

THE COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

S.C(FR) 209/2007

Vasudeva Nanayakkara
Attorney at Law
49 1/1 Vinayalankara Mawatha,
Colombo 10

Petitioner

vs

N.K.Choksy P.C.,
former Minister of Finance
23/3, Sir Ernest de Silva Mawatha,
Colombo 7

and 30 others

Respondents



BEFORE : Hon. Sarath N Silva, Chief Justice
Hon. R.A.N.G. Amaratunga, Judge of the Supreme Court,
Hon. D.J.de S.Balapatabendi, Judge of the Supreme Court

COUNSEL: M.A.Sumanthiran with Viran Corea for the Petitioner.

Nihal Fernando P.C., with Ronald Perera and V.K.Choksy
for the 1st Respondent.

L.C.Seneviratne, P.C., with A.P. Niles for the 3rd
Respondent

Viraj Premasinghe for the 10th Respondent

Avindra Rodrigo with Harshana Jayawardene for the 14th
Respondent

Romesh de Silva, P.C., with Harsha Amarasekera for the
18th to 21st Respondent.

Y.J.W. Wijayatilake, P.C., A.S.G., with Viraj Dayaratne
S.S.C for 8th, 15th to 19th, 26th and 31st Respondents.

22nd Respondent - Nihal Sri Amarasekera in person

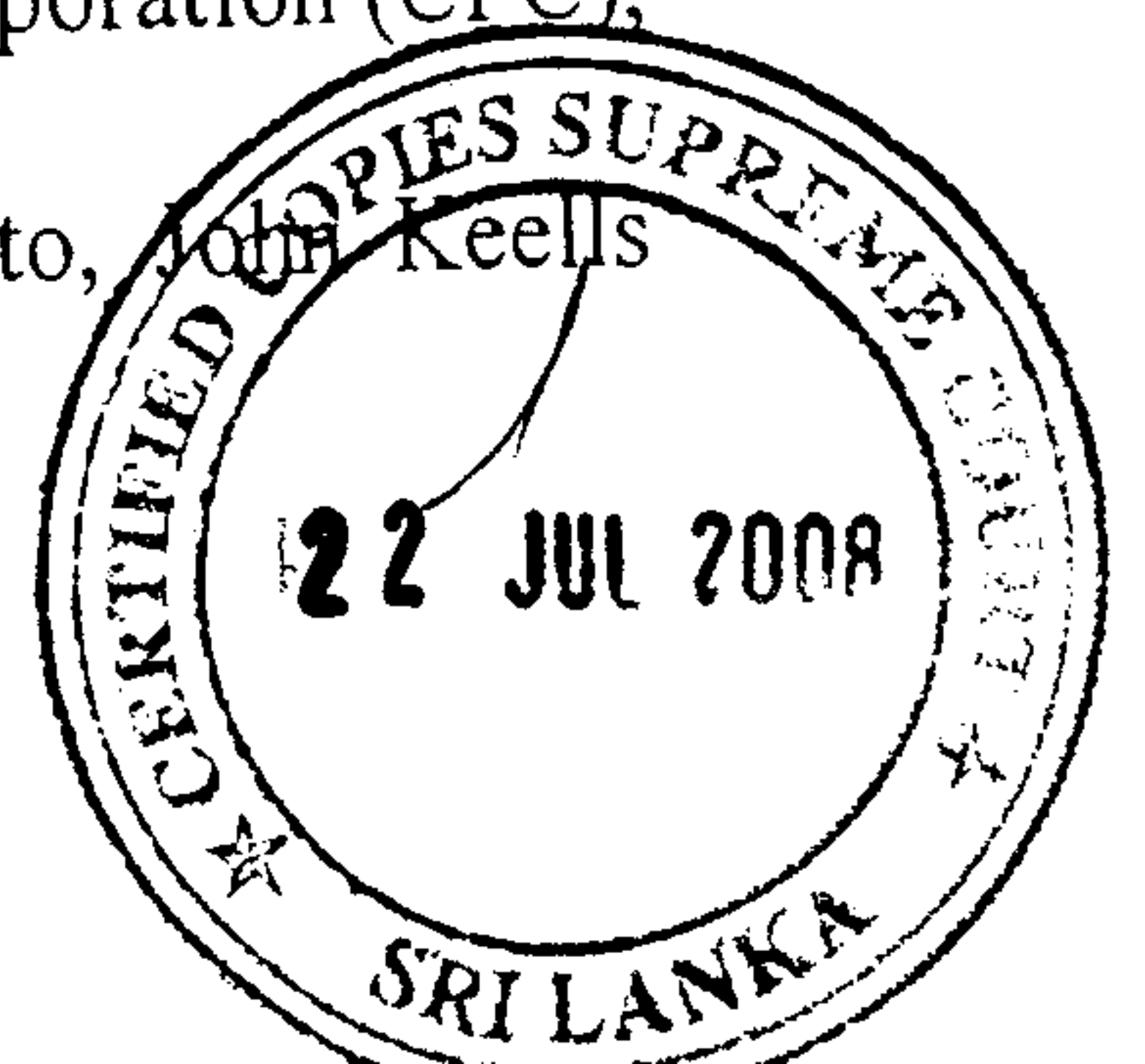
ARGUED ON : 14.3.08, 27.3.08,

WRITTEN SUBMISSIONS : 12.5.08 and 26.5.08

DECIDED ON : 21.07.2008

Sarath N Silva, C.J.,

The Petitioner, Vasudeva Nanayakkara, in the capacity of a national politician and a social worker has filed this application in the public interest in terms of Article 126 of the Constitution, alleging an infringement of the fundamental right to the equal protection of the law guaranteed by Article 12(1) of the Constitution. The impugned executive action as alleged by the Petitioner is the action, primarily of P.B. Jayasundera, the 8th Respondent who functioned at the material time as Chairman of the Public Enterprise Reform Commission (previously and presently Secretary to the Treasury) and of the then Cabinet of Ministers, including the 3rd Respondent, Ranil Wickremasinghe, who was the Prime Minister. The then President is cited as the 4th Respondent. It is alleged that Jayasundera caused the sale of shares of Lanka Marine Services Ltd., (LMSL) a wholly owned company of the Ceylon Petroleum Corporation (CPC), which was a profit making, debt free, tax paying company to, John Keells



illegally given a prior assurance that no additional payment need be made for the land, before even the business valuation was requested.

In the Agreement to transfer P27 although the CPC is described as the Vendor, it is clear from the terms and conditions of the Agreement itself that the CPC has no title to the land. Hence the Government is brought in with an obligation to ensure the transfer of the land without any payment to JKH. The Agreement is so biased in favour of the JKH that it even includes a clause that the land should be transferred free and all associated costs should be borne by the CPC since the sale of 90% shares of LMSL to JKH was "structured" on such basis. It is significant that this "structuring" was only done in the unauthorized communication made by Jayasundera as evidenced by document Z18 and thereby an illegal obligation was cast on the Government of Sri Lanka to "ensure" the transfer of 8 Acres 2 Roods 21.44 perches of land that comes within the declared limits of the Port of Colombo free of any charge whatsoever, to JKH. The transfer has to be done within 1 year and to add insult to injury LMSL (now owned by JKH) is entitled to enforce this Agreement by an "order for specific performance."

The alienation and disposition of the State land is a matter regulated in every step by law, and finally governed by the Constitution and cannot possibly be the subject matter of such an outrageous legal fiction as contained in the Agreement which was admittedly prepared by Jayasundera and the PERC.



JKH/LMSL pursued their "rights" under the Agreement P27 and the Government was compelled to seek extensions of the period of 1 year granted to "ensure" the transfer of the land. There were accordingly 4 amendments to the Agreement. Finally the then President made a Grant under the Public Seal of the Republic in respect of the land to LMSL under the State Lands Ordinance. The Grant P30 states that it is made in consideration of Rs. 1,199,362,500/- paid to the Republic by LMSL. It is common ground that this statement is incorrect. In fact no money was paid by LMSL to the Government. The amount is the ^{same} ~~sum~~ as that paid on 6.9.2002 by JKH to CPC for the purchase of shares of LMSL. Hence the grant is bad in law solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents. In normal circumstances a false statement as to a payment to the Government could not be made since, it has to be verified by the Treasury. But regrettably, that check is not there since by now the same Jayasundera who was responsible for the creation of the fiction in favour of the JKH that there would be no additional payment in respect of the land, is now ensconced as the Secretary to the Treasury.

The validity of the Grant P30 has also to be examined in the light of the provisions of the 13th Amendment to the Constitution.

The 13th Amendment to the Constitution certified on 14.11.1987 provided for the establishment of Provincial Councils. Article 154 G(1)



introduced by the Amendment vests legislative power in respect of the matters set out in List 1 of the Ninth Schedule (the Provincial Council List) in Provincial Councils. Article 154C vests the executive power within a Province extending to the matters in List 1 in the Governor to be exercised in terms of Article 154F(1) on the advice of the Board of Ministers. In terms of Article 154(F)(6) the Board of Ministers is collectively responsible and answerable to the Provincial Council. Thus it is seen that the 13th Amendment provides for the exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the "Westminster" model of Government. Item 18 of the Provincial Council List which relates to the subject of land reads as follows :

"Land - Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II:

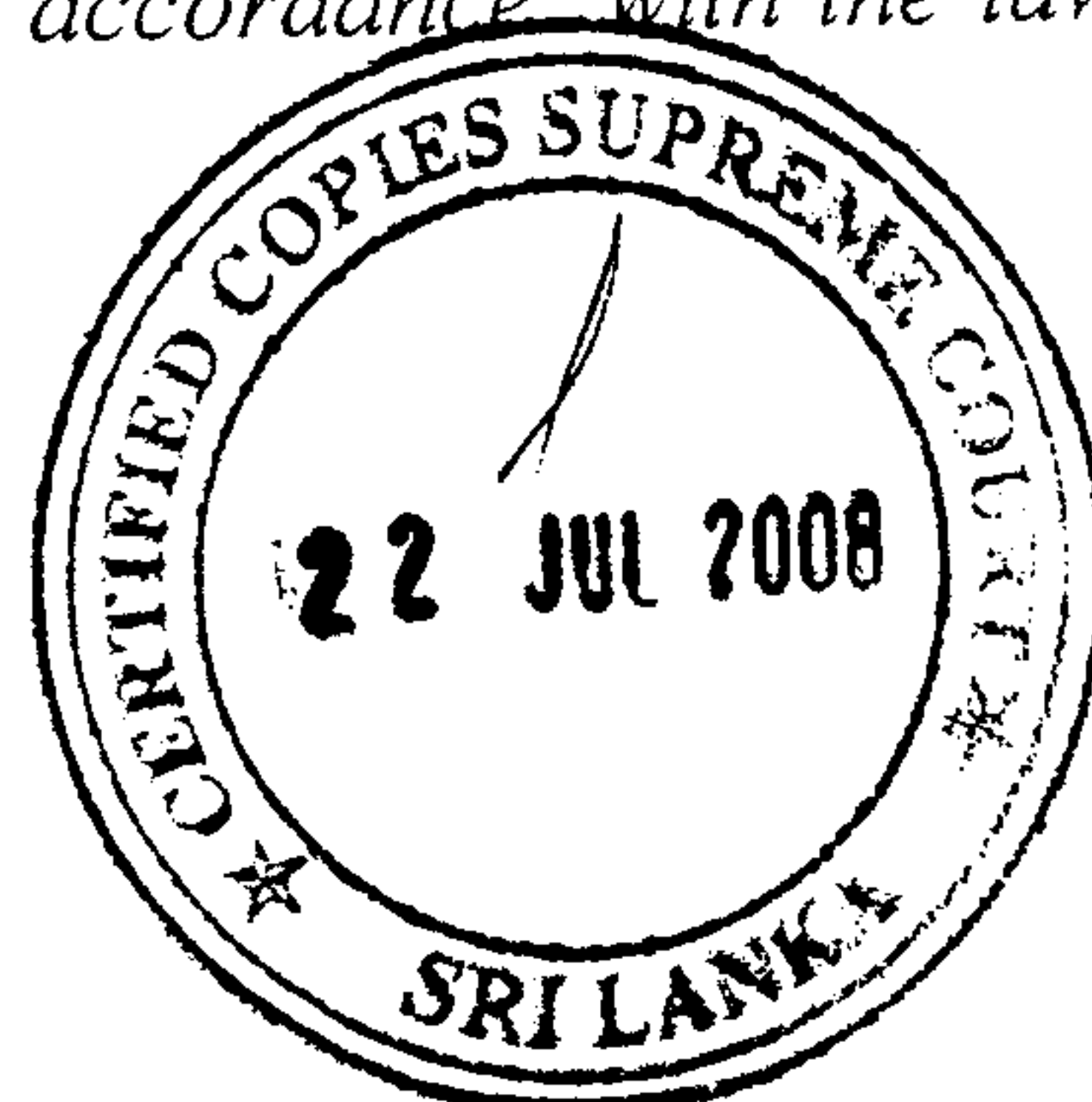
Appendix II referred to in item 18 reads as follows :

"Land and Land Settlement"

"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter. Subject as aforesaid, land shall be a Provincial Council subject, subject to the following special provisions :-

1. State land -

1:1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws



governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject;

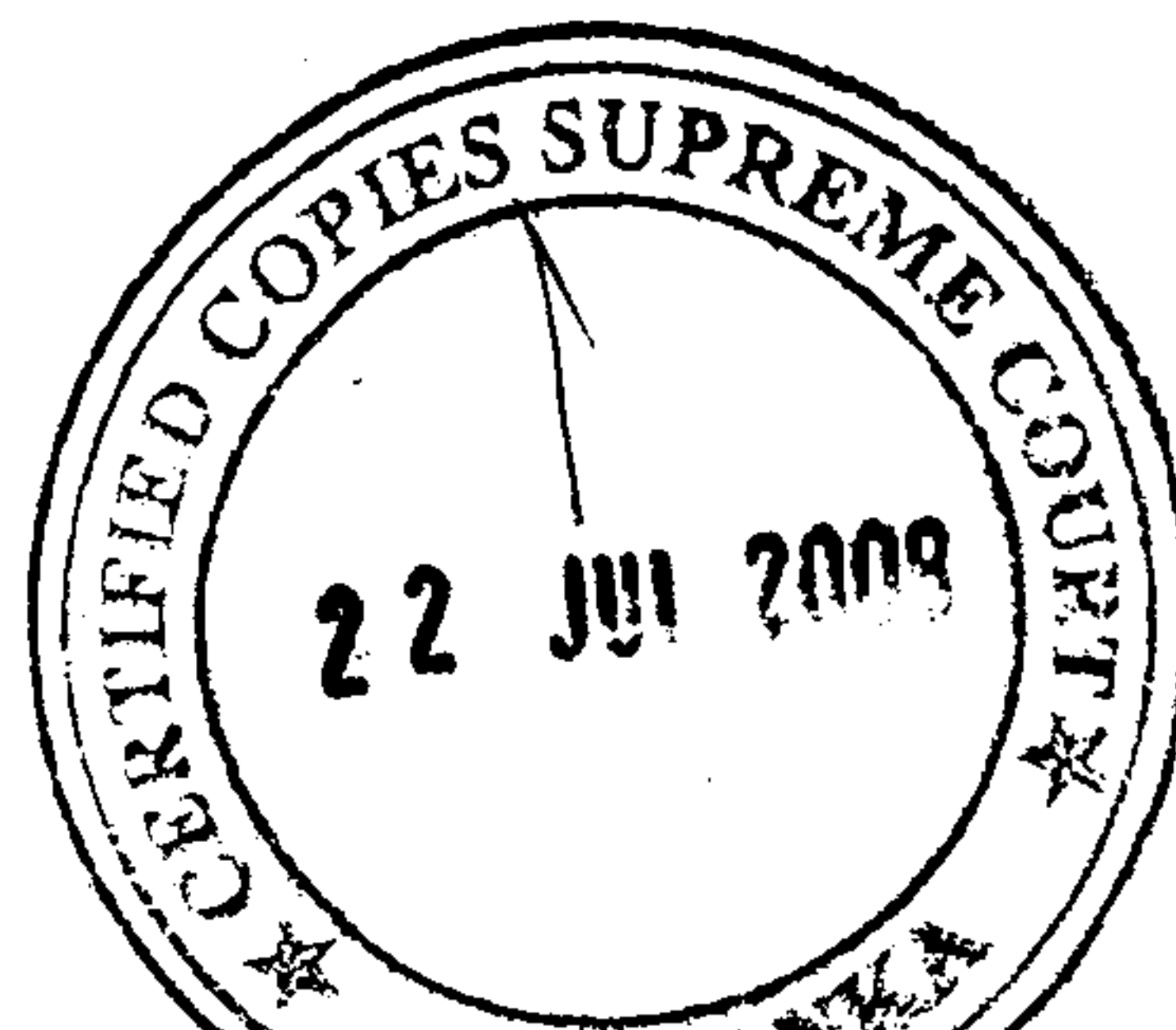
i:2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land in accordance with the laws and statutes governing the matter.

i:3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

It is seen that the power reposed in the President in terms of Article 33(d) of the Constitution read with Section 2 of the State Lands Ordinance to make grants and dispositions of State Lands is circumscribed by the provisions of "Appendix II" cited above.

"Appendix II" in my view establishes an interactive legal regime in respect of State Land within a Province. Whilst the ultimate power of alienation and of making a dispositions remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.

A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of



Ministers communicated through the Governor. The Board of Ministers being responsible in this regard to the Provincial Council.

Another aspect to be considered in regard to the facts of this case is the implication of paragraph 1.1 of Appendix II. The land in question comes within the limits of the Port of Colombo in terms of the order P33, made in terms of the Sri Lanka Ports Authority Act. Ports and Harbours being a Reserved subject in terms of paragraph 1.1 above the land may be used by the Government in accordance with the provisions of the Sri Lanka Ports Authority Act. Hence when the Order P33 is subsisting it would not be lawful to alienate the land in the manner it was purported to be done in favour of LMSL.

To sum up the findings as to the alleged "Deviation" in respect of land, I hold that the Petitioner has established not only that the deviation favours JKH denying to others the equal protection of the law but also that the alienation of the extent of 8 Acres 2 Roods 21.44 perches located within the defined limits of the Port of Colombo is invalid due to the -

- a) incorrect statement in the Grant that it is made in consideration of the payment of Rs. 1,199,362,500/-;
- b) the Grant was made without the advice of the Provincial Council as required in terms of paragraph 1:3 of Appendix II of List 1 in the Ninth Schedule to the Constitution;
- c) the land comes within the defined limits of the Port of Colombo in terms and can only be used by the Government in accordance with the Sri Lanka Ports Authority Act;

