

**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***

Vasudeva Nanayakkara
Attorney-at-Law
Advisor to His Excellency the President
Secretary, The Democratic Left Front
49 1/1, Vinayalankara Mawatha
Colombo 10.

Petitioner

SC FR Application No. 1 /2008

Vs

1. Dhammika Perera
Chairman / Director General
Board of Investment of Sri Lanka
Level 26, World Trade Center
Echelon Square
Colombo 1.
2. Arjuna Mahendran
Former Chairman / Director General,
Board of Investment of Sri Lanka
Chief Investment Strategist
Credit Suisse (Investment Banking)
One Raffles Link # 05-02
Singapore 039393
3. A.A. Wijepala
Commissioner General of Inland Revenue
Inland Revenue Department
Sir Chittampalam A Gardiner Mawatha
Colombo 2.
4. John Keells Holdings Ltd.
130, Glennie Street
Colombo 2.
5. Lanka Marine Services Ltd.
69, Walls Lane
Colombo 15.
6. Susantha Ratnayake
Chairman
John Keells Holdings Ltd.
130, Glennie Street
Colombo 2.

7. G.L. Peiris
Former Minister, Enterprise Development
37, Kirula Place
Colombo 5.
8. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS AND LADYSHIPS THE OTHER HONOURABLE JUSTICES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

On this 1st day of January 2008

The **Petition** of the Petitioner above-named appearing by Razmara Abdeen practising under the name, style and firm of **ABDEEN ASSOCIATES**, and his Assistants, Bushra Muheesa Hashim, Manjula Pasquel and Asirinie Wanniarachchi, his Attorneys-at-Law, states as follows:

1. The Petitioner is an Attorney-at-Law and the Secretary, The Democratic Left Front, Advisor to His Excellency the President, Leader of the Opposition, Colombo Municipal Council and former Member of Parliament.
2.
 - a) 1st Respondent is the present Chairman / Director General of the Board of Investment of Sri Lanka (hereinafter referred to as "BOI") established by statute, and had not been a party to the transaction in issue, but had been made a Respondent in the context of the reliefs claimed herein.
 - b) 2nd Respondent was the former Chairman / Director General of the BOI at the time material to this transaction in issue, and the BOI at the time material to this transaction in issue, had functioned under the purview, control and direction of the 7th Respondent, as the Minister of Enterprise Development.
 - c) 3rd Respondent is the Commissioner General of Inland Revenue, and had not been a party to the transaction in issue, but had been made a Respondent in the context of the reliefs claimed herein.
 - d) 4th Respondent is a listed public company duly incorporated in Sri Lanka, with large financial resources and influence.
 - e) 5th Respondent is a Company duly incorporated in Sri Lanka and was a former subsidiary of Ceylon Petroleum Corporation, and is now a subsidiary of the 4th Respondent.
 - f) 6th Respondent is the Chairman of the 4th and 5th Respondents.
 - g) 7th Respondent was the Minister of Enterprise Development at the time material to this transaction in issue, and the BOI at the time material to this transaction functioned under his purview, control and direction.
 - h) 8th Respondent is the Hon. Attorney General of Sri Lanka.
3. The Petitioner
 - a) has dedicated his entire life to work tirelessly, as a national politician and social worker, striving hard to achieve equitable social justice and the upliftment of the multitude of the poor down trodden masses of the country.

- b) has sustainedly espoused the cause of combating the pillage and plunder of public resources, misuse and waste of public property, denouncing fraud and corruption.
- c) files this Application
 - i) for himself and for and on behalf of all citizens of the country, who own the Consolidated Fund and all public property and public revenue, which should not be defrauded or plundered from them.
 - ii) in the national and public interest representing the rights of the citizens of the country, to enforce the fundamental rights to equality before the law, which has been denied by unjust, wrongful, unlawful, unreasonable, arbitrary, capricious, collusive and mala-fide administrative and executive actions.

4. The Petitioner respectfully

- a) invokes the jurisdiction of Your Lordships' Court in terms of Article 126, read with Articles 3, 4 and 17 of the Constitution, to examine the transaction in issue set out herein and to make requisite Orders, upholding the Directive Principles of State Policy and Fundamental Duties enshrined in Chapter VI of the Constitution, to protect and safeguard public property and public revenue that belongs to the People, and which property and revenue is held in trust for the People, and any brazen abuse of power to wrongfully alienate or misappropriate the benefit of such public resources, conferring undue and unjust benefit or gain on a privileged few, to the loss and detriment of the People, is an infringement of the fundamental right to equality before the law guaranteed by Articles 12 (1) and 12 (2) of the Constitution, and any such act, if unchecked, uncorrected and not denounced, would render such Constitutional guarantee of equality before the law meaningless.
- b) states that Your Lordships' Court exercising such jurisdiction, delivered Judgment recently in S.C. (F.R.) Application No. 503/2005, upholding that good governance and transparency characterise Democracy and the Rule of Law, and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be insisted upon; also citing also "Sed quis custodiet ipsos Custodes ?" i.e. "but who is to guard the guards themselves ?"; and that Cabinet of Ministers were the custodians of public property and public funds, and such property and funds will have to be dealt with according to law for the benefit of the People, and that therefore the law itself is the instrumentality through which custodians are guarded, which is the basic postulate of the Rule of Law.
- c) states that Your Lordships' Court further held that "Nemo debet sua iudex" is a principle of natural justice, which has now permeated the area of corporate governance as well, and that power is exercised in trust for the People, and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from Your Lordships' Court, as to the infringement of the fundamental right to equality before the law, and that the respective organs of government are reposed power, as custodians for the time being to be exercised for the People, as laid down by a 7-Member Bench of Your Lordships' Court in the Determination in relation to the proposed 19th Amendment to the Constitution.
- d) states that Your Lordships' Court also cited – "If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon a judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers".

5. a) The Petitioner addressed Letter dated 29.10.2007 to the 1st Respondent in relation to the BOI Approval granted to the 5th Respondent.

A true copy of Petitioner's Letter dated 29.10.2007 is annexed hereto marked "P1(a)", pleaded as part and parcel hereof

- b) 1st Respondent promptly replied by Letter dated 1.11.2007 forwarding copies of relevant documents.

A true copy of Letter dated 1.11.2007 is annexed hereto marked "P1(b)", pleaded as part and parcel hereof

6. 6th Respondent, as Director of the 4th Respondent, had submitted on 20.3.2002 an Application for BOI approval to set up a new Project to supply fuel oil and lubricants to the marine bunker market, stating also – 'if possible, the project envisages the purchase and expansion of an existing company in a similar business'.

A true copy of the BOI Application dated 20.3.2002 is annexed hereto marked "P2", pleaded as part and parcel hereof

7. a) On 11.7.2002 the 2nd Respondent had issued a Letter of Approval to the 4th Respondent granting BOI Approval, *inter-alia*, on the following terms:

- i) **the Project should be entirely new enterprise and should not involve the re-constitution of an existing business or transfer of assets of any description from an enterprise within Sri Lanka.**
- ii) **to incorporate a new company, for which purpose to forward the draft Memorandum and Articles for scrutiny.**
- iii) **the Plant, Machinery and Equipment to be used should be new.**
- iv) Tax Holiday for 3 years, 10% tax for the next 2 years, and 15% tax thereafter.
- v) Imports of related items for the Project to be free of Customs Duty.
- vi) At least 70% turnover should be received in foreign currency.

A true copy of Letter dated 11.7.2002 is annexed hereto marked "P3", pleaded as part and parcel hereof

- b) Even though, the 4th Respondent's Application stated – 'if possible, the project envisages the purchase and expansion of an existing company in a similar business', **the BOI had rejected the same and had granted BOI Approval only for an entirely new enterprise, without involving an existing company, but by incorporating a new Company.**

8. a) Significantly, on the very next day i.e. 12.7.2002, then Chairman, Public Enterprises Reform Commission of Sri Lanka (PERC), Dr. P.B. Jayasundera, prior to Cabinet Approval received on 21.8.2002 for 'competitive offers' to be called on the Colombo Stock Exchange for the sale of 90% Shares of the 5th Respondent, however had issued a Letter addressed to the 6th Respondent, as then Director of 4th Respondent, surreptitiously awarding the Sale of 90% Shares of the 5th Respondent to the 4th Respondent, which the 6th Respondent, as a Director of 4th Respondent promptly accepted by Letter also of the same date 12.7.2002 addressed to Dr. P. B. Jayasundera, then Chairman PERC.

True copies of both the Letters dated 12.7.2002 are annexed hereto respectively marked "P4(a) and P4(b)", pleaded as part and parcel hereof

- b) The Petitioner in SC FR Application No. 209/2007 has put in issue the above transaction, and Your Lordships' Court having granted Leave, the matter is now pending Hearing.
9. Subsequently, by Gazette Extra-ordinary No. 1256/22 dated 1.10.2001, the 7th Respondent, as then Minister of Enterprise Development, had gazetted Regulations dated 25.9.2002, amending existing conditions, *inter-alia*, granted BOI Approval for "... any existing or new enterprise which is formed by the acquisition of assets of any existing enterprise to engage in the business related to petroleum", and further granting a Tax Holiday for 5 years and more for any investment of Rs. 1250 million or more.

A true copy of Gazette Extra-ordinary No. 1256/22 dated 1.10.2001 is annexed hereto marked "P5", pleaded as part and parcel hereof

10. a) Promptly thereafter on 4.10.2002, the 6th Respondent signing on behalf of the 4th Respondent, had addressed a Letter to the BOI, drawing attention to the aforesaid gazetted amended Regulations granting approval to existing companies, and informing that the 4th Respondent in July 2002 had been awarded 90% Shareholding of the 5th Respondent for Rs. 1,199,362,500/-, and that the agreements were signed on 20.8.2002, and therefore that the 5th Respondent should be granted a Tax Holiday for 5 years, since it would invest more funds to make the total investment over Rs. 1250 million, as stipulated in the aforesaid gazetted Regulation.

A true copy of Letter dated 4.10.2002 is annexed hereto marked "P6", pleaded as part and parcel hereof

- b). Thereafter, on 24.10.2002 the 6th Respondent signing on behalf of the 4th Respondent had forwarded a further Letter to the BOI, **listing the amendments required to the previous Letter of Approval granted by the 2nd Respondent on 11.7.2002 and the BOI draft Agreement dated 16.9.2002.**

A true copy of Letter dated 24.10.2002, together with its attachments of Lists containing amendments required to be made to the BOI Letter of Approval dated 11.7.2002 signed by 2nd Respondent and the draft BOI Agreement dated 16.9.2002, is annexed hereto marked "P7", pleaded as part and parcel hereof

- c) It is patently clear that the 7th Respondent, abusing his power and position, had gazetted amending Regulations on 25.9.2002 in the background of the BOI draft Agreement dated 16.9.2002, which had been on the basis of the BOI Letter of Approval dated 11.7.2002, signed by the 2nd Respondent
- d) **4th and/or 5th Respondents had not made an Application to the BOI after the amending Gazette of 1.10.2002.**
- e) 6th and/or 4th Respondents had no right or status to have dictated amendments to the Letter of Approval dated 11.7.2002 signed by the 2nd Respondent in response to the 4th Respondent's Application dated 20.3.2002, nor to the draft BOI Agreement dated 25.9.2002, which had been based on the said BOI Letter of Approval dated 11.7.2002 signed by the 2nd Respondent.
11. a) Nevertheless, by Letter dated 31.10.2002 addressed to the 4th Respondent, the 2nd Respondent had granted revised approval in the absence of a new Application, to the 5th Respondent, *inter-alia*, granting a 5 year Tax Holiday, acting upon the Application that had been made on 20.3.2002, prior to the said amending Regulations.

A true copy of Letter dated 31.10.2002 is annexed hereto marked "P8", pleaded as part and parcel hereof

- b) The BOI grants approval for new investments to be made for development, *inter-alia*, for infrastructure projects, and not for the mere purchase of Shares in an existing company.

12. Thereafter, on 2.12.2002 a BOI Agreement had been signed, with the then Director General of BOI, the 2nd Respondent, and another Member signing on behalf of the BOI, and the 6th Respondent and another Director signing on behalf of the 5th Respondent.

A true copy of said BOI Agreement is annexed hereto marked "P9", pleaded as part and parcel hereof

13. The Petitioner respectfully states that;

- a) the conduct and actions of some of Respondents, in the perpetration of the transaction in issue are executive and administrative actions within the meaning of Article 17, read with Article 126 of the Constitution, which said acts have infringed and continue to infringe the fundamental rights of the Petitioner and the citizens of the country, guaranteed under Articles 12 (1) and 12(2) of the Constitution.
- b) it is abundantly clear that the 2nd, 4th, 5th, 6th and 7th Respondents had intentionally collusively surreptitiously acted wrongfully and unlawfully, causing grave loss and damage and mischief to the Government, that is the public, thereby wrongfully and unjustly causing the loss of public revenue held in trust for the people, with the deliberate intent of conferring unjust, wrongful and unlawful enormous benefit on a privileged few, in blatant violation of the constitutional safeguards.
- c) the transaction in issue has caused and continues to cause enormous loss and detriment to the Petitioner and the citizens of the country, conferring unjust, wrongful and unlawful benefit and enrichment to a privileged few, impoverishing the millions of the poor of the country.
- d) he reserves the right to add any other Respondents, as and may be necessary, and/or to adduce any further facts and documents, as may become available to the Petitioner.
- e) the averments contained herein, supported by the Documents annexed herewith, disclose an obnoxious, wrongful, unlawful and fraudulent transaction, which has caused and continues to cause enormous loss and detriment to the Government and the public, including the Petitioner, wrongfully, unlawfully and fraudulently brazenly conferring unjust enrichment on a privileged few, violating the Rule of Law, with misuse and abuse of power in breach of the trust of the People.
- f) he by no means advocates policies of liberalisation, and that this is a 'classic case', where in the name of liberalisation, very valuable revenue of the State, which belong to the people, have been surreptitiously fraudulently pillaged and plundered for the undue and unjust benefit of a privileged few, causing enormous loss and detriment to the State and the citizens of this country, further burdening them with the rise in their cost of living.
- g) he verily believes that the 5th Respondent had paid Income Taxes and other Taxes to the Government, prior to the so called privatisation, and that it is a grave national crime against the public to have granted Tax Holidays and other concessions, such as Import Duty exemptions for the **mere purchase of Shares** of a very profitable Government Company, **already having paid and paying Taxes to the Government**, and in this instance, the very sale of which has been put in issue before Your Lordships' Court as a major scandalous fraud perpetrated on the public.
- h) he verily believes that the above is only one shockingly glaring instance and is symptomatic of a greater malaise, which has caused and continues to cause colossal losses of State revenue, gravely impacting upon the cost of living, causing unbearable hardships to the people; and therefore all BOI Approvals granted ought be published in the Government Gazette to afford transparency and public scrutiny.

- i) i) It was recently reported in the media, that another Company, namely, Cargills Ceylon Ltd., which claims that it acts with 'corporate social responsibility', had wrongfully surreptitiously obtained for its 'Food City Super Markets' undue tax and import duty concessions, with further abuse of the use of import duty concessions, at the same time the 2nd Respondent, who had perpetrated this transaction in issue, had been in Office, and the 7th Respondent had been the Minister of Enterprise Development.
 - ii) The 1st Respondent had admitted to the media the truth of the aforesaid facts and had stated that the matter is being rectified, with amendments being effected to the existing BOI Agreement.
14. The Petitioner being appalled that the Chamber of Commerce of Sri Lanka, having been fully aware of the facts adduced before Your Lordships' Court in SC FR Application No. 209/2007 concerning the wrongful, unlawful and fraudulent conduct and actions of the 4th Respondent had given the Best Award for 'Corporate Social Responsibility', to the 4th Respondent during the pendency of the said Application, the Petitioner addressed Letter dated 24.12.2007 to the Ceylon Chamber of Commerce.

A true copy of said Letter dated 24.12.2007 is annexed hereto marked "P10", pleaded as part and parcel hereof

15. In the premises, the Petitioner respectfully states that he stands entitled to invoke the jurisdiction of Your Lordships' Court for the reliefs prayed for herein.
16. The Petitioner has not invoked jurisdiction of Your Lordships' Court previously in this specific matter, except to the extent of the related transaction put in issue in SC FR Application No. 209/2007..
17. The Affidavit of the Petitioner in support of the averments herein contained is annexed hereto.

WHEREFORE the Petitioner respectfully prays that Your Lordships' Court be pleased to:

- a. grant Leave to Proceed with this Application in the first instance,
- b. make Order declaring that the fundamental rights guaranteed under Articles 12(1) and 12(2) of the Constitution of the Petitioner and the citizens of Sri Lanka have been infringed,
- c. make Order declaring that the grant of BOI Approval to the 4th and/or 5th Respondent for the operation of the 4th Respondent is wrongful and unlawful and therefore *ab initio*, null and void and of no force or avail in law,
- d. make Order directing the 1st Respondent to cancel, annul and make void the BOI Approval granted to the 4th and/or 5th Respondent for the operations of the 5th Respondent, and to direct the Customs Department to recover all Customs Duties and other related charges, that ought to have been paid by the 4th and/or 5th Respondent in relation to all imports for which import duty exemption had been granted by the Board of Investment of Sri Lanka, together with full penalties and/or surcharges thereon,
- e. make Order directing the 3rd Respondent to cause the correct assessment, recovery and collection of all Taxes due from the 4th and/or 5th Respondent arising from the operations of the 5th Respondent, together with full penalties and/or surcharges thereon,
- f. grant interim relief directing the 1st Respondent to suspend forthwith the Approval granted by the Board of Investment of Sri Lanka to the 4th and/or 5th Respondent for the operation of the 5th Respondent,

- g. make Order declaring that the conduct and actions of the 2nd Respondent and/or 4th Respondent and/or 5th Respondent and/or 6th Respondent and/or 7th Respondent has/have caused and continues to cause grave loss and damage to the Government and the citizens of Sri Lanka, conferring unjust and unlawful benefit to a few and/or unto themselves and ought therefore be dealt with in terms of the law,
- h. make Order directing the 8th Respondent to cause action to be taken in terms of the law, including under the Offences Against Public Property Act No. 12 of 1982 against all those persons, whether any of the above Respondents or otherwise, who have acted wrongfully and/or unlawfully and/or fraudulently in granting/obtaining Approval of the Board of Investment of Sri Lanka for the 4th and/or 5th Respondent for the operation of the 5th Respondent and causing loss to public revenue,
- i. make Order directing the 8th Respondent to cause action to be taken in terms of the law, more particularly under the provisions of the Bribery Act, particularly for corruption, against all those persons, whether any of the above Respondents or otherwise, who has/have acted wrongfully and/or unlawfully and/or fraudulently in granting/obtaining Approval of the Board of Investment of Sri Lanka for the 4th and/or 5th Respondent for the operation of the 5th Respondent and causing loss to public revenue and/or causing undue benefit to the 4th and/or 5th Respondent,
- j. make Order directing the 1st Respondent to cause investigations to be made into instances, where special and/or extra-ordinary concessions have been granted causing undue loss of State revenue, and to submit a report to Your Lordships Court, indicating the remedial actions taken thereon, within a reasonable period of time,
- k. make Order directing the 1st Respondent to publish in the Government Gazette, giving details of concessions granted, in all instances, where Approvals of the Board of Investment of Sri Lanka have been granted in the past, and to do so in the future,
- l. grant costs, and
- m. such other and further relief as to Your Lordships' Court shall seem meet.

Abdulla Associates

Attorneys-at-Law for the Petitioner