

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

In the matter of the ordinary exercise of jurisdiction of the Supreme Court under Article 121 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Rule 63 of the Supreme Court Rules of 1978 against the Bill titled "State Land (Special Provisions)"

S.C. S.D. 01/2019 Petitioner: Udaya Prabhath Gammanpila,
65/14 G, Wickremasinghe Mawatha,
Kumaragewatta Road,
Pelawatta, Battaramulla.

Counsel: Manohara de Silva, PC with
Anusha Perusinghe Attorney-at -Law.

S.C. S.D. 02/2019 Petitioner: Premnath Chaminda Dolawatte,
No. 50, Ihala Bomiriya,
Kaduwela.

Counsel: Canishka G. Vitharana with Dinushka
Wasala instructed by Nalin Samarakoon.

S.C. S.D. 03/2019 Petitioner: Jayakodi Arachchige Sisira Jayakodi,
526, Galborella,
Kelaniya.

Counsel: Canishka G. Vitharana with Dinushka
Wasala instructed by H.M.
Thilakarathna.

S.C. S.D. 04/2019 Petitioner: Ven. Ulapane Sumangala Thero,
Dharmayathanaya,
45/4, Nawala Road,
Narahenpita.

Counsel: Dr. Wijayadasa Rajapaksha, PC with
Rasika Dissanayake, Dasun Nagashena,
Suraj Walgama and Rakitha Rajapakshe
instructed by Nimal Rajapaksha.

S.C. S.D. 05/2019 Petitioner: Jayantha Samaraweera,
No. 342/1/4, E.W. Perera Mawatha,
Kotte Road, Pitakotte.

Counsel: Manohara de Silva, PC instructed by
H.M. Thilakarathna.

Additional Solicitor General Viraj Dayaratne, PC
with Senior State Counsel Yuresha de Silva for the
Hon. Attorney General.

Before: Buwaneka Aluwihare, PC. J.
Prasanna Jayawardena, PC. J.
L. T. B. Dehideniya, J.

The Bench assembled for hearing on 09.07.2019, 11.07.2019 and 12.07.2019.

A Bill titled "*State Land (Special Provisions)*" was published in the Government Gazette and placed on the Order Paper of Parliament for 28.06.2019. The five Petitioners referred to above, have challenged the constitutionality of the said Bill by petitions presented to this Court in terms of Article 121 (1) of the Constitution.

All the petitions were taken up together. Learned Counsel for the Petitioners and the learned Additional Solicitor General for the Respondent made oral submissions, which were supplemented by written submissions. In the course of the hearing, several questions of inconsistency with the Constitution were raised.

The Bill, according to its long title, is an Act "TO GRANT ABSOLUTE TITLE TO STATE LANDS HELD BY CITIZENS WHO ARE HOLDERS OF GRANTS OR INSTRUMENTS OF DISPOSITION AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO";

Clause 3 of the Bill makes it clear that the proposed Act is to apply to persons who are holders of "*grants*" or "*instruments of disposition*" issued under the provisions of three enactments that are presently in force; namely, the Land Development Ordinance No. 19 of 1935, as amended, Land Grants (Special Provisions) Act No. 43 of 1979 and the Crown Lands Ordinance No. 8 of 1947, as amended.

In terms of Clause 3 (1) of the Bill read with Clause 30 (a) of the Bill, persons who are holders of land, on a Grant or an Instrument of Disposition made under the provisions of the three enactments referred to above, would become eligible to "*get an Absolute Land Grant up to five acres in extent*" [proviso to Clause 3(1)] which will, thereby, vest them with "*absolute title*" to the land they are holding presently in terms of the Grants or Instruments of Disposition issued to them under the provisions of aforesaid three enactments.

The only condition or restriction imposed on the Grantee of such an "*Absolute Land Grant*" in terms of the Bill, is set out in Clause 29 of the Bill which restricts the Grantee from transferring the land to any person other than one or more of his heirs or, in the event he wishes to transfer the land to any other person, imposes the mandatory condition that the Grantee's heirs must give their written consent to that transfer. Further, in the case of land used for paddy cultivation, a further restriction is imposed - namely, the transferee must be a resident of the same Grama Niladhari's Division as the Grantee and

be the holder of a Farmer Identity Card with current membership in a Farmers' Organisation established under the provisions of the Agrarian Development Act No. 46 of 2000.

We note that, in terms of Clause 30 of the Bill, a transferee to whom a Grantee of a land held by him under an "*Absolute Land Grant*", transfers that land, will get unconditional and absolute title which is free of any conditions whatsoever and which will entitle that transferee to thereafter transfer the land to whomsoever he may wish. .

It should be mentioned here that certain "*State lands*" of the types or descriptions listed in of Clause 4 of the Bill, are excluded from the ambit of the proposed enactment. These are: (i) "*State lands*" situated at an elevation over 1524 metres above mean seal level; (ii) "*State lands*" declared as development areas under and written law; (iii) "*State lands*" coming within a reservation or protected area declared under any written law; (iv) "*State lands*" vested in any local authority by law; (v) "*State lands*" falling within the ambit of an Urban or Rural Regeneration Project, an Urban or Rural Development Project, an Infrastructure Project or a Housing Project and (vi) "*State lands*" coming under any Resettlement Programme.

The contention in the main, on behalf of the Petitioners, was a threshold issue. They submitted that the Bill, in its entirety and the procedure followed in having the Bill placed on the Order Paper of Parliament, are inconsistent with the Constitution.

Learned President's Counsel appearing for the petitioners in SC. SD 1/2019 and SC. SD 5/2019 contended that the Parliament has neither the power nor the jurisdiction to enact the Bill without it being first referred to the Provincial Councils. He submitted that, in terms of Article 154G (3) of the Constitution, no Bill in respect of any matter set out in the Provincial Council List can become law unless such Bill has been referred by the President to every Provincial Council for expression of its views thereon, before the Bill is placed on the Order Paper of Parliament. He submitted that this procedural step must

be adhered to, before the Bill is placed on the Order Paper of the Parliament. Learned President's Counsel also stressed the fact that the subject of "*Land*" is listed in the Provincial Council List as Item 18 which states; "*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*". (Emphasis added)

Learned counsel for the Petitioners in SC, SD 2/2019 and SC. SD 3/2019 and learned President's Counsel for the petitioner in SC. SD 4/2019 associated themselves with the said threshold issue.

It was also submitted by learned counsel that, as per clauses 3, 5, 11, 12, 25, 26, 28 and 30 of the Bill and its long title, the Bill provides for the grant of absolute title to "*State Land*". Learned counsel submitted that, since an "*Absolute Land Grant*" issued in terms of the Bill necessarily means a transfer and an alienation of land, the Bill attracts Item 18 of the Provincial Council List because the land which will become the subject matter of an "*Absolute Land Grant*" is "*State Land*". It was further contended that, Clause 11(3)(a) of the Bill proposes the formation of "*criteria for eligibility*" to apply for an "*Absolute Land Grant*" by-passing the National Land Commission. Learned President's Counsel submitted that the formulation of "*criteria for eligibility*" to apply for an "*Absolute Land Grant*" to the "*Lands Grants Committee*" which is proposed to be established under the Bill (Clause 3(1) read with Part II of the Bill), without resorting to the National Land Commission, violates Paragraph 3 of Appendix II of the Constitution. .

These several submissions made by the Petitioners have as their basis, two main propositions; namely that the Bill seeks to alienate "*State Land*", and that alienation of "*State Land*" falls exclusively within the Provincial Council's legislative competence.

With regard to the first point, it was the position of the Respondents that the Bill does not seek to alienate "*State Land*". Learned Additional Solicitor General submitted that the act of alienation of State Land had already taken place at

the point of issuing a Grant or Instrument of Disposition under the legal regime of the Land Development Ordinance or the Land Grants (Special Provisions) Act or the Crown Lands Ordinance, as the case may be. Learned Additional Solicitor General submitted that the Bill only seeks to remove the conditions that may be attached to such Grant or Instrument of Disposition so as to enable the Grantee to benefit fully from the land he holds.

The act of alienation being a central issue, it is incumbent on this Court to examine the present regime of alienation of State Land under the Land Development Ordinance, the Land Grants (Special Provisions) Act and the Crown Lands Ordinance - to determine the strength of these arguments.

The existing legal regime relating to alienation (disposition) of State Land

The legal regime governing Grants and Instruments of Dispossession is, as mentioned earlier, set out in terms of the aforesaid three Acts of Parliament, namely the Land Development Ordinance, Land Grants (Special Provisions) Act and the Crown Lands Ordinance.

(i) Grants under the Land Development Ordinance (as amended)

As per the preamble to the Land Development Ordinance (as amended), the primary object of the Ordinance is *"TO PROVIDE FOR THE SYSTEMATIC DEVELOPMENT AND ALIENATION OF STATE LAND IN SRI LANKA"*...

A Permit issued in terms of the provisions of the Land Development Ordinance (as amended) authorising the permit-holder to occupy a State Land, could be converted to a Grant in terms of Section 19(4) of the Ordinance, if the permit-holder has complied with the conditions applicable to the Permit, paid all sums that are required to be paid and had developed the State Land to the satisfaction of the Government Agent (Divisional Secretary).

The Selection of Grantees is based at a Land Kachcheri or as per the *proviso* to Section 20 of the Ordinance, at the direction of the Land Commissioner or Minister acting in the public interest. The procedure to be followed is

stipulated in Sections 21 - 24 of the Ordinance. Further, as per Section 22A of the Ordinance, State Land can only be alienated to a citizen of Sri Lanka.

The selection is based on a procedure involving the Divisional Secretary, Land Commissioner General and Ministry of Lands, which culminates with the issuance of a Grant by the President, under whose hand the Grant is issued, in terms of Article 33(2)(f) of the Constitution.

A Grant issued in terms of Section 19(4) of the Ordinance is subject to the conditions stipulated in Section 19 (6) of the Ordinance, which prohibit the Grantee from disposing of the subject land without the prior approval of the Government Agent and also prohibit the disposal of a divided portion of the subject land below the minimum fraction specified in the Grant and disposition. Further, Section 35 of the Ordinance authorises the Land Commissioner to insert "*special conditions*" in the Grant which are applicable to the Grantee while, Section 35 of the Ordinance stipulates that such "*special conditions*" run with the land and bind the Grantee and all persons who may succeed to his rights in the land. Section 43 prohibits the Grantee from leasing the subject land other than in prescribed circumstances and permits the Grantee to mortgage the subject land only to a specified Bank or prescribed institution. Section 39 exempts land which is the subject matter of a Grant made under the Ordinance from seizure and sale in execution of a decree of a Court, other than in execution of a hypothecary decree.

As per Section 42 of the Ordinance, a disposition executed in contravention of the provisions is considered to be null and void.

Further, the manner of succession to land which is the subject matter of a Grant under the Ordinance upon the death of the Grantee, is specified in Chapter VII of the Ordinance. These provisions ensure that, upon the death of the Grantee, his surviving spouse obtains what is, in effect, a life interest in the land and that, upon the death of the spouse, the land passes to the Grantee's heirs.

Section 160 authorises the Government Agent to enter and inspect any land which is the subject matter of a Grant made under the Ordinance.

Further, a Grant issued under Section 19(4) of the Ordinance could be cancelled by the President as provided for in Section 104 of the Ordinance.

(ii) Instruments of Disposition under the Land Grants (Special Provisions) Act

The preamble to the Land Grants (Special Provisions) Act states that it is *"TO PROVIDE FOR THE VESTING IN THE STATE, OF AGRICULTURAL OR ESTATE LAND WHICH IS VESTED IN THE LAND REFORM COMMISSION UNDER THE LAND REFORM LAW; TO ENABLE THE TRANSFER, FREE OF CHARGE, TO THE LANDLESS OF THE LANDS SO VESTED IN THE STATE AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO."*

In terms of Section 2 read with Section 3 of the Act, State Land vested in the Land Reform Commission could be transferred by the President to any citizen of Sri Lanka by the execution of an Instrument of Disposition under the provisions of the Act.

A disposition executed as provided for in Section 3 of the Act is subject to the conditions contained in Section 5(1) of the Act, which *inter alia* preclude disposition of the subject land without the prior approval of the Land Commissioner and specifies that any failure on the part of the Transferee to comply with the conditions contained in the Instrument of Disposition, will result in the subject land reverting to and vesting in the State and entitle the State to apply to a competent court for a cancellation of the Instrument of Disposition.

Further, Section 11 specifies that any conditions specified in the Instrument of Disposition will run with the land and bind all persons who may succeed to the rights of the Transferee and all persons claiming under the Transferee in terms of section 11 of the Act.

Section 12 declares that any transfer by the Transferee to another person, of any land which is the subject matter of an Instrument of Disposition made under the provisions of the Act, shall be void and inoperative unless the prior written consent of the Land Commissioner to the transfer, has been obtained.

The manner of succession to land which is the subject matter of an Instrument of Disposition made under the Act upon the death of the Transferee (without him making a nomination of a successor) under the provisions of Section 9 of the Act, is specified in Section 10 of the Act. These provisions ensure that, upon the death of the Transferee (without first nominating a successor), his rights devolve on his surviving spouse and, thereafter, his heirs.

Section 15 authorises the Government Agent to enter into and inspect any land which is the subject matter of a Grant made under the Ordinance.

Further, as per Section 16(1) of the Act, the administration of the Act falls within the purview of the Land Commissioner.

(iii) Grants/Leases issued under the Crown Lands Ordinance (as amended)

The preamble to the Crown Lands Ordinance states that it is *"TO MAKE PROVISION FOR THE GRANT AND DISPOSITION OF CROWN LANDS IN CEYLON; FOR THE MANAGEMENT AND CONTROL OF SUCH LANDS AND THE FORESHORE; FOR THE REGULATION OF THE USE OF WATER AND LAKES AND PUBLIC STREAMS; AND FOR OTHER MATTERS INCIDENTAL OR CONNECTED WITH THE MATTERS AFORESAID."*

The President is empowered to execute Instruments of Disposition, by which, Crown Land is granted or sold or leased to any person in terms of Section 2 read with Section 8 of the Ordinance.

The conditions specified in an Instrument of Disposition executed under the provisions of the Ordinance run with the land and bind the Transferee and all

persons claiming under the original Transferee, in terms of Section 11 of the Ordinance.

Further, any disposition of land which the subject matter of an Instrument of Disposition made under the provision of the Ordinance, which has been executed by the Transferee without obtaining the prior consent or sanction of the President, where such prior sanction is to be a required condition in the Instrument of Disposition, shall be considered as void, by operation of Section 19 of the Ordinance.

As per Section 91 of the Ordinance, the administration of the Ordinance falls within the purview of the Land Commissioner.

Accordingly, it is observed that the legal regime governing the alienation of State Land by way of Grants and Instruments of Disposition made under the aforesaid three Acts of Parliament - namely the Land Development Ordinance, Land Grants (Special Provisions) Act and the Crown Lands Ordinance - **does not result in the Republic renouncing all its interests in the State Land which is the subject matter of such Grants and Instruments of Disposition.** It is evident that the State retains an appreciable degree of control over State Land which is the subject matter of such Grants and Instruments of Disposition even after they are made, and that there are several significant and long-term conditions which are attached to the land holdings conveyed to the Grantees and Transferees of State Land under the aforesaid enactments. These conditions are attached to the land itself, in that they pass from generation to generation, preserving at all times an appreciable degree of the State's power over the land. **In essence, under the existing system, the State maintains its overarching dominium to a discernible extent.** Although neither the State nor the Grantee holds all three attributes of *dominium* to the exclusion of the other party, by virtue of the conditions attached to the Grants and Instruments of Disposition, the State retains vital aspects of the *ius abutendi* [in the sense of the right to alienate] and also some aspects of the *ius utendi*. State Land which is the subject matter of an alienation made by Grants and Instruments of Disposition

executed under the aforesaid three Acts of Parliament, **never loses its essential character of State Land even after Grant or an Instrument of Disposition is executed.**

However, in view of the provisions of Clause 3 (1) of the Bill read with Clause 30 (a) of the Bill, persons who are holders of State Land under a Grant or an Instrument of Disposition made under the provisions of the three enactments referred to above, who receive an "*Absolute Land Grant*" under the provisions of the Bill and their successors in title, will hold absolute and unconditional title to what was "State Land", notwithstanding the provisions in Clause 29 of the Bill which impose a measure of restrictions on the initial transfer of land by the holder of an "*Absolute Land Grant*" and place no restrictions on the transfer of the land thereafter.

Thus, once an "*Absolute Land Grant*" is made under the proposed Bill, the State will sever all its control over the land to the benefit of the receiver. From that point onwards, the Grantee of State Land under and in terms of the provisions of the proposed Bill will receive, to the complete exclusion of the State, all attributes of *dominium* including unfettered *ius abutendi* [in the above sense] and *ius utendi*. **Stripped to essentials, the objective of the Bill is to convert State Land to land *simpliciter*.**

In such circumstances, we fail to see how the proposed Bill can be construed as anything other than one to provide for alienation of State Land. In our view, the Bill quite plainly deals with the same.

Therefore, it is incumbent on this court to consider the legislative competence of Parliament with regard to State Land and its alienation, particularly in light of Item 18 of List I of the Ninth Schedule and Appendix II thereto.

Legislative competence of the Parliament to enact laws relating to State land.

"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”, is a Provincial Council Subject as per Item 18 of List I to the Ninth Schedule. As observed by this court in the **Determination of Agrarian Services (Amendment) Bill (SC Special Determination Nos: 2/91 and 4/91)**, it is not possible to determine whether a particular subject falls squarely into a particular List by merely looking at the heading in those Lists. In the Determination referred to, this Court further observed, *“Nor can it be assumed that the title of an enactment conclusively establishes that its subject matter falls within an item bearing a similar heading in one of the Lists”*. Thus, jurisprudence already exists that when interpreting the Provincial Council List (List I of the Ninth Schedule), one needs to consider the scope of the subjects and examine the degree of power that each entity has been vested with, instead of limiting the analysis to the bare letters of the Lists. Our view resonates with the said view in this regard, subject however to the observation that that the said ‘purposive’ approach would apply only with regard to the question of ‘legislative competence’. We are of the view that, a degree of restraint is appropriate when applying a ‘purposive’ approach to determine the ambit of the subjects included in the Provincial Council List, where a Court is called upon to decide the ‘legislative procedure’ which is applicable.

Following the establishment of Provincial Councils through the 13th Amendment, the Legislature delegated some of its powers to the Provinces in respect of certain subjects referred to in the Ninth Schedule. The legislative power that was thus delegated to the Provincial Councils, finds expression in Article 154G(1) of the Constitution which empowers the Provincial Councils to make statutes applicable to the Provinces with respect to any matter set out in List I of the Ninth Schedule [the Provincial Council List] . The scheme being one of delegation of statutory powers in respect of specified subjects to the Provinces, Sub Article (7) of Article 154G reserves for the centre all statutory powers in respect of the matters set out in the Reserved List (List II of the Ninth Schedule), and keeps intact the specific plenary legislative powers under Article 154G(10) and Article 154G(11), which respectively read;

Article 154G(10): *“Nothing in this Article shall be read or construed as derogating from the powers conferred on Parliament by the Constitution to make laws, in accordance with the Provisions of the Constitution (inclusive of this Chapter), with respect to any matter, for the whole of Sri Lanka or any part thereof.”*

Article 154G(11): *“Notwithstanding anything in paragraph (3) of this Article, Parliament may make laws, otherwise than in accordance with the procedure set out in that paragraph, in respect of any matter set out in the Provincial Council List for implementing any treaty, agreement or convention with any other country or countries or any decisions made at any international conference, association, or other body.”*

Further, Article 154G(3) deals primarily with procedure and reads as follows:

“No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference...”

The implication of the Constitutional provisions referred to above, therefore, would be that, even in respect of subjects listed out in List I (the Provincial Council List), the Constitution provides for the centre to exercise legislative powers in the areas specified in Articles 154G(10) and 154G(11), or by following the procedure set out in Articles 154G(3), notwithstanding legislative powers which have been conferred on Provincial Councils by Article 154G(1) .

Thus, appreciation of the precise scope of the legislative power of the Provincial Councils is significant when determining the constitutionality of Bills. Article 154G(1) read with Articles 154G(3), 154G(10) and 154G(11) makes it abundantly clear, that the simple inclusion of a subject matter in the Provincial List, does not vest the Provincial Council with sole power to make

legislation in respect of the subjects referred to in Article 154G (1) and set out in List I of the Ninth Schedule.

Powers of the Provincial Councils with regard to alienation of State lands.

The Constitutional provisions relating to Land and State Land are found in Article 33(2)(f) (as amended by the 19th Amendment), List I and its Appendix II (the Provincial Council List) and List II (the Reserved List), of the Ninth Schedule to the Constitution.

The Ninth Schedule, List I (the Provincial Council List) refers to: “*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.*”

List II states: “*State Lands and Foreshore, Except to the Extent Specified in Item 18 of List I.*”

Although List I chronologically precedes List II, we are in agreement with the observation made by Mohan Peiris CJ. in the case of *Superintendent Stafford Estate and two others v. Solaimuthu Rasu* 2013 1 S.L.R 25 where His Lordship observed, “*Thus the Constitution as far as State land is concerned traverses from List II via List I, to final destination Appendix II*”. Additionally, the Reserved List may be taken as the starting point of any analysis of legislative competence in this area, as it is the only List that completely ousts the Provinces from its ambit.

The subject of “State Lands and Foreshore” is in the Reserved List (List II). This is however subject to the qualification: “*Except to the extent specified in Item 18 of List I*” (Provincial Council List).

In the Reserved List (List II) in reference to State Land, it is stated that, State Land except to the extent specified in item 18 of List I (Provincial Council List) vests with the centre.

However, the said Item 18 of List I is subject to a further limitation in that, the legislative competence of Provincial Councils shall only be exercised *“to the extent set out in Appendix II”*.

Accordingly, Appendix II of List I states that;

“State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(2)(f) (as amended by the 19th Amendment) and written law governing the matter.

Subject, as aforesaid, “[...] land shall be a Provincial Council Subject, **subject to the following special provisions:-**

1. State land -

1.1 State Land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject.

1.2 Government shall make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilize such State land, in accordance with the laws and statutes governing the matter.

1.3 Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.” (Emphasis added)

The words in List I, Appendix II to the effect, *“land shall be a Provincial Council Subject, subject to the following special provisions”* makes it clear that the Provincial Councils only have legislative power over those aspects of State

Land which have been specifically assigned to Provincial Councils by List I and its Appendix II, as referred to in List II.

Thus, as aforesaid, Article 154G(1) does not “automatically” vest in Provincial Councils, the exclusive statutory powers over any subject which is mentioned in List I.

The ambit of legislative competence of the Provincial Councils depends on two threshold requirements; firstly the subject matter must fall outside the Reserved List and secondly, it must be free from any restrictions within List I, or anywhere else in the Constitution, curtailing the legislative power of the Provincial Councils.

In this regard we are of the opinion, that the inclusion of the words, “*Subject, as aforesaid, “[...] land shall be a Provincial Council Subject, subject to the following special provisions”* in Appendix II, is a deliberate restriction introduced by the framers of the 13th Amendment, on the aforesaid Provincial legislative competence.

In a context where Appendix II reserves “*alienation and disposition*” of State Land to the central competence, upholding the petitioners’ submission that the subject matter of Paragraph 1.3 of Appendix II falls exclusively within the competence of a Provincial Council’s legislative power, would have the effect of vesting the Provincial Councils with autonomous legislative power *per se* in respect of the act of ‘alienation’ of State Land situated within the Province. Such a contention would be in direct conflict with the words, “*land shall be a Provincial Council Subject, subject to the following special provisions*”, in Appendix II.

However, this should not be construed to mean that the Provincial Councils have no role to play at all in respect of the alienation of State Land within the Province. On the contrary, as Appendix II itself very clearly demonstrates, Provincial Councils have a ‘functional/advisory’ role to play in the mechanism. Yet, this is a limited role and does not confer any form of

legislative competence upon Provincial Council to pass enactments relating to the alienation of State Land. .

Any interpretation to the contrary would mean that the centre has ceded its legislative powers over State Land to the periphery, which in turn results in nine Provinces being given the power to decide on 'alienation of state land' in possibly nine different ways. One may argue that such a result is inconceivable as the periphery, in any case, has to function under 'National Land Commission's Policy'. But such a contention cannot be sustained, as the Constitution states that, "***National policy on land use will be based on technical aspects (not on political or communal aspects), and the Commission will lay down general norms in regard to the use of land, having regard to soil, climate, rainfall, soil erosion, forest cover, environmental factors, economic viability, & c***".

Thus, if legislative competence over the alienation of State Land is to be divested from the centre and given to the periphery, firstly it would risk the promulgation of a national policy on State Land. The Court ventures to point out that it was not the intention of framers of the 13th Amendment to risk national policy, and this is evident from Article 154G(10) which states; "*Nothing in this Article shall be read or construed as derogating from the powers conferred on Parliament by the Constitution to make laws, in accordance with the Provisions of the Constitution (inclusive of this Chapter), with respect to any matter, for the whole of Sri Lanka or any part thereof.*" Therefore, we are of the view that any interpretation that hinders a national policy or consistent application of law should be rejected.

Secondly and more importantly, vesting 'alienation' in the provincial legislative competence will result in the ownership of State Land being given to the Provincial Councils by implication, for one cannot make laws 'alienating' something which they do not own. This would then render nugatory, the Paragraph 1.2 of Appendix II which states, "**Government shall**

make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject."

The only interpretation that stands to avoid all these conflicts, is to construe that legislative competence over State Land and its alienation is reserved for the centre, with the Provincial Councils having only an advisory/functional role to play in carrying out the process of alienation of State Land.

Procedure for legislating

This then brings us to examining Article 154 G (3) of the Constitution, which states that, "*No Bill in respect of any matter set out in the Provincial Council List shall become law* unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference [...]" (emphasis added).

The question would then be about ascertaining the effect of the words "*any matter set out in the Provincial Council List*".

In our view, the Court is required to go by the strict letter in this matter, as the intention of the 13th Amendment was to devolve powers to the Provinces to the proper extent set out therein. This leads to the conclusion that Parliament must refer proposed Bills for the views of the Provincial Councils, if the subject matter of the Bill finds expression in List I.

We are of the view that the Court should refrain from an interpretation of these words in a manner which will blur the lines drawn in the Ninth Schedule and cause a conflict between the provisions therein. This was what Fernando J. expounded to in the **Determination of the Agrarian Services (Amendment) Bill [S.C. Special Determination 2/91 and 4/91]**. His Lordship stated that the outcome of the interpretation of the Ninth Schedule must be "to

reconcile entries in Lists I, II and III of the Constitution and attributing any conflict between the powers of the Centre and the Provinces must be avoided."

While agreeing with this prudent observation, this Court, nevertheless wish to reiterate the initial observation that this construction applies insofar as the 'legislative power' is concerned, as distinct and different from the 'legislative procedure' to be followed by Parliament. This is primarily because, the Constitution has already in no uncertain terms laid down the only exceptions to the procedure set out in Article 154G(3), which are Article 154G(10) and Article 154G(11).

Accordingly, it is seen that, the only time Parliament is permitted to bypass the procedure set out in Article 154G(3) is when it is legislating under Article 154G(10) or Article 154G(11).

In our view, this conclusion receives credence within the constitutional scheme, for the reason that Article 154G(3) is only a procedural step. It does not impinge on Parliament's legislative competence, for if the intention of the framers of the 13th Amendment truly was to exclusively reserve that legislative competence to the Provincial Councils, there would be no necessity to provide a mechanism for Parliament to usurp the same. Therefore, Article 154G(3) is not to a bar to central legislative competence. It is simply an embodiment of 'comity'.

Naturally, this interpretation results in the requirement that Parliament must first refer to Provincial Councils all Bills dealing with subject matter which is properly within the ambit of List I — even if Provincial Councils only have a functional power as opposed to legislative, in respect of that subject matter. However, this procedure is constitutionally mandated and does not affect the legislative competence of Parliament, with the relevant legislative power remaining with Parliament. Following this procedure may make the legislative process more time-consuming. However, the fact that a constitutionally

mandated procedure may at times be time-consuming or even cumbersome, cannot be taken as a ground to invalidate constitutional requirements.

Apart from the threshold issue that this court had addressed above, learned Counsel who represented the Petitioners raised several other grounds of challenge such as; submissions that the Bill is inconsistent with Articles 12(1), 3 and 4 of the Constitution and submissions that certain clauses of the Bill violate the Directive Principles of State Policy enshrined in Article 27 of the Constitution. In addition, learned President's Counsel for the 4th Petitioner also contended raised that the placement of the Bill on the Order Paper is irregular on the basis of his submission that His Excellency, the President being the head of the Cabinet of Ministers in terms of article 42(3) of the Constitution, had not given his approval to the Bill.

Determination

Non-adherence to the procedure stipulated under the Constitution in placing the Bill on the Order Paper of the Parliament has been the preliminary ground of challenge. Accordingly, the Court determines that, for the reasons set out earlier, which led us to hold that the proposed Bill deals with the alienation of State Land, and that the Bill should be regarded as one relating a subject listed in the Provincial Councils List insofar as the procedure to be followed is concerned, this Bill must be referred to the Provincial Councils for the expression of their views, in terms of Article 154G(3) of the Constitution. By operation of Article 154G(3), the Bill cannot be validly placed on the Order Paper of Parliament and thereafter become law, until that is done. However, the Court reiterates that the said procedure must be adopted not because 'alienation' of State Land falls within the 'legislative competence' of Provincial Councils, but for the reason that the 'procedure for legislating Acts' which deal with any subject falling within the Provincial Councils List, mandates that it should be so.

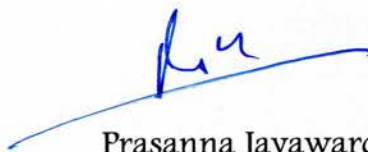
For the reasons set out above, we make the determination in terms of Article 120 read with Article 123 of the Constitution, that the Bill in question is in respect of a matter set out in the Provincial Council List, and shall not become Law unless it has been referred by His Excellency, the President to every Provincial Council, for the expression of their views thereon, and only thereafter be placed on the Order Paper of Parliament, as required by Article 154G (3) of the Constitution. Since the Bill has been placed on the Order Paper of Parliament without compliance with the provisions of Article 154G(3), we would not at this stage make a determination as to the other grounds of challenge referred to above.

We place on record our deep appreciation of the assistance given by the learned President's Counsel and other Counsel for the Petitioners and the learned Additional Solicitor General who appeared on behalf of the Hon. Attorney General.



Buwaneka Aluwihare PC

Judge of the Supreme Court



Prasanna Jayawardena PC

Judge of the Supreme Court



L.T.B Dehideniya

Judge of the Supreme Court