

**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.*

SC FR Application  
No.15/2010

1. Shanmugam Sivarajah
2. Sivarajah Sarojini Devi

Presently residing  
in Sagetrastrasse 12,3  
133  
Belp, Switzerland.

**Petitioners**

**Vs.**

1. Officer in Charge, Terrorist  
Investigation Division, Chaithya  
Road,  
Colombo 01
2. Director, Terrorist Investigation  
Division, Police Headquarters,  
Chaithya Road, Colombo 01.
3. Deputy Inspector General of Police,  
Terrorist Investigation Division,  
Chaithya Road, Colombo 01.

4. Inspector Abdeen, Terrorist Investigation Division, Chaithya Road, Colombo 01.
5. Subair, Terrorist Investigation Division, Colombo 01.
6. Mr. Mahinda Balasuriya, Inspector General of Police, Police Head Quarters, Colombo 01.
- 6A. Mr. N.K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 1.
7. Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 02.
- 7A. Mr. B.M.U.D Basnayake  
Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 2.
- 7B. Eng. Karunasena Hettiarachchi,  
Secretary to the Ministry of Defence, Ministry of Defence, Colombo 2.
8. Mr. H. K. Balasuriya, Additional Secretary, Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 02.
- 8A. Mr. S. Hettiarachchi,

Additional Secretary,  
Ministry of Defence, Public Security  
and Law and Oder,  
Ministry of Defence,  
Colombo 2.

- 8B Mr. S.Hettiarachchi,  
Additional Secretary Ministry of  
Defence, Ministry of Defence, Colomb  
Colombo 2
9. Mr. Lalith Weerathunga, Secretary to  
His Excellency the President,  
Presidential Secretariat, Colombo 01.
- 9A P.B.Abeykoon,  
Secretary to His Excellency the  
President,  
Presidential Secretariat, Colombo 01.
10. The Honourable Attorney General,  
Department of the Attorney General,  
Colombo 12.

**Respondents.**

**BEFORE:** Priyasath Dep, PC, C J.  
B. P. Aluwihare, PC, J &  
Anil Gooneratne, J.

**COUNSEL:** Saliya Pieris with Asthika Devendra and Thanuka Nandasiri  
for the Petitioners.  
Shanaka Wijesinghe, DSG for the Respondents.

**ARGUED ON:** 13.03.2017

**DECIDED ON:** 27.07.2017

ALUWIHARE, PC, J

The petitioners in this case seek a declaration that their fundamental rights guaranteed by Article 12 (1) of the constitution have been infringed by the 1st to the 10<sup>th</sup> respondents.

Leave to proceed was granted by this court for the alleged violation of Article 12 (1) of the Constitution, on 29-04- 2010.

The gravamen of the Petitioners' complaint is that, the order of forfeiture of the property owned by the petitioners, in terms of Regulation 7 (1) of the Emergency (Proscription of the Liberation Tigers of Tamil Elam) Regulations 2009 was made without considering the relevant material, in violation of the rules of natural justice and that the said order of forfeiture is unreasonable and unfair. The Petitioners are seeking, by way of relief, an order from this court, a declaration that the said order made by his Excellency the President in his capacity as the Minister of Defence, is null and void and of no force in law.

The Regulations aforesaid (hereinafter referred to as Emergency Regulations), were proclaimed by Gazette extraordinary bearing number 1583/12 of 7<sup>th</sup> January 2009 and subsequently amended by Gazette extraordinary bearing number 1606/12 of 18<sup>th</sup> June 2009.

Background :

Petitioners to the present application became the owners of the building in question by a deed of transfer bearing No.7143 attested by Notary Public Mrs. S Ganagatharan on 22<sup>nd</sup> of August 2005. The said premises originally bore the assessment number 18/1, 1st Chapel lane, but presently bears three separate assessment numbers 18/1,18/1-1/1 and 18/1-2/1, 1<sup>st</sup> Chapel Lane, Colombo 6.

The petitioners who are at present domiciled in Switzerland had executed a special power of attorney in favour of Ms. Valarmathy Suntharalingam to act as their attorney in order to, inter *alia* superintend, manage and control the said

premises and also to appear before any court in Sri Lanka, in all matters in connection with the said property.

Petitioners had executed an additional power of attorney on the 12<sup>th</sup>.04. 2010, so as to avoid any doubt regarding the previous power of attorney in favour of the aforesaid Ms. Valarmathy Suntharalingam.

Initially, a Sivapragasm Vijayanesan, a cousin of the 2<sup>nd</sup> petitioner, had looked after the premises in question. In 2006 Mr. Sivapragasam Vijayanesan had given the 1<sup>st</sup> floor of the aforesaid premises on lease to an organization named “Centre for Health Care”. Subsequent to the execution of the said lease, in 2008, Mr. Vijayanesan had migrated to Australia. Thereafter, upon the request of the petitioners, another cousin of the 1<sup>st</sup> petitioner, their present attorney Ms. Valarmathy Suntharalingam had come into occupation of the ground floor of the premises and further had collected the rent from the tenants on the other two floors.

Petitioners had been informed by Ms. Suntharalingam, that on 26<sup>th</sup> June 2009, several police officers attached to the Terrorist Investigation Division, including 4<sup>th</sup> and 5<sup>th</sup> Respondents had come to the said ‘Centre for Health Care’ and arrested three Tamil persons who had been working for that Centre. The said Respondents had also arrested the caretaker of the building, namely Wigneshwaran Kandusami who had been employed by the Centre for Health Care.

As per the reports filed by the 1<sup>st</sup> Respondent, the Centre for Health Care a non-governmental organisation, was alleged to have been a front organisation for the LTTE. On the very same day, Ms. Suntharalingam who had proceeded to the Wellawatte Police station to lodge a complaint and she had been directed to the Terrorist Investigation Division (hereinafter also referred to as the TID).

Ms. Suntharalingam, thereafter, on the advice of the petitioners had met the 1<sup>st</sup> Respondent, the OIC-TID, on 28.072009 and had complained to him that the

premises concerned has been unlawfully occupied purportedly under the authority of the OIC-TID. The 1<sup>st</sup> Respondent, however, had refused to entertain the complaint on the ground that Ms. Suntharalingam has no right /authority over the premises.

The Petitioners states that there was no justification for the 1<sup>st</sup> Respondent's action as Ms. Suntharalingam as the holder of the power of attorney, is legally empowered to act on their behalf who happened to be the holder of their power of attorney.

There is ample material in documents filed by the Petitioners, to establish that the Petitioners were the owners of the premises concerned at the time relevant to the incident referred to in this application. The documents have not been challenged by the Respondents other than to say that the "Centre for Health Care" was run by the LTTE.

It was in this backdrop that his excellency the President, in his capacity as the Minister of Defence, acting under the aforesaid Emergency Regulations made an order forfeiting the premises in question, to the State.

By the document marked and produced as P10A, Additional Secretary (police) of the Ministry of Defence, Law and Order had communicated to the Inspector General of Police, that his excellency the President had authorised the forfeiture of certain properties inclusive of the premises in question.

Interestingly, it's the Additional Secretary (police) who had sought permission from Secretary Defence to request his excellency the President to authorise the forfeiture of property in terms of Regulation 7 (1), asserting that the IGP had confirmed, that the Centre for Health Care was being run with the funding from the LTTE. (Documents P10B).

The Secretary Defence, on the same document, had made an endorsement addressed to his excellency the president seeking authorisation for the forfeiture,

(P10C). At the foot of that document, P10C, his excellency the president had made an endorsement “approved” and had placed the signature.

In terms of Regulation 7 (1) of the Emergency (Proscription of the Liberation Tigers of Tamil Eelam) Regulations, published in the Gazette dated 7<sup>th</sup> January 2009 bearing No.1583/2, power is vested with the Minister of Defence to forfeit to the state, moneys, securities or credits which are being used or intended to be used for the purposes of the proscribed organisation or **any other movable/immovable property belonging to such organization**. The order must be in writing, and is to be made only after such inquiry, as the Minister thinks fit.

The above Regulation had been amended by insertion of Regulation 7A by the Gazette of 18-6-2009 bearing number 1606/23 and which, inter alia reads thus:

*No Person shall-*

*(a)....*

*(b)...*

*(c) rent, lease or obtain or procure any movable or immovable property, material or other thing:*

*(d)...*

*(e)...*

*On behalf of himself or any person or body of persons (whether incorporated or unincorporated) in*

*contravention of the provisions of these regulations, with to or for, the Organisation styled the “Liberation Tigers of Tamil Elam” or any member of such organisation.*

*(2) Any person who acts in contravention of the provisions of paragraph (1) of this regulation shall be guilty of an offence*

*and all property or money, which is the subject of such offence shall be forfeited to the State.*

In his recommendation to the 7<sup>th</sup> respondent (P10B), the Additional Secretary claims, the Inspector General of Police has established after inquiries, that the Centre for Health Care is a Non-Governmental Organisation **run** by the LTTE and that the movable and immovable property had been used for the purposes of the LTTE and that the Inspector General of Police had recommended that the property referred to, in the Annexure A4 be forfeited.

Nowhere in 7<sup>th</sup> Respondent's recommendation, (P10B) is it asserted that the premises in question belongs to the LTTE.

Analysis of the Emergency Regulations aforesaid would be critical in my view in deciding as to whether the decision to forfeit the property is arbitrary and unreasonable and the forfeiture is illegal as claimed by the Petitioners, which forfeiture in turn had infringed their fundamental rights.

It is clear that the applicable provision for the order of forfeiture in the instant case is Regulation 7, in as much there is no evidence that any one had been charged under Regulation 7A (1), the only other section under which forfeiture can be affected.

Before an order for forfeiture can be made, however, it is imperative to establish that the property concerned should belong to a proscribed organization, in the instant case, the LTTE. It is a further requirement that the minister should hold such inquiry as he thinks fit before the decision is made.

The petitioners complain that no such inquiry had been held and as they have title to the property which could have been easily established through title deeds, they were not given an opportunity to make representations. Furthermore, the Centre for Health Care had leased only one of the floors of the premises in question and in proof of that, a letter written on behalf of the Centre For Health Care in 2007 had been marked and produced as P5. By the said letter Programme

Co-ordinator of Centre for Health Care had requested an extension of the lease of the premises 18/1, Chapel lane. This letter was written much before the relevant Emergency Regulations came into force.

I have given my mind to the objections filed on behalf of the 1<sup>st</sup> Respondent, the Officer-in-Charge of the TID and the only objections filed on behalf of the Respondents in this case. He asserts that the deed number 7143 was executed in transferring the property in favour of the Petitioners at a time both Petitioners were out of the country. This is a frivolous objection and shows the abysmal ignorance of the law. The presence of the buyer (transferee) is not a requirement to execute a deed of transfer and the absence of the Petitioners has no bearing on the execution of the deed or its validity.

The issue that this court has to answer is, did the minister hold the inquiry as required by the regulations and if so, did the minister go into the ownership of the premises 18/1, 1 Chapel Road Wellawatte before making the order of forfeiture.

Petitioners have, in these proceedings, furnished the title deed (P1), the survey plans (P2 and P2A), certificate of registration of ownership, issued by the Colombo Municipal Council (P2B1 and P2B2) and statutory notice of assessment (P2C1- P2E3) and had argued that the petitioners are the lawful owners of the premises in issue. It was also contended on behalf of the Petitioners that as oppose to the material furnished on behalf of the Petitioners, the Respondents have failed to establish any nexus between the Centre for Health Care and the Petitioners, nor is there any material to say that the acquisition of the property had been financed by the LTTE.

In the objections filed on behalf of the 1<sup>st</sup> Respondent, it is pointed out that a sum of Rs. 5.7 million had been paid from a joint account held by one Iyampille Gunamalan and Karthigesu Sivanesharajah and the balance was paid in cash by Sivapragasam Vijayanesan, implying that the money that was paid to the seller did not come from the Petitioners. According to the Petitioners, however, the said

Vijayanesan is a cousin of the 2<sup>nd</sup> Petitioner who had been entrusted with the property, the same to be looked after.

The basis, however, for the initial seizure of the property in issue, according to the 1<sup>st</sup> respondent, had been the suspicion that the property was being used for committing offences and for illegal activities. The 1<sup>st</sup> Respondent had averred in his objections that *“Since it came to light that the property was being used for committing offences and for illegal activities the property was sealed as per the gazette notification No.1 of 2005 dated 13-08-2005”*.

The 1<sup>st</sup> Respondent, however, had not referred to what those offences are or whether any person who had any association with the Centre for Health Care, had been charged in a court of law. It is the assertion of the Petitioners that the persons arrested by the TID have been discharged without any one of them being firmly arranged. The Respondents have not refuted this position. When one considers the objections filed on behalf of the Respondents, one gets the impression that the respondents are implying that the monies that went into the purchase of the property did not come from the Petitioners.

The material placed before us, there is nothing to indicate that the basic requirements that the minister was required to adhere to under the Regulations had been followed in the instant case. Specifically, the fact that an inquiry was held by him. It was argued on behalf of the Petitioners that the 1<sup>st</sup> to the 6<sup>th</sup> Respondents had failed to place relevant facts before the Minister and there was a duty on the Respondents to appraise the President of the full facts of this matter and the Petitioner contend that what can be deduced from these facts is that no inquiry had been held.

The Emergency Regulation, no doubt impinges on the property rights of the citizens and an order of forfeiture of property is purely an exercise of administrative discretion. Therefore, the minister is required to hold an inquiry in to the matter before a decision is taken in terms of the applicable Regulation.

House of Lords in the case of *Padfield Vs, Ministry of Agriculture 1968 (A.C) 997* rejected the concept of unfettered executive discretion. Lord Denning signifying the duty to exercise the discretion according to law, stated that “*the discretion of a statutory body is not unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant.*” It appears that in the instant case number of relevant matters does not appear to have been considered. Specifically, failure on the part of the Respondent to establish any nexus between the Petitioners and the Centre for Health Care. When one peruses P10 C and P10E it appears that the Minister (his excellency the President) had acted on the unverified reports of the police and abdicating his authority had proceeded to make an order of forfeiture that is nothing more than mechanical.

It was strongly urged on behalf of the Petitioners that the Respondents (Police) had made wrong representations without a proper consideration of the materials before him stating that the property in question was owned by the Centre for Health Care, whereas the said property was owned by the petitioners on whose behalf the 1<sup>st</sup> floor bearing the assessment 18/1 -1/1 was leased to the said Centre for the Health Care.

It also appears that his Excellency the President (in his capacity as Defense Minister) was misled by the 6<sup>th</sup> respondent in issuing an order to seize the premises by convincing that 18/1 Chapel lane Wellawatte was owned by the Center for Health Care. It was not disclosed to the President that the premises in question was owned by the petitioners and that there are no allegations against the petitioners of any involvement with the LTTE.

In view of the wording used in Regulation 7 (1) which specifically states that “where the Minister is **satisfied**, after such **inquiry** as it thinks fit.....”, it is imperative that minister holds an inquiry before making an order to forfeit any property. Thus, the empowering Regulation requires the Minister to come to a specific finding objectively, that the property in question belongs to the proscribed organisation. In my view, it is important to consider whether an

inquiry was conducted by the Minister of Defense as per required by the regulation 7 (1) of the Gazette No.1583/12 dated January 7<sup>th</sup> 2009. The above regulation specifically states that “where the Minister is satisfied, after such **inquiry as it thinks fit.....**”.

The legal definition of the term inquiry means the examination or investigation of facts or principles. There is no established degree of inquiry required by the Gazette. Also, the term “as it thinks fit” gives the discretion to the Minister to decide as to the extent of the inquiry that should be conducted and that could be varied from case to case.

In the material placed before this court there is nothing to say that the minister has arrived at such specific finding, hence in my view, there had been an error in the exercise of power by the minister in this instance.

In the case of *The Manager, Government Branch Press Vs Beliappa AIR1979 SC 429*, in interpreting Article 14 of the Indian Constitution, Justice Bhagawathi held:- “*In order to establish discrimination or denial of equal protection it is not necessary to establish the due observance of the law in the case of others who form part of that class in previous instances. The Rule of Law, which postulates equal subjection to the law, requires the observance of the law in all cases.*”

In the instance case the petitioners ought to have been afforded an opportunity to be heard or place any material in their favour and in my view, the term “inquiry” in Regulation 7 (1) postulates giving an opportunity to all parties that may be affected by an order of forfeiture. This court had consistently held that noncompliance of the rules of natural justice in particular the *audi ultra partem* rule tantamount to an infringement of fundamental rights under Article 12 (1). vide: *Prassana Withanage V. Sarath Amunugama 2001 1SLR 391 and Jayawardena V. Dharani Wijeyathilke 2001 SLR 132*

As to the exercise of power by authorities, Justice Mark Fernando remarked in the case of *Bandara v. Premachandra 1994 1SLR 304* “*Powers are conferred on*

*various authorities in the public interest..... and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction”.*

It would, in my view, be pertinent to refer to the pronouncement made by His Lordship Justice Wanasundera in the case Jayanetti v Land Reform Commission 1984 2 SLR 172 wherein his lordship said:

*“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 14<sup>th</sup> 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 any act of the state from whichever organ it emanated and compel it to justify its legality. It was not confined only to legalization, but extended 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**”* Therefore, it is clearly evident that there is a violation of Article 12 (1) as a Fundamental right of the petitioners.

All attended facts and circumstances considered, I hold that the forfeiture of the Petitioners’ property by the order (P10E) made by his excellency the President in his capacity as the Minister of Defense has infringed the petitioner’s fundamental right under Article 12(1) of the Constitution, and the said order forfeiting the premises bearing assessment no. 18/1 Chapel Lane Wellawatte Colombo 6 in terms of Regulation 7(1) of the Emergency (proscription of the Liberation Tigers of Tamil Elam) Regulations 2009, is null and void and is hereby quashed.

In the course of the hearing of this matter it was submitted on behalf of the Petitioners that officers of the Terrorist Investigation Division of the police are still in occupation of the building. I make a further direction to the 1<sup>st</sup> to the 3<sup>rd</sup> Respondent and the 6B Respondent to take immediate steps to hand over vacant

possession of the premises aforesaid to the Petitioners, if this assertion is correct and in any event not later than eight (08) weeks from the date of this judgement.

The 1<sup>st</sup> to 3<sup>rd</sup> Respondent and the 7<sup>th</sup> Respondent have acted in total disregard of the essential requirements of justice in making the recommendation to His excellency the President. However, this does not appear it to have been done with any malicious intent against the Petitioners, hence I am of the view that, this is not an instance where the Respondents should be called to pay compensation personally.

I consider it is equitable to award the Petitioners a sum of Rupees five hundred thousand, (Rs.500,00/=) as compensation and are entitled to the cost of this application.

JUDGE OF THE SUPREME COURT.

Justice Priayasath Dep P.C

I agree

CHIEF JUSTICE

Justice Anil Gooneratne,

I agree

JUDGE OF THE SUPREME COURT

JUDGE OF THE SUPREME COURT