IN THE SUPREME COURT OF THE DEMOCRACTIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. (FR) 535/2008 W. K. H. Wegapitiya (Petitioner)
A. H. M. Fowzie and 7 others
(Respondents)

S. C. (FR) 536/2008 1) Ven. Thinyawala Palitha Thero
2) Ravi Karunanayake
3) Ravi Jayawardena (Petitioners)

A. H. M. Fowzie and five others
(Respondents)

BEFORE: Sarath N. Silva, Chief Justice
K. Sripavan Judge of the Supreme Court
P. A. Ratnayake Judge of the Supreme Court

COUNSEL: U. Egalahewa with Ranga Dayananda instd. By Kamal Gunasinghe for the Petitioner
S. Rajaratnam D. S. G. for the 4th and 18th Respondents
F. Mustapha P.C., for the 1st Respondent
Ikram Mohamed P.C., for the 3rd Respondent

DECIDED ON: 17th December 2008

Sarath N. Silva, C.J.

We have heard these applications filed in the public interest and made orders on 28.11.08, 1.12.08 and 15.12.08. The alleged infringement of fundamental rights which deny to the People the equal protection of the law guaranteed by Article 12(1) of the Constitution relate to impugned executive or administrative action in two respects. They are:

i) "Hedging Agreements" that had been entered into by the 3rd Respondent, purportedly on behalf of the Ceylon Petroleum Corporation (CPC – 2nd Respondent); and
ii) The price of sale of petroleum products in particular of petrol

The applications have been filed in the public interest on the basis that the price of sale is not commensurate with world market prices. In that, with the reduction of the world market prices the People have not derived the benefit thereof at the point of sale due to the illegal "Hedging Agreements" on which over 32 Million US$ had been paid at the time the Applications were filed with a further imminent payment of US$ 46 Million and a total payment of US$ 675.72 Million for the operative period of 9 months calculated at the price of US$ 50 per barrel and; the arbitary and irrational government taxes and levies that have been imposed.

We made an interim order on 28.11.2008 suspending payments on the "Hedging Agreements" for the several reasons that were stated. The Monetary Board being the proper Authority, on whose licence the Banks have been operating was directed to investigate these matters and to take action according to law.

In the order of 15.12.2008, considering the submissions made by the Intervenient Petitioners supported by the documents that benefits have been provided to the 3rd Respondent, being the former Chairman of the CPC by certain banks involved in the "Hedging Agreements", we directed the Monetary Board to investigate these matters with the assistance of the Criminal Investigation Department of the Police. The Monetary Board is now directed to refer the results of the investigations to the Commissions to Investigate Bribery and Corruption.

The next aspect of the alleged infringement relates to prices. Considering the evidence adduced of the price of petrol in particular being highly excessive if it is decided to lay down a pricing formula to be addressed as a national issue above party politics and the 2nd Petitioner being a Member of Parliament in the Opposition agreed to co-operate in such exercise. Accordingly the Secretary to the Treasury who was present in Court was directed to submit a report on the taxes and levies with the suggested pricing formula. A copy of the Order was sent to the Secretary to His Excellency the President. In the order of 1.12.2008, we set out the 3 components of the pricing formula be considered only with regard to petrol. In the Order of 15.12.2008 having considered the report submitted by the Secretary to the Treasury and submissions of parties we directed that the benchmark figure should be taken at US$ 56.05 per barrel of imported refined petrol. The Secretary was directed to compute a formula on the basis of this benchmark price on the premise that the revenue component would not exceed 100% of the price per litre of imported refined petroleum and of overhead costs.

According to the report of the Secretary at the benchmark importation price of 56.05 US$ per barrel the cost of a litre of refined petrol is Rs. 39.06 and the overhead costs and profit margin of the Ceylon Petroleum Corporation is 9.71 totalling Rs. 48.77. The current selling price of a litre of petrol is Rs. 122/-. Hence a total of 7 Government and fiscal levies amount to Rs. 73.23. Accordingly, when a consumer purchases a litre of petrol of which the total cost is only Rs. 48.77 he is infact paying Rs. 73.23 by way of Government taxes and levies. Viewed from another perspective Government and fiscal levies amount to over 180% of the actual price of petrol. The Petitioners have thus established a strong prima facie case that as many as 7 different levies are imposed on an unreasonable and arbitrary manner. These levies are imposed in terms of the applicable law by way of executive orders published in Regulations and remain in force unless revoked by Parliament. The impugned executive orders being prima facie unreasonable and arbitrary, deny to the Petitioners and the People the equal protection of the law and excessive prices have a serious impact on the cost of living. Hence the Petitioners are entitled to the grant of interim relief. Accordingly, we made order on 15.12.2008 that the Secretary to the Treasury should prepare a price formula in terms of which at the benchmark referred above the totality of Government and fiscal levies will not exceed 100% of the cost (i.e. cost of import plus overhead and handling charges).

There has been a downward trend of the prices of the petroleum products. In view of the submission of the Secretary to the Treasury that there is a revenue expectation from the sale of petrol and that the formula should not diminish the revenue expectation, we made an order that where the price descends below US$ 56.05 per barrel the reduced amounts be absorbed by way of a customs duty adding to the volume of revenue. On the same basis that where there is an increase of the price from US$ 56.05 upto US$ 100 per barrel, there should be a decrease in government levies coming down to a minimum 75%.

Based on the aforesaid directions the Secretary to the Treasury has now tendered two options for the formula to be adopted.

Having considered the submissions of counsel, we are of the view that option No. 1 which is annexed marked "A" to this order would be just and equitable and assure to the People the equal protection of the law.

The Secretary has recommended that Government and fiscal levies be reduced to three instead of the previously applicable six. On the basis of the formula only following Government and fiscal levies would be imposed.

i) Excise duty Rs. 40/- per litre which would remain constant;

ii) An effective customs duty of Rs. 30/- per litre which would be adjusted by waivers being granted depending on the imported cost of barrel of petrol taking the benchmark at US$ 56.05 per barrel,

Annex "A" sets out the particulars of the price formula that would be applicable.

Secretary to the Treasury submitted that there would be an undue reduction in the Government revenue as a result of this formula. On the other hand the Petitioners contend that since

Government revenue would not descend below 75%, when the cost per barrel goes upto 100 Dollars the price per litre would be as high as Rs. 142/- per litre.

We are of the view what whilst there is some degree of merit in both contentions the formula at annex "A" adequately considering the interest of revenue as well as the interests of the consumer.

The Secretary's submission that there has been a high expectation of revenue from sale of petroleum is not well founded. According to the chart given in page 6 of his Report the percentage of taxes in relation to the total petroleum bill is as follows:

2003 - 39.23%; 2004 – 27.53%; 2005 – 19.52%; 2006 – 14.11%
2007 – 13.89%; 2008 till September 8.71%

Hence the Estimates for the year 2009 could not have been prepared on a revenue estimate significantly higher than 8.7. The presently applicable rate of 180% on the sale of petrol would have been way beyond any reasonable expectation. That has become possible only because of the downward trend of world prices and most importantly due to the interim relief staying the prime facie illegal "Hedging Agreements" being the executive action which infringed the fundamental rights of the People. Hence it is just and equitable that the People should derive the benefit of the interim order they secured from Court.

In the circumstances we make a direction that the price of petrol be adjusted on the basis of the formula in Annex "A" and that the selling price of petrol be reduced to Rs. 100/- per litre with effect from midnight on 17.12.2008. An adjustment of the Excise Duty, Customs Duty, Port and Aviation Levy (P.AL) being an increase, should be effected in terms of Annex "A" in the manner suggested by the Secretary.

As noted above the imposition of the Excise Duty in terms of Section 3(1) of Act No. 13 1989 and the imposition of Customs Duties and the grant of partial waivers as stated in Annex "A" in terms of Section 10A and 19A of the Customs Ordinance, are executive functions that come within the purview of the fundamental rights jurisdiction of this Court. The alleged infringements result from illegal arbitrary and unreasonable executive action. The Secretary being the appropriate functionary and the Attorney General who represents the President in terms of Article 35(3) of the Constitution have been heard on the several days this matter was considered. Accordingly we direct that necessary orders be made in terms of the applicable law to give effect to the content of Annex "A" which has been prepared by the Secretary to the Treasury.

A submission was made that the difference in price between the superior grades of petrol that is 95 octane and other superior grades and the ordinary rate of petrol is unreasonable.

The Secretary to the Treasury is authorized to obtain the necessary particulars from the CPC and LIOC and to make a suitable direction as regards the difference in the prices be levied in the aspect of the superior grades of petrol. Once that direction is made it should be notified to the CPC and the LIOC who would be bound to comply with it and adjust prices accordingly.

The Executive is also authorized to adjust the customs duty so as to prevent an undue gain by LIOC resulting from lower overhead charges and any subsidies that have been derived from the Government in the course of the privatization exercise, to which reference has been made in the order of 15.12.2008.

This order is to be communicated by the Registrar to the Secretary to the Treasury who is present and takes notice, the Chairman of the Ceylon Petroleum Corporation, the Chief Executive Officer of LIOC. They are directed to comply with the Price formula on Annex "A" from mid-night of 17.12.2008 and to ensure that sales take place without undue interruption. The Petitioners or any affected person may file papers in this Court in respect of any infringement of this directive.

A submission was also made when the percentage of tax operative at 100% goes up doe to lowering of prices from the benchmark price the excess revenue beyond 100% should be credited to a Stabilization Fund. We are of the view that this is a suggestion to which the Secretary to the

Treasury was in agreement is reasonable since such funds would be a useful source to meet with Government expenditure where assistance is required for different aspects of the economy.

Accordingly the Secretary is directed to make necessary arrangements to have such amounts credited to a Stabilization Fund to be used on the basis of the direction given by Government.

Objections may be filed by any of the Respondents, if necessary, within three weeks. Counter affidavits within two weeks thereafter and this matter is to be listed before the same Bench on 16.2.2009, together with SC FR 566/08, 567/08 and 577/08.

Directions state above will be in operation till the final determination of this application.

of this application.

Chief Justice.

Sripavan J.,

I agree.

Judge of the Supreme Court

Ratnayake J.,

I agree.

P. A.

Judge of the Supreme Court.

Option I

Pricing structure of Petrol as per the Order given by the Supreme Court on 15/12/2008 - Confining to 3 taxes proposed to be implemented

Refined Price USD/bl	30.00	40.00	50.00	56.05	60.00	65.00	70.00	75.00	80.00	90.00	100.00
Exchange rate Rs./USD	110.73	110.73	110.73	110.73	110.73	110.73	110.73	110.73	110.73	110.73	110.73
CIF Rs./Lt	20.91	27.87	34.84	39.06	41.81	45.30	48.78	52.26	55.75	62.72	69.69
Overheads including profit margin Rs./Lt	9.71	9.71	9.71	9.71	9.71	9.71	9.71	9.71	9.71	9.71	9.71
~~Govt. fiscal levies Rs./Lt~~	~~67.45~~	~~60.14~~	~~53.24~~	~~48.95~~	~~50.59~~	~~52.26~~	~~54.04~~	~~55.86~~	~~57.09~~	~~58.89~~	~~59.73~~
(I) Excise duty @ Rs.40/Lt	40.00	40.00	40.00	40.00	40.00	40.00	40.00	40.00	40.00	40.00	40.00
(ii) Effective Customs duty for price adjustment	26.40	18.75	11.50	7.00	8.50	10.00	11.60	13.25	14.30	15.75	16.25
Before adjustment @ Rs.30/Lt	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*	*30.00*
Partial custom duty waiver	*(3.60)*	*(11.25)*	*(18.50)*	*(23.00)*	*(21.50)*	*(20.00)*	*(18.40)*	*(16.75)*	*(15.70)*	*(14.25)*	*(13.75)*
(iii) PAL @ 5%	1.05	1.39	1.74	1.95	2.09	2.26	2.44	2.61	2.79	3.14	3.48
Govt. Tax as a % sum of CIF& Overhead costs	220%	160%	120%	100%	98%	95%	92%	90%	87%	81%	75%
Provincial Council TT Rs./Lt	1.96	1.95	1.96	1.95	2.04	2.15	2.25	2.36	2.45	2.63	2.78
Selling price (Rs./ Lt)	100	100	100	100	104	109	115	120	125	134	142

Note:

Since the overhead costs of the LIOC is presently not known the partial waiver has to be appropriately adjusted based on audited cost structure of the LIOC on a monthly basis.