

"Sittings of Presidential commission should be in public," says Commission

By M. J. M. Zarook and
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THE Supreme Court has laid down that in terms of Article 106 of the constitution the sittings of every court shall be held in public and all persons shall be entitled freely to attend such sittings.

We hold that proceedings before the Presiden-

tial Commission which are deemed to be judicial proceedings ought to be conducted in public where members of the public have the right and the opportunity to witness those proceedings freely and without restriction, the Special Presidential Commis-

sion sitting at the BMICH has stated in orders made in postscript in chambers in respect of certain submissions inter alia made by Mr. K. N. Choksy PC.

The Commission of Inquiry into malpractices and irregularities in public bodies comprises Justice Priyantha Perera (chairman), Justice Hector S. Yapa and Justice

Ninian Jayasuriya.

In this matter Mr. Choksy and other respondents Mr. Cornel Perera, Chairman and Managing Director of Hotel Developers (Lanka) Ltd, the owning company of the Hilton Hotel and former directors Mr. F. G. N. Mendis and Mr. R. Paskaralingam former Secretary to the Ministry of Finance

(who is absent) have been asked to show cause why they should not be found guilty of misuse or abuse of power of corruption or commission of fraudulent acts in connection with the construction of the Hilton Hotel.

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"Sittings of...

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The Commission in its Postscript dated March 1 stated: In the course of his response, President's Counsel, Mr. K. N. Choksy, PC, submitted that the Supreme Court in a judgement had considered the English decisions referred to by the Commission - i.e. the decision in *Daubney Vs. Cooper* and the decision in *Scott Vs. Scott* 1913 A.C. 417 and had held that these decisions had set out an incorrect statement of the law. The English law as propounded by these two English decisions has been adopted in Article 106 (1) and Article 106 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Supreme Court in a five-bench Judgement delivered in the case of *Madan Mohan Vs. Carson Cumberbatch & Co., Ltd.*, 1988 (2) Sri Lanka Law Reports (Page 75)

has laid down that in terms of Article 106, the Sittings of every Court shall be held in public and all persons shall be entitled freely to attend such Sittings. The Supreme Court directed the District Judge of Colombo to apply the Provisions of Article 106 and decide the question whether the Sittings were in public and all persons were entitled freely to attend such Sittings. Thus, the Supreme Court has in effect upheld the law as laid down in the aforesaid English decisions and the law as set out in the Provisions of Article 106.

Surprised

This Commission is surprised to ascertain and note that Mr. K. N. Choksy, PC was one of the Junior Counsel who appeared for the 2nd, 3rd and 7th respondents at the argument of this

appeal before the Supreme Court. In these circumstances, it surprises and startles this Commission how Mr. Choksy could with a conscience and consistent with his duties as Counsel to the Commis-

sion, make submissions to the effect that the Supreme Court refused to adopt the English law as laid down in these two English cases and held that the English law did not coincide with the law of Sri Lanka.

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commission stated:

In the course of the Oral response and in the statement dated March 18, 1996, filed by Mr. K. N. Choksy, P.C., who is a party noticed, an issue has been raised in regard to the exact stage for the consideration of his written submissions.

Mr. Choksy filed his written submissions on January 30, 1996 and soon thereafter, his written submissions and written statement received the close consideration and scrutiny by the members of the commission.

On February 29, 1996 after the commissioners had carefully and diligently analysed and had considered his written submissions, it was unanimously decided to refer him to two specific passages in his written submission.

Thereafter, the Commission referred, in regard to the first passage to the law that ought to be applied and referred in regard to the second passage to the true and actual facts of the case and kindly invited Mr. Choksy's oral response.

Mr. Choksy was afforded an unfettered and unrestricted opportunity of making his response orally before the commission and of preferring further oral submissions on the two points spotlighted. Thus it is ill-founded to urge that he was not heard in his response, or that his written submissions were not considered by the commission.

In the course of making his oral submissions, Mr. Choksy requested that a certified copy of the proceedings conducted before the commission be issued to him on February 29, 1996 to enable him to file a further response in writing.

He has been furnished with a certified copy of the proceedings and he has in his statement dated March 18, 1996 referred to what transpired before the commission and what is recorded in the certified copy supplied at pages 1 to 41. Mr. Choksy in his oral response stated thus:

"I move that I be furnished with a certified copy of today's proceedings, so that I can file my response in writing to the observations made by the commission. ...I will apply for it and I require it to file my response. Your Lordships have asked for my response. I must give my response in writing."

Unfortunately, no such further response in writing has been filed before this commission.

Mr. Choksy in his statement dated March 18, 1996 erroneously states thus:

"Although the stage for consideration of my written submissions had not been reached."

When his written submissions were filed before the commission long before February 29, 1996, the three commissioners carefully perused, analysed and considered his written submissions in depth. The Commission ought not to procrastinate and delay in the performance of its duties and functions, especially when a party noticed has taken pains and trouble to file a written submission to be carefully considered by the commission.

Control of proceedings

A court of Law, a Tribunal, or a Statutory Commission is under an imperative and mandatory duty to regulate and control the course of Proceedings conducted before it. Such an institution must in the interests of expedition and with a view to avoid grievous waste unnecessary delay and anxiety, deal straightway with needless obstacles, impediments and cobwebs that are woven round it. In the application of Abdul Latiff 19 NLR 346 - 348, Chief Justice Wood Renton remarked:

course of proceedings before him, both in regard to the direction and volume of the course of proceedings."

It is equally necessary to stress and refer to the power and jurisdiction of the Presiding officer inter alia to regulate and control proceedings by investigating and adjudicating on the needless points and unsustainable issues raised, as early as possible, so that he could devote his full attention to the tenable issues in the case at a later point of time.

This right to regulate and control proceedings (in other respects) have been judicially recognized. Chief Justice Bertram and Justice Garvin in a celebrated judgement but which remains to this date unreported - SC 441 DC Negombo Case No. 15956 S. C. Minute dated 2.7.1924 remarked that a Judge or Presiding Officer of a Tribunal must not play the mere role of an umpire, but take strict measures to control and regulate the proceedings conducted before him, especially, where counsel do not act in terms of their primary duties to court as officers of court.

SPC on malpractices in public bodies

Francis Newbolt, a distinguished writer in an article entitled, "Expedition and Economy in Litigation," has remarked "the true function of the court, it is submitted, is... not to conciliate or exhort the parties, as is sometimes suggested, much less to hurry them, or to deprive them of perfect freedom of action, but to use, the available machinery of litigation to enable them to settle their disputes according to law without grievous waste, unnecessary delay and anxiety? And in particular afford them how this, if desired, may be accomplished".

Thus if there is a point of law raised which appears to the commission to be unsustainable and untenable, after carefully considering written submissions filed by a party, the commission is well the entitled to raise this issue, refer the part to his written submission, invite a further response, and thereafter, to pronounce its adjudication and determination on the needless and untenable issue of law. In such a situation it is not open to a party to assert lawfully and reasonably that "the stage for consideration of that issue has not been reached".

By spotlighting this issue, referring to what appeared to be the applicable law and inviting the party

concerned, before it proceeds to the stage of adjudication and determination.

In the course of the proceedings of February 29, 1996 the commission has adverted to the provisions of Rules 15, 50 and 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) and to two dicta pronounced by two eminent Judges presiding over the Superior Courts of Great Britain.

A Court of Law, a Tribunal, or a Statutory Commission ought to, in the course of its Proceedings, apply and enforce such rules of Conduct and Etiquette. A court must not only be concerned with punishing Counsel for breach of such rules, but must ensure that such rules are observed in proceedings conducted before it.

Preventive exercise is much more desirable than the punitive exercise. It is with this object that the commission referred to the aforesaid rule; and aforesaid dicta of English Judges. We would in this context refer to an interesting article on the province of disciplinary power of court as an exercise of judicial power - disciplinary power of Court to control those who practice before it and a review of the decision in Attorney-General of Gambia vs N'Jie 1961 WLF 845 - vide Annex No. 2.

Untenable submissions

Mr. Choksy in his oral response and his written statement contends that counsel is entitled to place before court untenable and incorrect submissions as well as legally valid submissions, and that counsel is lawfully entitled to place both types of submission: Mr. Choksy in his oral response has submitted thus "My Lord, let us assume all that. With great respect that I am wrong, the commission is right. Often Counsel's submissions are not accepted by the court as valid, but does the court accuse the counsel as misleading the court."

In regard to this contention, we wish to refer to the English decision in Rex vs. Simmonds 1967 2 AEJ 399 at 403, where the learned Judge remarked succinctly, "It is no part of a lawyer's duty to raise untenable points at length." Vide also the decision in Rex vs. Kalia 1974 60 Criminal Appeal Report page 200.

In addition to the dicta of Lord Reid and Lord Esher to which the commission has already referred to in the Proceedings, this Commission wishes to place on record certain decisions which lay down valuable pronouncements in regard to the para. our

"In the discharge of his office, the Advocate has a duty to his client, a duty to the State, and a duty to himself."

This passage was cited with approval by Lord Justice Willmer in *Meek vs. Flemming*.

In Public

At this stage, in the absence of further written response, on a consideration of the totality of the material placed before us and on a careful consideration of the written submissions and the oral response, we hold that proceedings before the Presidential Commission, which are deemed to be judicial Proceedings, ought to be conducted in public, where members of the public have the right and opportunity to witness those Proceedings freely and without restriction.

The Commission has a discretion to sit in camera and exclude the public only in the limited situations spelt out in Article 106 (2) of the Constitution and in English law.

We refer to the proceedings conducted before the Commission on February 29, 1996 at pages 30 - 32 and at page 19. In the course of the argument, Mr. Choksy has admitted that in his submissions he has stated as material facts, facts which may not be factually correct. "But anyway, My Lord, If there is that statement it may not be factually correct in one element of it." There is absolutely no doubt that Mr. Choksy in his written submission and statement has stated as follows:

"I was not a Director at the time the plans were prepared (1983 & 1984), at the time the building contract entered into - (i.e. 1.1.1984) and the construction work executed. The construction of the building had been completed when I joined the Board.

If a fraud had been committed in the construction, it was done prior to my becoming a Director and the contractor would obviously be a privy to the same.

Untrue

Thus it is crystal clear that there is such a statement to the effect 'that although the contractors appeared before the Commission' in black and white in his written submission. This Commission is unable to understand the lurking doubt in Mr. Choksy's mind as to whether there is such a statement or not, in his submission.

We are of the unanimous view that in this respect he has stated untrue, erroneous and false facts, which necessarily has the tendency to mislead and deceive the public in general (who would have read his written submissions which were carried in full for two days of running in issues of the 'Island' newspaper), and the members of this Commission.

The dates in regard to the preparation of the plans and execution of the Construction Agreement relate to an anterior period of time. The charges and allegations preferred against Mr. Choksy do not relate to that anterior period of time. The five charge and allegations preferred against him relate to a posterior point of time (i.e. 19/12/86 to 16/1/1993) when he was holding the Office of a Director and these charges are not similar (as wrongly reported) to the charges preferred against the other parties noticed under Section 9..

Mr. Choksy was appointed to the post of Director before the hotel building was fully constructed and handed over by the Contractors. He was appointed to the Board of Directors on 19.12.1986. The construction of the Hilton Hotel building was fully completed and the building was handed over by the Consortium of Contractors on 30.4.1987.

The Consortium of Contractors - Mitsui and Taisai Corporation and its then directors were foreign entities and persons and would not come within the definition of "public bodies" or functionaries attached to public bodies. This Commission has no jurisdiction over them.