in *Saman v. Leeladasa and another 1989 1 SLR page 1.*

“The Constitution protects fundamental rights against infringements by all persons, and not only by the State, I think that the question whether such a right has been infringed by a Respondent, and if so, whether any other person is also

liable in respect of such infringement, must be determined by the same legal principles. The principles whereby an employer or a principal is to be made responsible for the act of an employee or agent have not been laid down in the Constitution, and hence must be determined by reference to other (statutory or common law) principles of our law those principles do not vary (except perhaps in terms of the State (Liability in Delict) Act). Questions relating to acts which are ultra vires or done in violation of prohibitions, do arise, but the common law principles are sufficiently virile and flexible to deal with these. I am conscious that the time limits fixed by Article 126 may create difficulties of proof of loss or damage, but the power of this Court under Article 126 (4) is extensive, and enables the Court to give appropriate directions (even after an infringement has been held to have been committed) to obtain the material necessary to quantify the loss or damage. A wrongful act - the invasion of a right, or the violation of a legally protected interest - causing pecuniary loss to the plaintiff, committed wilfully, is sufficient to establish liability in the Aquilian action ; in the modern law, patrimonial loss need not be proved where the object of the action is not to obtain compensation for harm done but to establish a right. An impairment of personality - the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be a public or a private right - committed with wrongful intent establishes liability in the actio injuriarum ; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered (I). When the Constitution recognised the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable; and his master, too, if the wrong was committed in the course of employment, (b) It was not necessary for a new delict to be created by statute or judicial decision. The 1st Respondent is thus liable in respect of the infliction of cruel, inhuman and degrading treatment and punishment on the Petitioner, for which the State is also liable as it was inflicted

in the course, and within the scope, of his employment under the State. (emphasis added)

I have already referred to some of the expenses the Petitioner had to bear due to the wrongful action of the 1st Respondent.

Justice Abdul Carder in the case of *Daramitipola Ratnasara Thero v. Udugampola & Others* - (1983) 1 SR LR 461, 471 (with Justices, Wimalaratne, Ratwatte, Colin-Thome and Rodrigo, agreeing) held :

“In my view this is a serious violation of the fundamental rights of a citizen of this country which calls for the award of substantial damages. A mere declaration without more in the form of some penalty . . . will not deter such future abuse of fundamental rights of citizens. This Court does have the power to grant such relief or make such directions as it may deem just and equitable in the circumstance in terms of Article 126 (4) of the Constitution”.

All attendant facts and circumstances considered, I direct the 1st Respondent to pay personally, a sum of Rs.725,000 (seven hundred and twenty five thousand) and the 6th Respondent Board to pay a sum of Rs.400,000 (Four hundred thousand) as compensation to the Petitioner whilst the State is directed to pay a sum of Rs, 25,000/- to the Petitioner.

All payments to be made within four months of today.

I am also of the view that this is a fit instance where the 6th Respondent ought to have conducted an inquiry into this matter. We leave it open to the 6th Respondent Board to take whatever action necessary in accordance with the applicable rules and regulations as there is no material before this court to determine what they are.

Petitioner is entitled to the cost of this application.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J DE ABREW

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONERATNE

I agree

JUDGE OF THE SUPREME COURT