

**ENVIRONMENTAL FOUNDATION LIMITED
vs
URBAN DEVELOPMENT AUTHORITY OF SRI LANKA
AND OTHERS**

SUPREME COURT

SARATH N. SILVA, C. J.

N. K. UDALAGAMA, J AND

N. E. DISSANAYAKE, J

SC (F. R.) APPLICATION NO. 47/2004

Constitution - Article 12(1) - Equality before law - Article 14(1) (a) freedom of speech and expression - Article 4(d) - Manner in which the sovereignty of the people shall be exercised in relation to fundamental rights - Whether petitioner being an incorporated company had legal status to invoke fundamental rights jurisdiction under Article 12(1) and 14(1)(d) of the Constitution.

An application was filed by the petitioner in the public interest and it relates to a purported Management Agreement or Lease entered into on 15.12.2003 by the 1st respondent (UDA) with the 2nd Respondent (E. A. P. Networks (Pvt.) Ltd. - E. A. P. Ltd) whereby it was sought to hand over the management and control of the 14 acre - "the Galle Face Green", to E. A. P. Ltd. The Supreme Court granted leave to proceed and made an interim order directing the UDA to refrain from putting into operation any lease or any other kind of arrangement or agreement affecting the use, occupation and/or management of the area described as the Galle Face Green.

Held:

- (1) Although the right to information is not specifically guaranteed under the Constitution as a fundamental right, the freedom of speech and expression including publication guaranteed by Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to affairs of State and official communications.

- (2) The Urban Development Authority (UDA) is an organ of the Government and is required by the provisions of Article 4(d) to secure and advance the fundamental rights that are guaranteed by the Constitution.

The UDA has an obligation under the Constitution to ensure that a person could effectively exercise the freedom of speech, expression and publication in respect of a matter that should be in the public domain. Consequently, a bare denial of access to official information amounts to infringement of the petitioner's fundamental rights as guaranteed by Article 14(1)(a) of the Constitution.

- (3) The arbitrary refusal of information required by the Petitioner is an infringement of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution.
- (4) The word "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to all entities having legal personality recognized by law.

Sarath N Silva, CJ:

"Although Counsel contended that Article 14(1) should be read differently in view of the reference to a "citizen". I am of the view that this distinction does not carry with it a difference which would enable a company incorporated in Sri Lanka, to vindicate an infringement under Article 12(1) and disqualifies it from doing so in respect of an infringement under Article 14(1).

- (6) The action of the UDA constitutes an infringement of fundamental rights guaranteed by Article 12(1) of the Constitution.

APPLICATION for relief for infringement of fundamental rights.

Cases referred to:-

1. *Janatha Finance & Investments Ltd vs. Liyanage & others* -1983 2 SLR 111
2. *Smithkline Beecham Biological S. A. & Others vs. State Pharmaceutical of Sri Lanka & Others* 1997 3 SLR 20
3. *Leader Publications (Pvt) Ltd vs. Ariya Rabasinghe, Director of Information & competent Authority & others* 2000 1 SLR 265

I. R. Rajapakse with Ms. Pamoda Rajakeeya for Petitioner

Romesh de Silva, P. C. with Sugath Caldera for 1st Respondent.

Shankir Parathalingam, P. C. with N. R. Sivendran and S. Cooray for 2nd Respondent.

Cur. vult. adv

November 23, 2005

SARATH N. SILVA, C. J.

This case relates to a purported Management Agreement or Lease entered into on 15.12.2003 by the 1st Respondent (Urban Development Authority – UDA) with the 2nd Respondent (E.A.P. Networks (Pvt) Ltd – EAP Ltd), whereby it was sought to hand over the management and control of the 14 acre seaside promenade of Colombo - “the Galle Face Green”, to E. A. P. Ltd. When the application was supported on 13.02.2004, the Court granted leave to proceed and made an interim order directing the UDA to refrain from putting into operation any lease or any other kind of arrangement or agreement affecting the use, occupation and /or management of the area described as the Galle Face Green. The order states as follows:

“We make this order on the basis that Galle Face Green has been open to the public, established and maintained as a public utility for the past 150 years.”

The interim order did not make specific reference to the impugned Agreement since it was not in the public domain at that time and the Petitioner had been denied access to it, being the alleged infringement of Article 14(1)(a) of the Constitution.

The Agreement has been subsequently produced by E.A.P. Ltd., marked 2R2. Although the Agreement purports to be a Management Agreement, as correctly submitted by Counsel for the Petitioner, since it provides for payment to be made to the UDA it is more in the nature of a lease. It is plain that a manager does not pay the owner. I do not have to dwell on this matter further, since even after the extended time allowed for the purpose, the Respondents have failed to produce any grant, lease or order by which Galle Face Green was vested in the UDA. Therefore, the UDA had no power whatsoever to enter into the Agreement 2R2 and the interim order of this Court fortuitously prevented, “the landmark in

the history of our nation”, “the nations pride and heritage” (to use the words, in the prominent newspaper notification P5, published by the UDA, which would be referred to later) from passing into private hands.

This is an application filed in the public interest and considering the purported exercise of power by the UDA alleged to be an infringement of Article 12(1) of the Constitution – and the refusal to disclose information alleged to be an infringement of Article 14(1)(a), it is necessary to examine the legal status and character of the Galle Face Green.

As stated in the description, in the newspaper notification P5, published by UDA, the Galle Face Green is in certain respects a “landmark in the history of our nation”, in reference to the British period of colonial rule of our history and the later period after gaining independence. Whilst the national, social, cultural and political events that have taken place at the Galle Face Green, including Independence Day Parades, Swearing in of the President, visit of His Holiness the Pope and foreign dignitaries including Her Majesty the Queen, May Day Rallies, and the like form part of our contemporary history, the establishment and development of Galle Face Green are firmly engraved on a rock tablet and a plaque, found at the seaward edge and at the Galle Road end, respectively of the Green. The rock tablet (referred to in P4d) at the sea-ward edge of the ‘walk’ marks the commencement of the Galle Face Green and has a legal significance that we have to take note of. The rock tablet, well preserved upto date, has the following inscription:

GALLE FACE WALK

Commenced by
Sir Henry Ward
1856

Completed 1859

and recommended to his successors in the interest
of the Ladies and Children of Colombo

Sir Henry Ward was the Governor and wielded the power of the British Monarch. The inscription reflects the immense toil that would have gone into the construction of the elevated walk and green with the panoramic view of the Indian Ocean stretching to the arch of the horizon. The idyllic setting of tranquility and leisure was dedicated to the “ladies and children of Colombo”. The “recommendation to his successors” by the Governor, which would include the Government of the Republic of Sri Lanka, ascribes to it the character of a dedication in perpetuity and it is the duty of the Government of Sri Lanka to maintain the Galle Face Green in the manner as laid down by Sir Henry Ward. The location of the Galle Face Hotel constructed in 1864, effectively prevents the construction of any road, highway or rail track across the Green and removed it from the pale of commercial exploitation. The cherished dedication of Sir Henry Ward has held sway for nearly 150 years until, the arrangement being the subject of this application was made, in the manner that will be stated hereafter.

As noted in the publication P4, over the years due to bad maintenance, the Green turned into a dust bowl and in the years 2000 – 2001 the then administration undertook a comprehensive rehabilitation programme spending over Rs. 30 Million, which was completed 23.9.2001 as recorded in the plaque referred to above, as a part of a comprehensive Galle Face Development Programme.

After the change of administration towards the end of December 2003, the Petitioner pleads that there were several newspaper publications, some of which have been produced marked P4(a) to P4(d) reporting a “deal” entered into between the UDA and EAP Ltd., whereby the control of the Green would pass to the latter to set up a “Mega Leisure Complex”. The computer print out of the Gulf News “GN online” dated 23.12.2003 (P5d) contains an account of the Governor and the extensive development carried out by the previous administration. A portion of this publication reads as follows:

“Now, the Urban Development Authority has leased out the sacred site to a private entertainment company, E.A.P. Edirisinghe, to turn the Green to a mega entertainment and leisure park with food stalls with a hawker-street style theme. Small-time traders fear they will be wiped out of business as the big-names come into eat into their business. And free access will surely be a thing of the past. The ‘hands-off’ Galle Face Green policy since the latter part of the 19th century might not be yielded without a fight.”

The UDA lost no time responding to these publications which implied a “secret deal” and published a half page notification on 4.1.2004(p5) with a bold headline.

MORE TRANSPARENT THAN GLASS

The notification is in reference to the transaction the UDA has entered into with E. A. P. Ltd., and extols the many attributes of the Green some of which have been referred to above with an assurance that the public would have free and uninterrupted access to the Green.

Within 2 days of the publication P5, the Petitioner wrote letter P6 (dated 6.1.2004) to the UDA describing its status as a “ non-profit making organization - which has for over 22 years dedicated itself to the protection of the environment in the public interest” and called for copies of the following documents-

- (a) The Order vesting the Galle Face Green in the UDA
- (b) The Lease Agreement entered into with EAP Group of companies or related entity
- (c) The approved plan, if any, for the development of Galle Face Green in terms of the said lease.

The Petitioner copied the letter to the Chairperson E.A.P. Group of Companies. There was no response to this request of the Petitioner by the UDA and E.A.P. Ltd. The Petitioner then sent a further request by letter dated 14.1.2004, addressed

to the UDA and E.A.P. Ltd (P7 and P8) The UDA replied by letter dated 20.1.2004(P10), stating that the Authority is not in a position to forward official documents as requested.

The Petitioner alleges that the refusal on the part of the UDA to disclose the information, as requested in the letters marked P6 and P8 constitute an infringement of the fundamental right guaranteed by Article 14(1)(a) of the Constitution. It is seen that this Article guarantees “the freedom of speech and expression including publication”.

There is no specific guarantee of a fundamental right to information contained in our Constitution.

Counsel for the Petitioner contended that the right to information, in the circumstances of this case, is implicit in the freedom of expression, that is guaranteed by Article 14(1)(a) of the Constitution. It is submitted that the UDA by the publication of P5 containing the bold headline “more transparent than glass” brought the matter of the agreement entered into with E.A.P. Ltd., into the public domain. Therefore the Petitioner is entitled to check on the information given by the UDA as regards the transaction entered into with E.A.P. Ltd., by securing the relevant documents including the vesting order, agreement and the approved plan for development. It is only on the basis of this information the Petitioner would be in a position to effectively exercise the freedom of expression. It is contended that the Petitioner, being a well recognized entity working for the preservation of the environment is entitled to act in the public interest and secure relevant information as to the transaction that had been entered into since the matter should be in the public domain.

The contention of the Petitioner and the objections raised thereto, have to be considered in the light of the fact the right to information is not specifically guaranteed under our

Constitution as a fundamental right. Although there is no such safeguard I am of the view that the 'freedom of speech and expression including publication' guaranteed by Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to affairs of State and official communications.

Article 4(d) of the Constitution states the manner in which the sovereignty of the people shall be exercised in relation to the fundamental rights, as follows:

"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

The UDA is an organ of the Government and is required by the provisions of Article 4(d) to secure and advance the fundamental rights that are guaranteed by the Constitution. It has an obligation under the Constitution to ensure that a person could effectively exercise the freedom of speech, expression and publication in respect of a matter that should be in the public domain. Therefore a bare denial of access to official information as contained in P10, sent by the UDA, in my view amounts to an infringement of the Petitioner's fundamental rights as guaranteed by Article 14(1)(a) of the Constitution.

The petitioner also alleges that the refusal as contained in document P10 on the part of the UDA amounts to an arbitrary exercise of power in the absence of specific reasons that support such refusal. The UDA is here purporting to exercise statutory power. It has held out in publication P5 that a very transparent

transaction has been entered into in respect of Galle Face Green with E.A.P. Ltd., with all necessary safeguards to preserve and protect the public interest. Since the transaction entered into and the publication constitute a purported exercise of power, the arbitrary refusal of information required by the Petitioner is an infringement of the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. In this instance I have to note that the conduct of the UDA is worse than being arbitrary in the light of the publications that alleged a "secret deal" in respect of the Galle Face Green and UDA's bold notification that the agreement entered into was a very transparent transaction. The purpose of the publication was to mislead the public that everything has been done reasonably and according to law. But, when requested for information the UDA took a different turn and refused any disclosure of whatever information. The UDA has persisted in this refusal even before the Court. This is administrative action that has to be unreservedly condemned. Therefore the irresistible inference to be drawn is that the publication P5 was an act of deceit on the part of the UDA to prevent any further inquiry into the matter and the agreement entered into, until it was implemented.

The timely intervention of the Petitioner prevented the matter becoming a *fait accompli*. In the circumstances the action of the UDA constitutes an infringement of fundamental rights guaranteed by Article 12(1) of the Constitution.

An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the fundamental rights guaranteed by Articles 12(1) and 14(1)(a) can be invoked only by persons and in the case of Article 14(1)(a) by a citizen. In my view the word "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to all entities having legal personality, In several cases this Court has given relief to

incorporated bodies that have a legal personality recognized by law *Janatha Finance & Investments Ltd. vs. Liyanage & Others*⁽¹⁾ *Smithkline Beecham Biological S. A. & Others vs. State Pharmaceutical of Sri Lanka & Others*⁽²⁾ *Leader Publications (Pvt) Ltd vs. Ariya Rubasinghe, Director of Information & Competent Authority & Others*⁽³⁾ Although Counsel contended that Article 14(1) should be read differently in view of the reference to a "citizen", I am of the view that this distinction does not carry with it a difference which would enable a company incorporate in Sri Lanka, to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1).

The Petitioner has pleaded, without contradiction that it is a non profit making organization with the object of *inter alia* the monitoring of State Departments and regulatory Agencies to ensure that the public interest is protected in the matter of preserving the environment.

In December 1981 Central Environment Authority registered the Petitioner as a National Level Non-Governmental Organization engaged in activities in the field of environment (P3).

In several cases the petitioner has assisted this Court in important matters with regard to the preservation of environment. In this instance too the Petitioner has acted in the public interest and exposed acts on the part of the UDA that are clearly *ultra vires*. As noted above although much time has been granted, the UDA has failed to produce any order or authority by which the Galle Face Green had been vested in it.

It appears that the then Minister in charge of Urban Development whose efforts are referred to in the publications P4(c) and P4(d), used the agency of the UDA in order to carry out the ambitious Galle Face Development Project. It had been done in the fulfilment of the dedication made by Sri Hen-

ry Ward to preserve this seaside promenade as a place of quiet leisure for the people of Sri Lanka” After the change of administration the UDA has endeavoured to commercialize this property dedicated to the public benefit without realizing the significance of the sensitivity with which the colonial Governor expended enormous amount of money and effort to create a panoramic setting.

For the reasons stated above I would grant to the Petitioner a declaration that the fundamental rights guaranteed by Articles 12(1) and 14(1)(a) have been infringed by acts of the UDA.

I would make a further order declaring that the purported agreement entered into between the UDA and EAP Limited and produced marked 2R2 is *ultra vires* and of no force or avail in law. The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by the Government of Sri Lanka, being the successor to the Colonial Governor who made the dedication referred to above.

The application is allowed and the 1st Respondent is directed to pay the Petitioner a sum of Rs. 50,000/- as costs.

UDALAGAMA J. - I agree

DISSANAYAKE J. - I agree

Application allowed.