

CORPORATE BODIES AS INSTRUMENTALITIES OF THE STATE AND THE JURISDICTION OF THE SUPREME COURT

Chandaka Jayasundara*

Article 12 (1) of the Constitution of Sri Lanka provides and guarantees to all persons the equality before the law as well as the concomitant right of equal protection of the law.

In the case of Jayanetti Vs. The Land Reform Commission¹ Wanasundara J held 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”.

Wade² observes that Courts have through their decisions extended the pale of judicial review “to bodies which, by the traditional test, would not be subject to judicial review and which, in some cases, fall outside the sphere of government altogether.”

A variety of government/State owned commercial organizations although incorporated as limited liability companies under the provisions of the Companies Act nevertheless engage in activities which,

although devoid of any statutory flavor or status may be considered acts of the State or the government due to the connection and control such corporate entities have with the State or the Government. This is more so in the context of recent history in Sri Lanka where the Government/State takes an pro-active role in the market place in commercial activities ranging from the management of airlines and Ports to providing even basic grocery, catering, medical and other services for the general public.

As held in Harjani v. Indian Overseas Bank³ Courts in Sri Lanka and elsewhere have demonstrated a willingness to ‘recognize the realities of executive power’ and to review the decisions of a number of such bodies. In their desire to prevent the abuse of ‘executive power’ in the hands of these powerful non-statutory bodies, the courts have ventured to review the decisions of these bodies. It must be noted that this willingness is not a purely Sri Lankan initiative but was started in the English Courts.

As held in Harjani’s case, Courts have extended the application of prerogative remedies to the non-statutory bodies

* President’s Counsel ,LLM (Colombo)

¹ 1984 2 SLR 172 at 184

² H.W.R. Wade & C.F. Forsyth, Administrative Law, 8th Edition, 627

³ [2005] 1 Sri LR 167 at 172- 173

regulating industries on a voluntary basis through a process of self-regulation⁴.

This development with regard to prerogative remedies has also been applied in full with regard to the fundamental rights jurisdiction by the Supreme Court in a series of judgements, culminating in the judgement of Prasanna Jayawardena J in *Captain Channa D.L. Abeygunewardena Vs. Sri Lanka Ports Authority & others*⁵ which will be discussed in detail below. In that context, in *Perera Vs. Universities Grants Commission*⁶, Sharvananda J, as his Lordship then was, held that:

"The wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by the State authority, does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising Governmental functions. It refers to exertion of State power in all its forms"

On the same lines, in *Wijetunga vs. Insurance Corporation*⁷, Sharvananda J observed:

"The term 'executive action' comprehends official actions of all Government Officers When private individuals or groups are endowed by the State with power or functions, governmental in nature, they become agencies or instrumentalities of the State subject to the constitutional inhibitions of the State."

*Atukorale J's in Rajaratne vs. Air Lanka Ltd*⁸ that,

"..... by resorting to this device of the corporate entity, the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance. Consequently, when ascertaining whether a corporate body is an agency or instrumentality of the State, the Court should endeavour to perceptively examine with an investigative bent of mind, the character of the corporate body and the features of its management and operations and, thereby, determine whether the corporate body is, in truth and in fact, an agency or instrumentality of the State. *A Court has to look behind any cosmetic artifices of incorporation or illusory distancing placed between State and the corporate body and dissects the flesh, blood and bones of the corporate body to expose its real*

⁴ R v. Panel on Takeovers and Mergers ex parte Datain [1987] 1 QB 815

⁵ S.C F.R. 57/2016, decided on: 20th January 2017,

http://www.supremecourt.lk/images/documents/sc_fr_57_2016.pdf

⁶ [1978-79-80 1 SLR 128 at 137-138]

⁷ 1982 1 SLR 1 at p.5-6

⁸ 1987 2 SLR 128

kinship and association with the State.”

In examining the fundamental rights jurisdiction bestowed on the Supreme Court in terms of article 126 of the Constitution, Atukorale J held that:

- The sole and exclusive jurisdiction vested in the Supreme Court by Article 126 of the Constitution to hear and determine questions relating to the infringement (actual or threatened) of fundamental rights enshrined in Chapter 111 are confined to those that arise out of executive or administrative action.
- In so far as fundamental rights are concerned, it is only infringement or imminent infringement by executive or administrative action which falls to be justiciable in this Court under Article 126.
- The question therefore arises as to what is meant by the expression executive or administrative action. Our Constitution contains no definition of this expression.
- The trend of decisions, however, has been to construe this expression as being equivalent to action of the Government or of an organ or instrument of the Government.

In *Wijeratne v. The People's Bank*⁹ Sharvananda, J observed that: the cardinal question as to whether the People's Bank is properly to be regarded as merely an instrument subservient to the State or in truth is a commercial bank, not identifiable with the State has to be decided by looking

into the function and control of the bank; On the material before Court it was held that the major role of the People's Bank was in the commercial sphere; that it was a commercial bank, that there was no nexus between the State and its banking activities that the State was not involved in the Commercial activities of the bank and that such commercial activity of the bank did not qualify as State action; and the action of the bank in reorganizing its security services, being a part of its commercial activities, did not amount to executive or administrative action.

However, in *Ariyapala Guneratne v. The People's Bank*¹⁰ Wanasundera J distinguishing *Wijeratne vs Peoples Bank*, pointing out that numerous provisions of the People's Bank Act; No. 29 of 1961, which indicated a close nexus of the Bank with the Government and also Government control of the Bank, held that the People's Bank constituted the State or the Government within the meaning of S. 18 of the 1972 Constitution in so far as the matter in issue before him was concerned. He also added that in his view even under the 1978 Constitution the concept of State was a wider concept than "the expression executive or administrative action".

Thus, in the background of the above judicial authorities, the term "organs of the government" used in Article 4 (d) of the Constitution encompasses not only the State per se but also its "agencies and instrumentalities" which exercise Governmental functions.

⁹ (1984) 1 Sri LR1

¹⁰ (1986) 1 Sri LR 338

As examples of the expansion of the jurisdiction of the Supreme Court in terms of Article 126:

- In **In Perera vs. Universities Grants Commission**¹¹ the Supreme Court held that the University Grants Commission, which was a corporate body established by Statute, performed a “very important governmental function” and was financed by the State, which made it “an organ or delegate of the Government”;
- In **Rajaratne vs. Air Lanka Ltd** the Supreme Court held that taking into consideration the fact that Air Lanka was established and its existence was for carrying out a function of great public importance, once carried out by the government through a statutory corporation, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors Air Lanka Limited is an agency or instrumentality of the government.
- In **Jayanetti vs. Land Reform Commission**¹², the Supreme Court held that the Land Reform Commission, which was a corporate body established by Statute, was an instrumentality of the State since it was set up to manage vast acres of State land in compliance with State policy and subject to close State

control in its activities and its finances.

- In **Dahanayake vs. De Silva**¹³, the Supreme Court regarded the Ceylon Petroleum Corporation as an agency of the State since it had a monopoly on the sale of petroleum products which are not a mere consumer item of private trade and since it provided an essential service by distributing and selling these petroleum products to the people.
- In **Ariyapala Guneratne v. The People's Bank**¹⁴ distinguishing the judgement of **Wijeratne vs. Peoples Bank**¹⁵ which held that the Peoples Bank was not an agency or instrumentality of the State that the Peoples Bank indeed is an agency or instrumentality of the State.
- In **Jayakody vs. Sri Lanka Insurance Corporation and Robinson Hotel Company Ltd**¹⁶, the Supreme Court held that, a duly incorporated limited liability Company which carried on a solely commercial enterprise was an agency or instrumentality of the State if the State had effective ownership and control of that Company. The Supreme Court held that this would be so even if the ownership was through another legal entity and the control was exercised through another legal entity who acted as the agent.

¹¹ supra

¹² supra

¹³ 1978-79-80 1 SLR 47

¹⁴ supra

¹⁵ supra

¹⁶ 2001 1 SLR 365

Fernando J held [at p.373] that: *“The chain of ownership and control may extend indefinitely: e.g. the State may set up a corporation which it (in substance) owns and controls; that corporation may set up a limited liability company which it (in substance) owns and controls; and that company in turn may set up another company or other entity . . . and so on”*. And further: *“But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities -every link in that chain -are State agency”* and *“Even if it was performing purely commercial functions, it would nevertheless be a State agency, albeit a State agency performing commercial functions.”*

- In **Wijewardhana vs. Kurunegala Plantations Ltd**¹⁷, it was accepted by the Court that, a duly incorporated limited liability Company which was subject to ministerial control, was to be regarded as being an agency or instrumentality of the State.

The above being some of the instances, where the Supreme Court has found that government agencies including Corporations set up by Statute and limited liability companies are amenable to the fundamental rights jurisdiction of the Supreme Court, in **Dharmaratne vs. Institute of Fundamental Studies**¹⁸, the Supreme Court held that courts have applied various tests to determine whether

¹⁷ [S.C F.R.24/2013 decided on 03.09.2014 http://www.supremecourt.lk/images/documents/scfr_24_13.pdf

a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions.

Marsoof J held that where the body whose action is sought to be impugned is a corporate entity the tests that have been used included, among other things:

- on the nature of the functions performed by the relevant body,
- the question whether the state is the beneficiary of its activities,
- the manner of its constitution,
- Whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds,
- The degree of control exercised by the State,
- The existence in it of sovereign characteristics or features, and
- Whether it is otherwise an instrumentality or agency of the State.

As such, some of the features which demonstrate that a corporate body (incorporated by Statute or otherwise) to be an agency or instrumentality of the State, will be:

- The State, either directly or indirectly, having ownership of the corporate body or a substantial stake

¹⁸ [2013] 1 SRI L.R. page 365

in the ownership of the corporate body;

- The corporate body performing functions of public importance which are closely related to Governmental functions;
- The corporate body having taken over the functions of a Department of the State;
- The State having deep and pervasive control of the corporate body;
- The State having the power to appoint Directors and Officers of the corporate body;
- The State providing a substantial amount of financial assistance to the corporate body;
- The corporate body transferring its profits to the State;
- The State deriving benefits from the operation of the corporate body;
- The State providing benefits, concessions or assistance to the corporate body which are usually granted to organs of the State;
- The Accounts of the corporate body being subject to audit by the Auditor General or having to be submitted to the State or an official of the State;
- The State having conferred a monopoly or near monopoly in its field of business to the corporate body or the State protecting such a monopoly or near monopoly;

- Officers of the corporate body enjoying immunity from suit for acts done in their official capacity.

This brings us to the recent and the last judgement in this series which is *Abeygunewardena v. Sri Lanka Ports Authority*¹⁹ once again setting out in detail the applicable tests that have been used by the Supreme Court in order to determine whether any particular functionary or entity falls with the definition of ‘executive or administrative action.’

In this case the Petitioner was employed as the Deputy General (Bunkering) of a duly incorporated Company named Magampura Port Management Company Ltd [“MPMC”]. MPMC is fully owned by the Sri Lanka Ports Authority [“SLPA”].

- The Petitioner’s case was that he was suspended from service without pay signed by the Managing Director of the SLPA.
- The Petitioner filed a fundamental rights application alleging that, the Respondents’ acts of suspending him from service and subsequently terminating his services, were a violation of the Petitioner’s fundamental rights guaranteed by Articles 12 (1), 12 (2) and 14 (1) (g) of the Constitution.
- The Respondents raised two preliminary objections to the Petitioner’s ability to maintain the application. Their first objection was that, the impugned acts do not constitute “executive or administrative action” as contemplated in Article 126 of the

¹⁹ supra

Constitution and that, therefore, the Court does not have the jurisdiction to entertain the application.

- Their second objection was that, in any event, the impugned acts do not attract a Public Law remedy, and, for that reason, the Petitioner cannot invoke the fundamental rights jurisdiction of this Court.
- The Petitioner contended that although MPMC is a Company incorporated under the Companies Act No. 07 of 2007, MPMC is a body fully owned by, financed by, operated by and answerable only to the Government of Sri Lanka and the control exercised by SLPA permeates the functioning of MPMC at every level. The Petitioner also contended that the composition of the Board of Directors of MPMC reveals this control exercised by SLPA and that the facts before the Court make apparent the close nexus and inextricable link between the State, SLPA and MPMC. On this basis, it was contended that the impugned acts amount to “executive or administrative action” as contemplated in Article 126 (1) of the Constitution.
- The response of the Respondents was that MPMC is independent of the State and cannot be regarded as being “an agency or instrumentality” of the State and that the material which is before the Court establishes that, the State does not have “deep and pervasive” control over the management of MPMC. Secondly, they also

contended that, in any event, the impugned acts arise from or relate to a Contract of Employment which is commercial in nature and which has no ‘statutory underpinnings’ and that, therefore, the Petitioner’s remedy is limited to Private Law.

After an exhaustive study of the earlier judgements of the Court, Jayawardena J holds as follows:

- The Constitution does not define or describe what is meant by the term “executive or administrative action”. Thus, while Chapter III of the Constitution sets out the several fundamental rights guaranteed by the Constitution and the limited situations in which the exercise of these fundamental rights may be restricted, Article 17 in Chapter III only provides that, every person shall be entitled to apply to the Supreme Court respect of the infringement of any of his fundamental rights by “executive or administrative action”.
- In turn, Article 126 (1) only stipulates that, the Supreme Court shall have jurisdiction to hear and determine any question relating to the infringement of fundamental rights by “executive or administrative action” and Article 126 (2) only provides that, any person who alleges that any of his fundamental rights have been infringed by “executive or administrative action”, may apply to the Supreme Court for redress.
- Although the term “executive or administrative action” has not been

specifically defined or described in the Constitution, Article 4 (d) indicates that, this term refers to organs of the Government when it states “the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of the government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided”;

- Accordingly... this Court recognized that, the term “organs of the government” used in Article 4 (d) of the Constitution encompasses both the State and also its “agencies and instrumentalities” which exercise Governmental functions. It should be made clear that, in the context of the meaning of the term “executive or administrative action”, the words “State” and “Government” are used interchangeably and with the same meaning. Naturally so, since acts by the State or on behalf of the State are performed by the members and officers of the Government.
- When an impugned act is committed by or on behalf of the State by an Officer of the State or by a Department of the State, such an act will constitute “executive or administrative action” since in each such case it is, quite obviously, an “organ of the Government” which commits the act.
- However, the position is less clear when the act is committed by an incorporated body which has been established by the State or which is

connected to the State. In such circumstances, the corporate body which commits the impugned act has a legal persona and identity which is distinct from the State. This may make it not immediately evident whether or not the act committed by that corporate body, amounts to “executive or administrative action” as contemplated in Articles 17 and 126 (1).

- Therefore, in such situations where it is alleged that an impugned act committed by a corporate body amounts to “executive or administrative action” as contemplated in Articles 17 and 126 (1), it is necessary to ascertain whether that corporate body can be properly regarded as falling within the aforesaid description of an “agency or instrumentality of the State” referred to by *Sharvananda J in Perera vs. Universities Grants Commission* and *Wijetunga vs. Insurance Corporation.*
- The criteria applied in *Wijetunga vs. Insurance Corporation, Chandrasena vs. National Paper Corporation, Wijeratne vs. People’s Bank and Jayanetti vs. Land Reform Commission* are sometimes referred to as the “functional test” and the “Governmental control test”. The approach taken in these cases appears to have been on the lines that, the “functional test” would be satisfied only if the Statute establishing the corporate body vested it with the duty of performing

important Governmental functions which have traditionally been the sole and exclusive preserve of the State and that, the “Governmental control test” would be satisfied only if the Statute establishing the corporate body made it subject to very close State control coupled with financial dependence on the State.

- In subsequent cases, the Supreme Court has (while not jettisoning the “functional test” and the “Governmental control test”) adopted a more investigative approach when determining whether a corporate body is an agency or instrumentality of the State.
- The Supreme Court has been more ready to pull aside the veil of incorporation and probe deeper to see whether “the brooding presence of the State” as evocatively termed by Krishna Iyer J in *Som Prakash vs. Union of India*²⁰, lies behind the corporate body making it, in truth and in fact, an agency or instrumentality of the State.
- Consequently, the somewhat narrow and rigid tests referred to in the aforesaid early cases were expanded in the later Cases with the Supreme Court preferring to adopt a less restrictive approach which looked to ascertaining the real relationship which exists between the State and a corporate body.
- This approach was necessary since the Court was alive to the reality that, the modern State has an array of corporate entities which are formed by the State or on the directions of the State, to engage in a variety of activities including the provision of services, administration, manufacturing and commerce.
- Though these corporate bodies are legal persons in their own right and their legal identity is distinct from the State, they often operate in terms of State policy or are closely associated with the State or perform functions on behalf of the State or are largely controlled by the State or are financed by the State.
- In many cases, they conform to many or all of these characteristics. Frequently, the power and authority of the State lies behind these corporate bodies when they deal with the people. They are, in truth and fact, agencies or instrumentalities of the State which, therefore, must be held to be bound by Article 4 (d) of the Constitution, which requires all organs of the Government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.
- Citing *Rajaratne vs. Air Lanka Ltd*, Sukhdev *Singh vs. Bhagatram*²¹ and the decisions of *Ramana Dayaram Shetty vs. The International Airport Authority of*

²⁰ AIR 1981 SC 212 at p.229

²¹ AIR 1975 SC 1331

India²², Ajay Hasia vs. Khalid Mujib and Som Prakash vs. Union of India in which the Indian Supreme Court described some of the identifying characteristics which show a corporate body to be, in fact, an agency or instrumentality of the State. Atukorale J in Rajaratne's case followed the approach taken in these Indian decisions, which he described [at p.146] as "the test of governmental agency or instrumentality".

- This broader and more investigative approach was adopted in Roberts vs. Ratnayake²³, Wijenaike vs. Air Lanka Ltd²⁴, Wickrematunga vs. Ratwatte²⁵, Samson vs. Sri Lankan Airlines Ltd²⁶, Jayakody vs. Sri Lanka Insurance and Robinson Hotel Company Ltd²⁷, Organization of Protection of Human Rights & Rights of Insurance Employees vs. Public Enterprise Reform Commission²⁸, Dharmaratne vs. Institute of Fundamental Studies²⁹ and Wijewardhana vs. Kurunegala Plantations Ltd³⁰.
- The Judgments quoted illustrate some of the identifying characteristics of a corporate body which is an agency or instrumentality of the State, but it is important to keep in mind that, this list is by no means exhaustive.

- It must be stressed that, the presence of one or more of these identifying characteristics does not, necessarily, lead to the conclusion that a corporate body is an agency or instrumentality of the State. Instead it is, usually, the cumulative effect of some of these identifying characteristics being found in a corporate body, which leads to the conclusion that it is an agency or instrumentality of the State.
- It has to be kept in mind that, the modern State often resorts to the mechanism of incorporating Statutory Bodies and Companies to carry on the myriad activities which a modern State engages in, including commercial enterprises. It also has to be kept in mind that, although at first blush these corporate bodies may seem to be distinct from the State by virtue of their incorporation as limited liability Companies or because they engage in a solely commercial enterprise or for other reasons, some of them are, in truth and in fact, agencies and instrumentalities of the State which not only enjoy the privileges of an organ of the State but also have the power of the State strengthening their hand when dealing with the people.
- The Supreme Court, which is entrusted with the guardianship of

²² AIR 1979 SC 1682

²³ 1986 2 SLR 36

²⁴ 1990 1 SLR 293

²⁵ 1998 1 SLR 201

²⁶ 2001 1 SLR 94

²⁷ 2001 1 SLR 365

²⁸ 2007 2 SLR 316

²⁹ supra

³⁰ supra

fundamental rights under the Constitution, has a duty to ensure that, if a corporate body is, in truth and in fact, an agency or instrumentality of the State, that corporate body is held accountable to honor and abide by Article 4 (d) of the Constitution which requires all organs of the government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.

- Consequently, when ascertaining whether a corporate body is an agency or instrumentality of the State, the Court should endeavor to perceptively examine with an investigative bent of mind, the character of the corporate body and the features of its management and operations and, thereby, determine whether the corporate body is, in truth and in fact, an agency or instrumentality of the State.
- The circumstances referred to in the judgment establish that, the State both directly and through its organ, the SLPA, has deep and pervasive control over MPMC.
- The Supreme Court must look to the reality of the situation rather than the rules in Articles of Association and the reality of the situation is that the State controls MPMC.
- His Lordship quotes Krishan Aiyar J in **SOM PRAKASH vs. UNION OF INDIA** [at p.218] who stated, “.....merely because a Company or other legal person has functional and jural individuality for certain

purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we could not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights.....”.

- That the fundamental rights jurisdiction of the Supreme Court can be invoked by a Petitioner who alleges that an organ, agency or instrumentality of the State has violated his fundamental rights in the course of dealings under and in terms of a contract entered into between them.
- That this has to be so for the simple reason that, Article 4 (d) of the Constitution has an overarching effect which binds all organs, agencies and instrumentalities of the State in all things they do and at all points of time. Therefore, the fact that an organ, agency or instrumentality of the Government has entered into a contract cannot release it from its duty, under Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of the contracting party in the course of dealings under that contract. This duty will, necessarily, continue at all stages of the contract.

- This is a duty which an organ, agency or instrumentality of the State cannot escape from by entering into a contract and it is a right which the contracting party cannot cede or abandon by entering into a contract. The validity of this conclusion is confirmed by the fact that, Article 15 of the Constitution allows restrictions on fundamental rights only in the limited situations specified therein and only if so prescribed by Law. There is no provision made in the Constitution to restrict the operation of fundamental rights by contract.
- The terms of the contract between the State and the contracting party will, naturally, determine the rights and obligations of both parties and a Court would give full recognition to the principle that, parties are free to determine the contents of the contract and should be held to what they have agreed to. Thus, the terms and conditions of the contract would usually determine whether or not the rights of either party have been violated.
- However, when one of the contracting parties is an organ, agency or instrumentality of the State, there is the overriding obligation cast on it to comply with Article 4 (d) of the
- Constitution and not violate the fundamental rights of the other party in the course of dealings under the contract.
- In practice, this means that, while the terms of the contract would,

usually, be the determining factor when assessing whether an organ, agency or instrumentality of the State has violated the rights of the other party in the course of dealings under a contract and the general rule is that, a party who acts in accordance with the terms of the contract does not violate the rights of the other party, the position would be different if the organ, agency or instrumentality of the State has used the terms of the contract as a cover for malicious, perverse or arbitrary acts.

- This is so since the State and its organs, agencies and instrumentalities are enjoined to act with good faith in their dealings with the people including where such dealings are in pursuance of a contract.
- Thus, organs, agencies and instrumentalities of the State are to be guided by the requirement of good faith in their contractual dealings and a departure from this standard by misusing a contractual term or committing a deliberate breach of contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, could well amount to an act which violates the fundamental rights of the victim if the impugned act violates one or more of his fundamental rights declared and recognized in Chapter III of the Constitution.
- Where an organ, agency or instrumentality of the State acts in breach of a contract due to bona fide commercial or operational factors or

inadvertence or unavoidable circumstances or as a result of a bona fide revised policy or for similar reasons, that breach per se is unlikely to amount to a violation of the fundamental rights of the other party and would, usually, attract only the remedies available under the contract. A Court would, naturally and advisedly, be unwilling to substitute its own opinion of what should have been done under the contract in place of the decision taken by the contracting party.

- But, where there has been a deliberate misuse of a term of the contract or a deliberate breach of the contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, then there could be a violation of the fundamental rights of the other party. This is because, in such cases, the impugned act may amount to a violation of Article 12 (1) or another Article in Chapter III of the Constitution by reason of the malice, perversity, arbitrariness or manifest unreasonableness of the impugned act.
- Each such case would have to be determined upon the facts and circumstances before the Court and in the context of the contract between the parties. When doing so, it should be kept in mind that, as mentioned earlier, the parties have agreed to be bound by the terms of the contract and the remedies available under the contract and that, therefore, unless the nature of

the impugned act warrants the invocation of the fundamental rights of this Court for the reasons set out above or for such other reasons as the Court may consider relevant, the parties should be required to seek their remedies under the contract they have entered into.

- These principles are equally applicable whether the contract is of a commercial nature or is a contract of employment. An employer which is an organ, agency or instrumentality of the State, has the duty, under and in terms Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of its employees. This entitles an employee of an organ, agency or instrumentality of the State to invoke the fundamental rights jurisdiction of this Court if he alleges that his employer has violated his fundamental rights in connection with the contract of employment in the manner set out above. The fact that, the employee is not categorized as a ‘public servant’ cannot disentitle him from that constitutional right.

Thus the Judgement of Jayawardena J clearly and unambiguously lays down and follows the more expansive jurisdiction of the Supreme Court that the modern State often resorts to the mechanism of incorporating Statutory Bodies and Companies to carry on the myriad activities which a modern State engages in, including commercial enterprises, and that although at first blush these corporate bodies may seem to be distinct from the State by virtue of their incorporation as limited liability

Companies or because they engage in a solely commercial enterprise or for other reasons, some of them are, in truth and in fact, agencies and instrumentalities of the State which not only enjoy the privileges of an organ of the State but also have the power of the State strengthening their hand when dealing with the people.

The criteria to identify such bodies as agencies or instrumentalities of the State are clearly set out in the series of judgements quoted but such criteria are not exhaustive, and each case must be considered on its own distinguishing characteristics.

Therefore the Supreme Court, which is entrusted with the guardianship of fundamental rights under the Constitution, has a duty to ensure that, if a corporate body is, in truth and in fact, an agency or instrumentality of the State, that corporate body is held accountable to honor and abide by Article 4 (d) of the Constitution which requires all organs of the government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution