

## SUPREME COURT JUDGMENT ON P-TOMS

*Thirty-nine MPs belonging to the Janatha Vimukthi Peramuna (JVP) filed a fundamental Rights petition before the Supreme Court claiming that the Memorandum of Understanding signed by the government and the LTTE to setup a Post-Tsunami Operation Mechanism Structures (P-TOMS) violated their fundamental rights. They sought from the court an injunction prohibiting the operation of the MoU. The determination, written by Chief Justice Sarath Silva, is significant in a number of counts. While rejecting some key arguments of the petitioners, the Court granted them an interim relief concerning the clauses of the MoU relating the Regional Fund and the Regional Committee.*

*The following are the relevant excerpts of the judgment, delivered on July 15, 2002.*

### Sarath N Silva. Chief Justice

“The Petitioners contend that the entering into of the MOU, the management structure of P-Toms, and the respective powers and functions constitute an infringement of their fundamental rights guaranteed by Article 12(1) of the Constitution, for the following reasons:

- i. The 3<sup>rd</sup> Respondent does not have any authority to enter into the MOU for and on behalf of the Government of Sri Lanka
- ii. The MOU does not specify that the 3<sup>rd</sup> Respondent has been authorized by the President in this matter and in any event, even the President cannot grant such authority on her own responsibility in view of the provisions of Articles 42 and 43(1) of the Constitution.
- iii. There is no legal basis to enter into the MOU with the LTTE, which is not an entity recognized by law and which is identified with terror, violence, death and destruction;
- iv. The powers and functions of the Committees especially that of the Regional Committee are governmental in nature and content and cannot be validly conferred on such Committees in the manner contemplated in the M.O.U.;
- v. The foreign funds committed by the donors to carry out tsunami relief through the Government, form part of the funds of the Republic and should be disbursed and accounted for in the manner provided in the Constitution and the applicable laws and procedure. The provisions in the MOU for the Regional Fund and its management by the Regional Committee are inconsistent with their legal requirements.

On the basis of the foregoing it is contended that the MOU sets up a structure and lays down procedures that are contrary to the rule

of law and deny the Petitioners equal protection of law as guaranteed by Article 12(1) of the Constitution.

It is further contended that the MOU with special provisions in relation to six districts only of the TDZ with the establishment of a Regional Committee and a Regional Fund, discriminate against citizens in the area outside their Districts who have been equally or worse affected by the tsunami, on the basis of place of the birth and residence and as such the fundamental rights guaranteed by Article 12(2) of the Constitution is infringed.

The matters drawn in issue by the Petitioners in relation to:

- i) The ambit of Executive power of the President;
  - ii) The MOU ex facie agreed and accepted by the Government and the LTTE;
  - iii) Structure intended to be set up under the MOU in the form of Committees and their composition;
  - iv) The powers and functions of the Committees and the financial arrangements;
- are indeed unique and unprecedented in every respect.

The final relief sought by the Petitioners is that the MOU be declared void and invalid in law as being an infringement of their fundamental rights guaranteed by Article 12(1) and 12(2) of the Constitution. They have sought interim relief to restrain the Respondents from taking any steps to implement the MOU pending the final determination of these applications.”

The alleged infringements relate to the MOU which provides a management structure with functions and powers assigned to

Committees at three levels and in examining the criteria set out above the question to be considered is, whether the Petitioners have established a strong prima facie case in respect of the entirety of the MOU or in respect of any clearly severable part or parts of the MOU. If so, the interim relief has to be restricted to such parts only.

The criteria generally described as balance of convenience and equitable considerations would encompass the matters stated above with regard to the relief that may be granted for the protection of fundamental rights, as set out in article 126(4), and considered in the preceding section of this judgment. On the basis of that analysis, it would be necessary to consider the disadvantage and damage in relation to both parties. Since the MOU is intended to deliver urgent humanitarian assistance to the persons who suffered from the tsunami in the six districts referred to above, if there are any parts of the MOU in respect of which the Petitioners establish a strong prima facie case, it is incumbent on this Court to take the further step of converting the alleged illegality in respect of which a strong prima facie case has been made to a situation that is legal and according to law and thereby ensure that the interim relief would not result in undue hardship to the persons who suffered from the tsunami in these districts.”

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Mr. H.L. de Silva, P.C. contended that although the President identified in Article 4(b) as the single authority to exercise the executive power which forms part of the sovereignty of the People, the exercise of such power by the President is circumscribed by the provisions of Articles 42 and 43(1) of the Constitution.

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On a careful scrutiny it is seen that Article 42 specifies the responsibility of the President to Parliament for the due exercise, performance and discharge of the powers and duties under the Constitution and the law. Article 43(1) similarly lays down the collective responsibility of the Cabinet of Ministers to Parliament in respect of the direction and control of Government. These two provisions relate to responsibility and answerability for the exercise of executive power. The fact that these provisions lay down the element of answerability bring home the point that the exercise, performance and discharge of executive power and functions is primarily vested with the President. The stage at which answerability arises is upon the exercise of power. It could not be contended on the basis of these provisions that the President should consult or seek prior concurrence of either the Parliament or Cabinet of Ministers for the exercise of Governmental power. However, the element of responsibility and answerability postulates that the President, where it is necessary may seek the concurrence of the Cabinet of Ministers and of Parliament.

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These provisions in my view confer on the President not only specific powers but also a residuary power, in respect of functions that broadly come within the realm of the executive, and the Government, being the description of the status of the President in article 30(1), in appropriate circumstances the President may lawfully act on behalf of the Republic and enter into agreements

and arrangements that may be necessary to carry out essential Governmental functions.

The preamble to the MOU sets out the basis on which it was entered into, being the need to provide urgent humanitarian assistance to the persons who have extensively suffered on an unprecedented scale from the tsunami that struck Sri Lanka in December 2004. As Head of the Executive and of the Government it is the duty of the President to ensure that essential relief and assistance for rehabilitation, reconstruction and development should be made available to the persons who have thus suffered. Hence in my view there is no illegality in the President entering into an MOU for the objectives and reasons set out in the preamble. The Petitioners have failed to make out a strong prima facie case in respect of matters (i) and (ii) drawn in issue by them.

Mr. S.L. Gunasekera, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organization that caused tremendous loss of life and property in this country. The contention is that even assuming that the President could enter into a MOU for the objectives and reasons stated in the preamble, the other party to the MOU is not an entity recognized in law and should not be so recognized due to antecedent illegal activities of the organization.

In this regard I have to note that the matter so strenuously urged by Counsel cannot by itself denude the status of the 4<sup>th</sup> Respondent to enter into the MOU. The circumstances urged by Counsel cannot and should not have the effect of placing the 4<sup>th</sup> Respondent and Organization that he seeks to represent beyond the pale of law. We have to also bear in mind that already a cease-Fire Agreement has been entered into on 23.2.2002 between the Government of Sri Lanka and the LTTE, which according to section 2(b) of the MOU “shall continue in full force and effect.”

In these circumstances there is no illegality in entering into the MOU with the 4<sup>th</sup> Respondent for the purpose of rendering humanitarian assistance as contemplated in the preamble to the MOU. The petitioners have failed to establish a strong prima facie case in respect of this matter as well. In the result the Petitioners have failed to make out a strong prima case on any ground that warrants interim relief as to the entirety of the MOU.

From this point, I have to examine the submissions with regard to the specific provisions of the MOU in relation to the Committees and their respective powers and functions.

The basic submission of the Counsel for the Petitioners in this regard is that the three Committees proposed to be set up, as the Operational Management Structure would not derive authority from any law that is applicable. The Respondents reply is that these Committees are adhoc structures intended solely to ensure the effective disbursement of post-tsunami relief in the six districts referred to above. The Respondents have not identified the provisions of any statute or any other applicable law on the basis

of which the Operational Management Structures are being set up. Considering the objectives as set out in the preamble to the MOU and the fact that the Structure is set up to facilitate the disbursement of urgent humanitarian assistance, it would not be necessary, in my view to derive any specific authority from a statute, as contemplated by the Petitioners. The submission of the Petitioners that even in such circumstances the Structure sought to be established should derive authority from a statute imposes a undue rigidity to a process that must retain a degree of flexibility to ensure that all persons who have been affected are adequately cared for.

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The provisions of section 7 which establish the Regional Fund have been reproduced before. The Fund consists of foreign funds and secretariat funds, including both foreign and local funds. It is clear from the provisions of the MOU that the foreign funds referred to are the donations to be received by Sri Lanka from multi-lateral and bi-lateral donors. These funds when received by the country should in terms of Article 149(1) of the Constitution be paid into the Consolidated Fund and be disbursed in terms of the Constitution and the applicable law. Expenditure from this fund would be subject to audit by the Auditor General, as provided for in Article 154 of the Constitution. These are salutary safeguards included in respect of public finance to ensure transparency in the matter of disbursement of funds and proper accountability. Multi-lateral and bi-lateral donors being fully committed to the rule of law, transparency and good governance would necessarily insist that funds committed by them magnanimously for a humanitarian objective be properly dealt with and accounted for in this country, according to the applicable law. The provisions in Section 7 read with 6(b)(iv) are plainly inconsistent with the Constitution and applicable law. Thus the Petitioners have in my view established a strong prima facie case for interim relief in respect of Sections 6(b) (ii) and 6(b)(iv) and Section 7 of the M.O.U. A question now arises as to whether any measures could be imposed by this court to convert the situation of a prima facie illegality referred to above to one of legality so that it would be just and equitable from the perspective of all parties concerned.

In this connection it is relevant to note that Section 6(i) coming within the purview of the Regional Committees provides for Project Management Unit (PMU) to be established to manage projects approved by the Regional Committee. When the operation of Section 6(b)(i)(ii) with regard to project approval and management by the Regional Committee is stayed, necessarily the provisions of sub-paragraph (i) would have no effect. However, considering the objectives as set out in the preamble it would be necessary to establish a Project Management Unit that would exercise the Governmental functions in respect of projects for relief, reconstruction, rehabilitation and development in these districts. Therefore the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are at liberty to establish a Project Management Unit in accordance with applicable procedures. The Unit so established would take into account the measures recommended by the Regional Committee in terms of Section 6(b)(i) and the Regional Committee would retain its

functions in terms of 6(b)(iii) of overall monitoring of projects to ensure that relief is equally received by all persons who have been affected by tsunami.

A specific submission has been made with regard to the provisions of section 4(b)(f) being the location of the Regional Committee. It is provided that the Regional Committee shall be located at Kilinochchi. Counsel for the Petitioners contended that persons from certain parts of the six districts referred to would not have easy access to Kilinochchi. This matter was not disputed by Counsel for the Respondents. The safeguards contained in the decision making process set out in Section 6(e) to be effective to any "minority group" the members of the Committee should have no fears with regard to the proper exercise of their choice. The Petitioners contention of the lack of such an environment of freedom in the designated place cannot be disputed. In the circumstances the Petitioners have made out a strong prima facie case in respect of Section 6(f). Accordingly interim relief is granted restraining the operation of this provision. The parties would be at liberty to decide on a suitable site to locate the Regional Committee on the basis of the criteria set out below:

- i) That the place be centrally located with the TDZ of the six districts referred to;
- ii) That all persons from every part of the TDZ of these districts should have free and unhindered access to such location;

The criteria set out above would result in the illegality referred to above being converted to a situation according to law.

The findings stated above are summarized as follows:

- i) an interim order is not granted in respect of the entirety of the MOU referred to and the Structure as provided in the MOU consisting of Committees may be established and become functional subject to the restrictions as are imposed by this judgment;
- ii) the operation of Sections 6(b)(ii), 6(b)(iv), 6(b)(iv), 6(b)(f), 6(I) and 7 of the MOU are stayed pending the final determination of this application;
- iii) the funds both foreign and local intended to be deposited in the Regional Fund as provided in Section 7 may instead be dealt with according to the provisions of the Constitution and deposited in a separate account with a Custodian to be designated, if lawfully authorized;
- iv) the location of the Regional Committee be decided on by the parties in compliance with the criteria that has been stated;
- v) a Project Management Unit (PMU) may be set up in lieu of the Unit provided for in Section 6(I) by the relevant Ministry in accordance with the applicable procedure. Such Project Management Unit would be at liberty to coordinate and implementation of the projects with the District Committees, the Regional Committee and the High Level Committees as provided in the MOU. ■