

‘EXTRACTS’ OF FINDINGS IN THE SUPREME COURT JUDGMENT

His Lordship the Chief Justice, Sarath N. Silva P.C., with Justices R.A.N.G. Amaratunga and D.J. de S. Balapatabendi agreeing, delivered a landmark Judgment annulling the scandalous privatization of Lanka Marine Services Ltd., (LMSL) to John Keells (JKH), holding *inter-alia* the same to be illegal and unlawful, in a Fundamental Rights Application made in the public interest by Vasudeva Nanayakkara, Advisor to His Excellency the President. The following extracts from the Supreme Court Judgment bear out the findings.

The Petitioner was actively supported by Nihal Sri Ameresekere, the 22nd Respondent, who succeeded P.B. Jayasundera as Chairman, PERC. I would reject the objection raised by the contesting Respondents, which denies a public interest in the due execution of this Law, and also denies a locus standi to the Petitioner to vindicate such public interest by invoking the jurisdiction of this Court in terms of article 126(1) of the Constitution, as being misconceived and myopic.

The functions and objects of the PERC are set out fairly and squarely in Section 4 of the Act - *"The function of the Commission shall be to advise and assist the Government on the reform of public enterprises with the following objects in view"*. It is manifest from this provision that role of the PERC is limited and circumscribed by law to one of advising and assisting the Government in any envisaged reform of a public enterprise including divestiture of State ownership.

A further aspect to be noted in the Section is that all objects of the PERC are intended primarily to benefit the People. The public element of the process is further enhanced by the specific duty cast on PERC by Section 5(i) which reads *"to assist the Government to create public awareness of Government policies and programmes on the reform of public enterprises with a view to developing a commitment by the public, to such policies and programmes"*. Thus public enterprise reform including divestiture could never descend to be a shadowy, slithering process. The Law mandates that it should be a transparent process circumscribed by an abiding public interest in ensuring its legality and propriety.

The Cabinet considered the memorandum on 22.6.2000, together with observations made by several Ministers and decided to refer the matter to a Committee of Officials for a report thereon. The officials to consist of Secretaries to Ministers of Finance, Shipping, Irrigation and Power and of PERC. The Committee Report dated 1.8.2000 was submitted to the Cabinet with a memorandum of the Minister of Shipping. It is to be noted that the Committee recommended a cautious approach of preserving the monopoly of LMSL within the Port and liberalizing the sector by the grant of 3 licences for the supply of bunkers outside the Port of Colombo. The PERC had to make recommendations regarding this process. The Cabinet considered the matter on 17.8.2000 and granted approval to the proposals in the memorandum and directed that action be taken by the Minister of Shipping and Shipping Development.

Thus the process of reform in the bunkering sector authorised by the Cabinet was a phased out arrangement. Initially for the PERC to invite offers for supply of bunkers outside the Port of Colombo and licenses being granted to 3 suppliers. To continue with the monopoly of LMSL to supply bunkers within the Port of Colombo for 1 year, within which period the privatisation of LMSL to be completed. The benefits for the Government of Sri Lanka (GOSL) are set out in paragraph 3(d) of the recommendations of the Committee Officials which reads - *"The benefits to GOSL are expected from the increase in tax revenue through higher income tax from the local companies as well as opportunities for employment generation. In addition GOSL would charge a license fee, for the use of Sri Lanka's territorial waters"*

Jayasundera has in paragraph 8 of the affidavit admitted the contents of these documents and of the decision of the Cabinet. Hence he knew fully well that the task of PERC was to make a recommendation to the Cabinet on the 3 processes that were envisaged in the following order:

- (i) the process of calling for tenders through an open tender to issue initially 3 licenses for the supply of bunkers within the territorial waters and Ports other than Colombo;

- (ii) the process of privatization and the removal of the monopoly given to LMSL within a period of 1 year of the operation of this partly liberalized regime as envisaged in (i) above;
- (iii) the operation of the fully liberalized regime of bunkering services after the privatization of LMSL as envisaged in (ii) above;

Admittedly, PERC did not make any recommendation to the Cabinet on any of the matters envisaged above which would have brought about an improved regime of bunkering facilities to service a growth in the shipping sector; higher foreign exchange earnings and a higher yield of tax revenue. Nor was there any change in the Cabinet decision stated above. Instead, whilst purporting to act under the said Cabinet decision, PERC embarked on a course of action devised by itself.

On 28.10.2001, PERC published a notification inviting proposals from private sector operators to participate in the marine fuel market in Sri Lanka within the territorial waters including the Ports. The notice also stated that there will be no limit in the number of licenses to be issued. This notification is contrary to the Cabinet decision. The Committee of Officials had recommended that only three licenses should be issued initially and in any event in the first year, services could be provided only outside the Port of Colombo.

More significantly the issue of licenses required a new legal regime, which as pleaded in paragraph 6 of the Petition by the Petitioner is contained in the Petroleum Products (Special Provisions) Act No. 33 of 2002. This averment is admitted by Jayasundera in paragraph 5 of his affidavit. The Act No. 33 of 2002 was passed by Parliament and certified by the Speaker only on 17.12.2002. Hence the notice calling for proposals more than 1 year before the law was enacted was an exercise in futility. It appears that PERC took no action on the proposals received pursuant to the notifications referred to above, except to forward them to the Ministry of Power and Energy. No recommendation was made by Jayasundera as required in the Cabinet decision as to the process of granting three licenses initially to operate bunkering service outside the Port of Colombo.

PERC published another notice on 8.2.2002 inviting Expressions of Interests (EOI's) for the purchase of 90% shares in LMSL. EOI's were to be submitted on or before 21.2.2002. The notice stated that it is being published on behalf of the Government of Sri Lanka. It has to be noted that the Cabinet of Ministers did not in the decision referred to above, authorize PERC to call for such EOI's. It is significant that the Minister's observation does not even refer to any action on the part of PERC in this regard.

From this perspective the course of action adopted by PERC of dampening the liberalization process and publishing a notification with an obvious over breadth, shorn of the necessary legal machinery, which could not have been implemented at that stage, and by accelerating the privatization process of LMSL, has to be viewed in a dim light. The action which was contrary to the Cabinet decision had the effect of favouring the would be purchaser of LMSL shares, who will continue in effect to have a monopoly of providing bunkering services. The inference is further supported by an amendment to the draft CUF Agreement, agreed to by Jayasundera at the behest of JKH, after the offer of JHK for purchase of LMSL shares was accepted, which was availed of by LMSL then under the control of JKH to stave off competition in the supply of bunkers.

The Petitioner and Ameresekere have made several submissions that Jayasundera has acted contrary to the Public Finance Circular No.FIN 358 (4) dated 29.11.1999 which Jayasundera himself had issued for "Enhancing the Effectiveness of the Procurement Procedure....." by his failure to constitute a Cabinet Approved Tender Board (CATB) for the purpose of making recommendations to the Cabinet on the sale of LMSL shares. It was submitted that the Tender Documents viz; the EOI and Request (RFP) should have been approved by a CATB and the TEC. In this instance only a TEC had been appointed, and on the sequence of dates it was established that the EOI and RFP had been issued prior to even the appointment of the TEC.

The requirements to appoint a CATB and a TEC are intended to ensure transparency, fairness and honesty which those volumes of guidelines and circulars are intended to safeguard. Jayasundera has conveniently sought to explain the failure to appoint a CATB on the basis that it is not a practice to appoint such Board in respect of the sale of Government shares. If it is so, his practice is contrary to his own circular. Be that as it may, the appointment of a CATB would have afforded a mechanism to redress the bitter grievances such as those voiced by the 32nd Respondent, as to a lack of transparency and of unfavourable treatment. Furthermore, it would have ensured that the Cabinet was apprised of the process of evaluation of bids and a decision being made by the Cabinet, as to the manner in which the sale should be effected, without Jayasundera on his own accord purporting to “clinch the deal” with JKH.

The Petitioner has established that the Land in question in extent 8 Acres 2 Roods and 21.4 perches is in fact a part of the Port of Colombo in terms of Order made by the Minister in terms of Section 2 (3) of the Sri Lanka Ports Authority Act No. 51 of 1979..

The steps taken by Jayasundera and PERC towards effecting a sale of shares of LMSL is not in any way mandated by the decision of the Cabinet of Ministers, and is manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular issued by Jayasundera himself!

It is correct, as noted above, that the Cabinet of Ministers decided that PERC should make proposals for liberalizing the bunkering trade by issuing licenses to the private sector. Jayasundera as revealed in the preceding analysis, in fact put this process of ‘liberalizing’ in cold storage, and moved at express speed in the opposite direction of privatizing LMSL, with the monopoly in tact. In that respect he has acted contrary to Section 5(t) of the PERC Act, relied on by him by failing to act in the manner he was authorized to do, and by engaging in a process which was diametrically opposed to the policy as laid down in the Cabinet decision.

Valuation of LMSL had been done by the Chief Valuer as at 2.7.93. Jayasundera wrote to the Chief Valuer on 6.2.2002 requesting an updated version of the valuation. The Chief Valuer replied him by letter dated 7.5.2002 stating that the valuation of assets is almost complete and can be finalized within a week and that the business valuation was not started since his officers are entitled to an incentive payment as approved by the Cabinet. He requested Jayasundera to confirm the payment as approved by the Cabinet. Jayasundera did not reply this letter. Instead, by letter dated 15.5.2002 a business valuation of LMSL was requested from the DFCC Bank to be given before 28.5.2002. A sum of RS.750,000/- plus GST and NSL were paid by Jayasundera to DFCC Bank without demur.

A question immediately arises, as to how a public officer, who was reluctant to pay an incentive allowance to another public officer, could be so generous to a private bank. The only reason given by Jayasundera for not pursuing the matter with the Chief Valuer is that “it would not have been feasible to have expected a business valuation to be done by the Chief Valuer within a short period of time” (paragraph 12K of his affidavit). Even the DFCC bank appears to have been rushed through by PERC to finish the valuation. Question looms large as to whose deadline Jayasundera was trying to keep. The Cabinet had not even authorized PERC to make a recommendation as to the sale of LMSL shares.. Hence, his hasty action was certainly not based on a lawful exercise of executive power in terms of the PERC Act, and was contrary to the decision of the Cabinet of Ministers.

Even assuming that Jayasundera wanted to make an unsolicited recommendation to the Cabinet, as regards the sale of LMSL shares, the proper course would have been to secure a valuation from the Chief Valuer, which had been previously requested and would have been ready within a week in regard to the assets of LMSL. He avoided getting this valuation by refraining from making a commitment to pay the Chief Valuer the incentive allowance, which the latter was entitled to in terms of Cabinet decision.

Having successfully stalled that process, he selected a private bank on his own and paid the full fee that was sought. This is completely contrary to the basic tenets of public sector procurement. The business valuation he sought was conceived by him alone. Based on the business value given by the DFCC, Jayasundera fixed the floor price for bids of 90% of LMSL at Rs.1.2 Billion. The severe criticism of the valuation and the floor price fixed is based on the financial performance of LMSL with 4 years of the privatization. According to Annual Reports profits of LMSL have been as follows:

2002/2003 -	508,735,000
2003/2004 -	267,802,000
2004/2005 -	575,035,000
2005/2006 -	<u>1,106,992,000</u>
	<u>2,458,564,000</u>

Thus, it is pointed out by the Petitioner and Ameresekere that within 4 years, more than double the amount that had been spent on the purchase of shares was recovered by way of profits from the business of LMSL. That alone gives credence to the criticism of Petitioner and of Ameresekere that the basis of valuation and the process of sale were seriously flawed.

Ameresekere in his submissions demonstrated that this is an erroneous basis of valuation considering the nature of the business activity, especially if the high component of real estate (more than 8 Acres of Land in the Port of Colombo) is to be taken into account. Real estate could never be valued in the manner it was sought to be done. The valuation of real estate could have come from the assets value done by the Chief Valuer, which Jayasundera carefully avoided obtaining.

The Petitioner in paragraph 22, quoted paragraph 12 of the COPE Report, which highlights both matters referred to above - *“Consequently, being confronted with the above monopoly clause, DFCC Bank reneged on their “business valuation” of LMSL of Rs 1,200,000,000/- and confirmed in writing that on the basis of a “monopoly” their “business valuation” Rs. 2,400,000,000, confirming that had they been required to give a “net assets valuation” they would have engaged the services of a professional real estate valuer for the land 8A.2R.2I.44P.”*

Jayasundera’s conduct in the matter of obtaining the valuation is basically not authorized by the Cabinet, is characterized by inexplicable haste; erratic; apparently designed to suit his own objectives; contrary to all accepted procedures and furthest removed from a lawful exercise of power under the PERC Act of tendering well considered advice and recommendation to the Cabinet.

A ‘TEC’ was appointed by C. Ratwatte, the then Secretary to the Treasury entirely on the recommendation of Jayasundera. A characteristic feature of the entire process is that Ratwatte has approved and signed every paper that had been put by Jayasundera, promptly and without any question being raised. The criticism of the Petitioner and Ameresekere as to the failure of Jayasundera to get a CATB appointed gathers strength, since there was no other body other than Jayasundera himself to check on the work of the TEC.

The entirety of the envisaged process of shortlisted parties being allowed to place financial bids on the Colombo Stock Exchange was obviously devised and followed by Jayasundera on his own, as the later events reveal, since the matter of sale of shares had not even been placed before the Cabinet, as at that stage, and there was admittedly no CATB.

The criticism of the 32nd Added Respondent, that JKH only made use of the credentials of FAMM to clear the initial threshold and that collaboration with FAMM, was never genuinely intended gains strength from a document that emerges from an entirely different quarter. The Petitioner has at a later stage in the case obtained documents marked P36 and P37 from the BOI, as to an application for investment relief submitted by Ratnayake on behalf of JKH. On 20.3.2002, being 7 days before the meeting of the TEC referred to above in which the EOI's were reviewed, Ratnayake submitted an application in terms of Section 17 of the BOI Law for tax relief in respect of a "new investment". In column 1 (a) of the application form as to "Particulars of Collaborators" only the name of John Keells Holdings and the address at 130 Glennie Street, Colombo 2. is specified. Significantly, there is no reference to any collaborator or to any foreign investment.

More significantly the particulars of the proposed investment carries all the details of LMSL without the name. The address of the place where the investment is going to be made is given as 69, Walls Street, Colombo 15, which is the address of LMSL. The extent of Land required for the investment is given as 8 Acres 2 Roods 21.4 Perches being precisely the extent of the Land within the Port of Colombo, which features so significantly in the case. 12 Tanks, 40 years old being the facilities used by LMSL are also included. The application made by Ratnayake on behalf of JKH is premised on a suppression of the truth, in that, it is nowhere stated that what was intended is an acquisition of the business of LMSL. It is falsely made out to be a new investment to qualify for investment relief. The omission to refer to the collaboration of FAMM, which was most significant from the perspective of the BOI, clearly establishes the allegation of 32nd Added Respondent that the inclusion of FAMM in the EOI submitted at the same time was only a passing show to get past the threshold of 70 marks.

Another aspect to be considered is the basis on which Ratnayake of JKH was so confident that its EOI containing the misrepresentation of collaboration with FAMM, would clear all the hurdles and be able to "clinch the deal" including the Land of 8 Acres, before the EOI was even shortlisted. Was it optimistic guesswork? Or, as alleged by the Petitioner and Ameresekere, the entire deal was arranged between Jayasundera and Ratnayake ? The subsequent events will shed light as to which alternative is more possible.

To continue the narrative of events with regards to the BOI application. By letter dated 11.7.2002 the BOI notified JKH that the application for investment relief has been approved and there will be no income tax for a period of 3 years. Thereafter income tax would be 10% for the 4th and 5th year and 15% thereafter. The irony of the process as pointed out by Ameresekere is that LMSL owned by the Ceylon Petroleum Corporation, was a tax paying enterprise. The criticism of Ameresekere that a profit making tax paying public enterprise became a tax free private enterprise, as a result of the impugned exercise is well established. Whereas the object of the process of liberalization according to the Cabinet Memorandum which approved was to increase the volume of bunkering and thereby increase the revenue yield to the State.

The date of the BOI Letter granting tax exemption been 11.7.2002 may have some significance, since on the very next day – 12.7.2002, Jayasundera rushed a Letter to Ratnayake that the JKH bid was accepted and that "it is proposed to conclude the transaction". Ratnayake replied on the same day 12.7.2002 stating that they are willing to conclude the transaction. There is indeed, amazing speed, in concluding a transaction as to the sale of a public asset, which also included 8 Acres of Land in the Port of Colombo. All this was done when the proposed process of sale had not been even considered by the Cabinet. The Cabinet considered the process, a month later on 14.8.2002.

To conclude the narrative of events as regards the BOI approval, although approval was granted by Letter dated 11.7.2002, it would not have in effect given tax relief to JKH, since only a new investment was, opposed to an acquisition of an existing business, would qualify for such relief. The applicable Regulation was thereafter amended by Gazette bearing No.1256/22 dated 1.10.2002 to include an investment formed by an acquisition of assets of an existing enterprise. The amendment is “tailor made” to fit the acquisition of assets of LMSL by JKH. Which inference is fully supported by the prompt Letter dated 4.10.2002 sent by Ratnayake to BOI requesting an amendment of the Agreement that had already been entered in to on the basis of the amendment to the Regulation.

All the amendments to the Agreement suggested by Ratnayake were incorporated by BOI ensuring the tax relief referred to above for the investment. This process to say the least makes a mockery of the Rule of Law and the equal protection of the law. If the law can be bent and amended to suit an individual purpose and to confer a benefit to any party that was not due under the existing law, the hallowed principle of equality before the law, will be denuded of its essential and abiding meaning.

A Pre-Bid Conference was convened by Jayasundera on 30.4.2002 and held at PERC office. Representatives of CPC, SLPA , Colombo Stock Exchange and of parties, who submitted EOI's were present. It is clear that the Meeting was convened well before the Report of the TEC was completed. The TEC report is undated, but it refers to a meeting on 6.6.2002. It appears that without finalizing the Report and the signing it, the parties who were shortlisted were notified that they could submit proposals on the basis of the RFP furnished by PERC. The absence of any guidelines laid down by the Cabinet and of a CATB appears to have enabled Jayasundera to devise a procedure of his choice being a course of action far removed from the power vested in PERC under the law referred to above, being to advise and assist the Government. Be that as it may, when parties come for the Pre Bid Conference no one knew of the basis on which the EOI's were evaluated for the plain reason that there was no Report of TEC as at that date.

Paragraph 1. of the Minutes specifically states that LMSL will not have a monopoly on the import and sale of bunkers subsequent to the sale of LMSL shares. Paragraph 1.5 states that the present CPA Act provides for the Minister to authorize the import and sale of bunkers. Thus the clear message given to the bidders is that after the sale, the monopoly will be dismantled with licenses being granted to others. The Cabinet had directed the reverse of the process, being a partial dismantling of the monopoly, and a sale of LMSL shares within 1 year thereof.

Further, it is clear from the sequence of events set out above under the head “Liberalization of Bunkering”, that the PERC headed by Jayasundera did not take steps towards liberalization, as required by the Cabinet and on the contrary, the process was effectively put in cold storage. Hence Jayasundera who knew fully well that PERC had not taken steps to even recommend a liberalized regime to the Cabinet and, at the least for sometime to come there would be no competition in the sector, failed to apprise the bidders of the true picture and conveyed an incorrect impression. Whereas, if in effect the monopoly was going to continue for a limited period of time, the bidders may have had a basis to enhance their bids. Hence Jayasundera's action was adverse to the interest of the State in securing a better price. He failed to take into account the specific decision of Cabinet that the monopoly would at the least would continue to the Port of Colombo for one year.

The more serious allegation against Jayasundera on that account is that after the JKH bid was accepted he agreed to a suggestion of Ratnayaka made in Letter dated 31.7.2002 that provision be included in the draft CUF Agreement, which had been issued with the RFP, that all bunkers handled and transported within the Port of Colombo will have to use the Common User Facility (CUF). Accordingly, the CUF was amended including as clause 8.2, the assurance sought by Ratnayake as an undertaking of the Government and SLPA. Hence the requirement in clause 8.2 would necessarily result in any party supplying bunkers in the Port of Colombo having to use of tanks of LMSL. Finally, the Court of Appeal held that the said clause 8.2 was invalid as being inconsistent with Act No.33 of 2002.

At the pre bid Meeting Jayasundera clearly indicated that there would be no monopoly and that other licenses would be issued. He acted contrary to the proclaimed position in two ways. Firstly, he refrained from acting on the specific decision of the Cabinet made on the recommendation of the Committee of Officials, including a Director of PERC, that PERC should make recommendations, as to the issuance of licenses to liberalize the bunkering trade. Thereby he brought about a situation of a defacto monopoly by dampening the competitive regime, which the Cabinet envisaged. Secondly, he readily and without any consultation agreed to the inclusion of clause 8.2 in the CUF departing from the draft previously issued, being a provision obviously intended to install a monopoly. Jayasundera's function under the PERC Law cited above was only to advise and assist the Government, and not to commit the Government to an undertaking, which is completely contrary to the previous decision of the Cabinet.

Jayasundera has in paragraph 18(d) of his affidavit admitted the subsequent inclusion Clause 8.2, and seeks to justify his action on the basis that it was done *"in order to maintain a level playing field among all bunker operators."* In respect of this quaint defence, his perception of a "level playing field" appears to be one with a single player. He indirectly assured to the continuance of the monopoly, being a course completely contrary to the position set up in the forefront of the Pre Bid Conference.

JKH knew fully well that this was not a mere sale, but a sale of shares owned by a Public Corporation in an extremely lucrative venture. That, transparency and action being taken according to law should necessarily underpin the validity of the transaction. The declared basis at the Pre-Bid Conference attended by Ratnayake representing JKH was that there will be no monopoly after the sale and that other suppliers of bunkers would be issued licenses. Having come in on this openly declared premise, no sooner the bid was accepted by Jayasundera, Ratnayake moved quickly to get the former committed to an inclusion of clause 8.2. The obvious purpose of getting clause 8.2 included was to drive away competitors, as manifested by the subsequent conduct of JKH of procuring the SLPA to take action against the 32nd Respondent, and thereafter by directly instituting legal proceedings against the latter. Hence, I cannot agree with the submission of bona-fides.

The following dicta of the Privy Council appropriately deal with the proposition – now advanced by Counsel for JKH. *"Next comes the question whether the Principal Collector of Customs had ostensible authority, such as would bring the Crown, to enter in to the contract sued on. All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out "by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists. Their Lordships think therefore nothing done by Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Principal Collector had the right to enter into a contract to sell the goods which are the subject matter of this action."*

The judgment in A.D. de Silva's case was followed by the Supreme Court in the case of Rowlands vs Attorney General 74 NLR PAGE 385. In that case the Court considered the question whether the principal of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance. The Court held as follows (at page 410) "Now in the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual. There is clear authority to this effect in American law but there would appear to be a dearth of authority in English law. In our law however there is now clear authority to this effect."

The Supreme Court cited the preceding dicta in A.D. de Silva's case as the authority for this proposition. The Court also observed that in a contract involving a larger sum of money the authority to bind the State lay in the Cabinet as a whole (p.405) and not on a single member who acts on his own responsibility. That the Minister should have got approval of the Cabinet or gone "before the House" (Parliament).

For the reasons stated above, I cannot accept the submissions of Counsel for J.K.H. (18th to 20th Respondents) based on bona fides. It is that these Respondents got an advantage over the competitors through the yielding hand of Jayasundera to safeguard what they secured in an illegal, arbitrary and biased exercise of executive power.

The next Deviation alleged is in respect of the Land in extent 8 Acres 2 Roods 21.44 perches being an area generally referred to as the “ Bloemedhal Oil Depot”. The statement contained in paragraph 4.4.1 of the RFP that the CPC presently holds freehold title to the Land and has obtained Cabinet approval to transfer it to LMSL, is incorrect. The Land infact comes within the limits of the Port of Colombo, as specified in the Order dated 24.3.1986 made by the then Minister of National Security in terms of Section 2(3) of the Sri Lanka Port Authority Act No.51 of 1979.

All parties submitting proposals were specially required to carry out their own due diligence without relying on the representations in RFP. Hence JKH cannot rely on the incorrect statement contained in paragraph 4.4.1 of the RFP. Be that as it may, it is common ground that LMSL being a Company did not own this property and had no legal claim to it, whatsoever.

Paragraph 5 of the minutes of Pre-bid Conference reads -

“ The time frame for the transfer of assets to LMSL from CPC:

- a. All movables – prior to closing date*
- b. Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMS:*

The Petitioner has quoted this section of the minute verbatim in paragraph 25 (c) of the Petition and Jayasundera had to answer as to what he intended to notify the bidders by 7.5.2002 as to the terms of the transfer and the payment to be made. As noted above, by this date the Cabinet has not even been notified of any sale of LMSL shares, let alone a transfer of 8 Acres of land within the Port of Colombo. The Cabinet had not authorized Jayasundera or PERC to do anything in this regard. A question looms large as to the basis on which Jayasundera intended to give this vital information regarding the land within 7 days. Jayasundera has stated in paragraph 27 (b) and (c) of his affidavit which reads as follows:

“(b) The transfer of title of the said land was not to be free of “valuable consideration” because the value of the said land was taken into account in arriving at the business valuation of LMSL.

(c) the issue of transferring title of the said land was discussed at the Pre- Bid conference since matters such as the manner of transfer, the instrument to be executed etc., had to be finalized.”

In respect of what he has stated in paragraph (b) above, it is to be noted that he did not inform the bidders that the value of the Land has been taken into account in arriving at the business valuation of LMSL. On the other hand he could not have possibly given this information since the business valuation was requested from the DFCC by him only on 15.5.2002, and the valuation report is dated 10.6.2002, whereas the Pre-Bid Conference was on 30.4.2002.

Jayasundera had no mandate, whatsoever, from the Cabinet or anyone else to make an astounding representation that title to 8 Acres of State Land would be transferred without any payment, in such a casual manner, on a sheet of paper that does not bear even a signature. When State Land is bequeathed on Grant or Lease at a nominal price or gratuitously, it is described as a “special grant or lease”. Section 6(1) of the State Lands Ordinance empowers the President to make such special grant or lease only for any “charitable, educational, philanthropic, religious or scientific purpose.” Even the power reposed in the President would now be subject to the 13th Amendment to the Constitution. Thus Jayasundera making this representation was arrogating to himself a power that even the President did not have.

The Chief Valuer who was requested to do a valuation wrote to Jayasundera on 7.5.2002 stating that the assets valuation was nearly ready and requested confirmation of the incentive payment authorized by the Cabinet for the business valuation. It was noted in the preceding analysis that Jayasundera effectively prevented the Chief Valuer from submitting a valuation by not making a commitment to make the incentive payment. Having thus stalled the Chief Valuer he caused Z18 to be sent to JKH on 10.5.2002 stating that there would be no separate payment for the Land. Thereafter, on 15.5.2002 he requested the business valuation from DFCC Bank. Thus it is clear that the business valuation by DFCC Bank is a contrivance adopted by Jayasundera to avoid a separate assets valuation and a business valuation being done by the Chief Valuer.

After having made an award in favour of JKH in an exchange of Letters dated 12.7.2002 between Jayasundera and Ratnayake, well before the matter was even considered by the Cabinet, PERC set about in getting the relevant agreements ready for signature. The Agreements were executed on 20.8.2002 one day prior to the decision of the Cabinet being confirmed. The proposal to the Cabinet does not make any reference to the Government being a party to an Agreement to transfer Land.

An examination of the reasons given by Jayasundera in the context of the documented sequence of events demonstrates that they centre around his own role in this regard. The statement that land “was to form part of the assets” is a nebulous statement. Land is immovable property with clearly defined legal means of acquiring ownership. The question is whether at the material time Land was in law an asset of LMSL. Admittedly it was not. It has been a part of the Port of Colombo. The incorrect statement in paragraph 4.4.1 of RFP that CPC holds freehold title to the Land and obtained Cabinet approval to transfer the Land to LMSL referred to above, was only in the imagination of Jayasundera and PERC.

However, since the bidders were put on “due diligence” to ascertain the truth of the statement in the RFP and since no commitment in this regard being made at the Pre Bid Conference as revealed in the preceding analysis, nothing would have turned only on this incorrect statement. The turning point was the communication that no additional payment will be due in respect of the land. Jayasundera had no authority, whatsoever, to make such a communication. Having given this assurance, Jayasundera avoided getting a separate assets and business valuation from the Chief Valuer and opted to get only a business valuation from the DFCC Bank. The Bank has quite correctly admitted before the Committee in Parliament that if a net asset valuation was requested they would have engaged the services of a real estate valuer.

Jayasundera now takes shelter for actions on the basis that the value of the Land has been taken into account in the business valuation, whereas he has without any authority and 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 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 to JKH without any payment. 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 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 PERC.

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. 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 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 - “*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 - “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.-*

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 the 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 and can only be used by the Government in accordance with the Sri Lanka Ports Authority Act;

The undated report of the TEC had been signed presumably after the meeting on 6.6.2002. The report recommends that 6 shortlisted bidders be allowed to place financial binds on the Colombo Stock Exchange for the shares of LMSL "subject to Cabinet approval". The DFCC Bank valuation report stating a valuation for 90% of the shares in the range of Rs. 1.016 billion to Rs. 1.286 billion is dated 10.6.2002. Considering that Jayasundera and PERC had not been authorized by the Cabinet to make even a recommendation as to the privatization of LMSL, if it was intended to give unsolicited advice to the Cabinet, this was the appropriate stage for the matter to have been referred to the Cabinet. Instead Jayasundera appears to have taken two parallel courses of action.

Firstly, a Cabinet Memorandum dated 20.6.2002 was submitted by the 2nd Respondent being the then Minister of Power and Energy. It is clear from its contents that it has been prepared on the basis of information furnished by PERC. There is a specific reference to the shortlisting of bidders and the valuation by DFCC Bank. Significantly, it does not refer to a valuation requested from the Chief Valuer which was not pursued. The more importantly the Memorandum makes no reference whatsoever to the previous decision of the Cabinet as regards liberalizing of the bunkering sector. Since PERC is obviously responsible for the preparation of the memorandum, the omission to refer to the previous policy decision has to be attributed to PERC. It is manifest that the 2nd Respondent who has not filed any objections in Court, has merely adopted a draft submitted by PERC, without any examination of its content.

Be that as it may, if the matter was submitted to the Cabinet as alleged by the Petitioner, no further action could have been taken by PERC, whose sole function was to advise and assist the Government, until a decision was made in this regard by the Cabinet. The observations made by the former President in the Memorandum dated 7.8.2002 (P14) reveals that the Memorandum of the 2nd Respondent had been circulated only on 6.8.2002. Hence there appears to have been no urgency in dealing with the matter in the Cabinet and a decision in respect of the memorandum was made only on 14.8.2002 and confirmed on 21.8.2002. The decision states that action should be taken on the matter by the Ministry of Power and Energy.

The second course of action taken by PERC was, that while its proposal was pending before the Cabinet, to finalise the sale of shares. It is clear that Jayasundera viewed the process pending before the Cabinet as a mere formality. And, acting entirely in excess of the power vested in PERC by Act No. 1 of 1996, he called for bids from the shortlisted parties. Thus the shortlisting done by the TEC in the faulty process referred above which favoured JKH become a fait accompli. Further, the valuation done by the DFCC Bank, which was obtained entirely on the decision of Jayasundera after carefully avoiding a valuation being done by the Chief Valuer became a fait accompli.

Jayasundera then, acting on his own fixed the floor price at Rs. 1.2 billion and required the bidders to furnish a bid bond for 10% of the floor price to be eligible to bid at the Stock Exchange for 90% of Shares of LMSL. The terminal date for the bid bond was fixed by Jayasundera as being 10.7.2002. As at that date the Cabinet Memorandum of the Minister being the 2nd Respondent had not even been circulated amongst the members of the Cabinet. But, there was a flurry of activity on the part of Jayasundera and PERC which the Petitioner has pleaded by producing contemporaneous accounts of these events published in the Daily News Papers of 10.7.2002, 13.7.2002 and 24.7.2002 produced marked P17.

The complaint of the bidders published in the Newspapers is that they had time only from 1.00 p.m. to 2.00 p.m. on the 10th to furnish the bid bonds and that those with foreign collaborators could not get necessary instructions within the limited space of time. JKH was the only bidder to place the bid bond.

Jayasundera has on his own fixed the sale for bidding at the Stock Exchange for 12.7.2002 and since JKH was the only bidder to have furnished the bid bond, he decide that it was not necessary to go ahead with the bidding process and notified by Letter bearing date 12.7.2002 itself to S. Ratnayake of JKH (P15(a)) that "it is proposed to conclude the transaction..... and signing the Agreements by July 24th 2002". Ratnayake by Letter addressed to Jayasundera bearing the same date 12.7.2002 (P15) stated that JKH is willing to conclude the transaction as set out in Jayasundera's letter.

When looking at the two Letters bearing the same date one gets the impression that Jayasundera and Ratnayake sat across the table and exchanged them. Counsel for JKH submitted that they were exchanged by FAX. Jayasundera's FAX letter bears time 4.45 p.m. and Ratnayake's Fax the time 5.30 p.m. Whatever be the travails of other bidders, the timing fitted well to Ratnayake's affairs since according to document P37 (subsequently obtained by the Petitioner from the BOI) by Letter dated 11.7.2002 the BOI informed JKH that the application for tax relief in this regard has been allowed. I have already dealt with the false and illegal manner in which JKH secured the tax relief.

Having promptly and without reservation agreed to close the transaction by letter P16, Ratnayake continued to secure more concessions from Jayasundera as noted above by sending Letter P18(a), which included the concession as to the amendment of the CUF by incorporating clause 8.2 on the basis of which, JKH sought stave off competitors as revealed above.

It is seen from document P15(a) that Jayasundera stated that the Agreements would be signed by July 24, 2002, well before the Cabinet Memorandum being circulated. He admits that PERC got all the Agreements ready pending a decision of the Cabinet. The Agreements are heavily biased or favour JKH and have cast responsibilities on the Government of Sri Lanka that are not even referred to the Cabinet Memorandum. Impatience of Jayasundera appears to have given way and the Agreements were in fact signed on 20.8.2002, 1 day before the Cabinet minutes were confirmed. Ironically, the decision of the Cabinet is for action to be taken by the Minister of Power and Energy, and not by Jayasundera and PERC.