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

S.C.Application No.209/07

Vasudeva Nanayakkara,
Attorney at Law
Advisor to HE the President
Secretary, Democratic Left Front
No. 491/1, Vinayalankara Mawatha
Colombo 10

Petitioner

Vs

1. K.N.Choksy,P.C., M.P
Former Minister of Finance
No.23/3, Sir Ernest de Silva
Mawatha, Colombo 7

2. Karu Jayasuriya, M.P.,
Former Minister of Power & Energy,
No.2 Amarasekera Mawatha,
Colombo 5

3. Ranil Wickremasinghe, M.P.,
Former Prime Minister,
No. 115, 5th Lane,
Colombo 3

And 28 others

Respondents

AND NOW BETWEEN

Dr. P.B.Jayasundera
No.761/C Pannipitiya Road,
Pelawatte
Battaramulla

8th Respondent Petitioner

vs

The Attorney-General
Attorney General's Department
Colombo 12

31st Respondent-Respondent

BEFORE:	Hon. J.A.N.de Silva	Chief Justice
	Hon.Dr.Shirani A.Bandaranayake	Judge of the Supreme Court
	Hon.Shiranee Tilakawardane -	Judge of the Supreme Court
	Hon. S. Marsoof	Judge of the Supreme Court
	Hon. D.J.De S.Balapatabendi	Judge of the Supreme Court
	Hon. K. Sripavan	Judge of the Supreme Court
	Hon. P.A.Ratnayake	Judge of the Supreme Court

COUNSEL: Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th Respondent – Petitioner

M.A.Sumanthiran with Viran Corea for the Petitioner-Respondent

Nihal Sri Amarasekera for the 22nd Respondent-Respondent appearing in person

Mohan Pieris P.C., for the Attorney General with J.Wijetilleke, A.S.G., Sanjaya Rajaratnam D.S.G., and Nerin Pulle, S.S.C as amicus

ARGUED ON: 24.09.2009

DECIDED ON : 13th October 2009

J.A.N.De Silva, C.J.,

When this matter was taken up for hearing on the 24th September 2009, the court pronounced that by a 6 to 1 majority decision relief would be granted

to the 8th Respondent-Petitioner and the reasons would be given in due course. Now I proceed to give reasons for the aforementioned decision.

The application to this Court was to release the 8th Respondent-Petitioner from the binding force of the contents of a purported affidavit tendered by him at the direction of this Court. This was originally a case where the Supreme Court found the 8th Respondent-Petitioner guilty of violations of certain fundamental rights in his capacity of a public officer and awarded compensation to the State which the 8th Respondent-Petitioner paid. Accordingly the case against the 8th Respondent-Petitioner had reached its finality.

I will briefly trace the history of this present application. The present Petitioner (hereinafter called the "Petitioner') was cited as the 8th Respondent in S.C.F/R Application No. 209/2007. At the time material to that application the Petitioner held the post of Secretary to the Treasury and Chairman, Public Enterprises Reform Commission. His Lordship Sarath N Silva, Chief Justice, Justices Nimal Amaratunga and Jagath Balapatabendi delivered judgment in the said application on 21st July 2008 granting specifically the relief prayed for in paragraphs (g), (h), and (i) of the prayer to the petition. The Supreme Court directed the present Petitioner to pay a sum of Rs. 500,000/- as compensation to the State on the basis that his conduct was arbitrary, ultra vires, biased and collusive. The Petitioner paid the said sum of Rs. 500,000/- as compensation to the State on 28.07.2008. This is the final determination of the application as far as the 8th Respondent of that case (the present Petitioner) is concerned.

After delivery of Judgment the Registered Attorney for Vasudeva Nanayakkara viz: Abdeen Associates filed a motion dated 2nd September 2008 which was marked and produced C(1). This motion makes no reference to the present Petitioner. The case was mentioned on 8th September 2008, before Hon. Chief Justice, Sarath N Silva, Justice Tilakawardena and Justice Amaratunga which was not the original Bench.

In the course of hearing into that motion Mr. Nanayakkara's Counsel submitted that "The findings of this Court is that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution and is disqualified from holding office." This submission has no basis in the Judgment. It perplexes the mind as to how this submission was made by Counsel. On that day the Court ordered that "The matter should be referred to the Bench that heard the main case."

On 29th September 2008 the case was mentioned before Hon. Sarath N Silva, C.J., and Justices Tilakawardena and Amaratunga. Again the Bench was not the Bench that heard the main case Here the Court observed that the Petitioner "has infringed the fundamental rights guaranteed by Article 12(1) of the Constitution" and noted that "motion indicated that notwithstanding these findings which show that he has acted in flagrant violation of the Constitution the 8th Respondent (the present Petitioner) is yet continuing to hold public office." At this stage Addl. Solicitor General who appeared for the 8th Respondent informed Court that the 8th Respondent has resigned from his office and he no longer appear for the 8th Respondent. However, the Court directed the Attorney General to assist the Court since he is not appearing for any particular party now. There was a further direction that the case be resumed before the same Bench on 08th October 2008,

I note here with some trepidation that the Bench and the Counsel appearing have lost sight of the fact that the order made on 2nd September 2008 was to have taken up before the Bench that heard the main case. The Bench which initially heard the motion was different from the original Bench and the Bench that noted that the Petitioner was still holding public office as aforestated was different from the original Bench as well as the one that initially heard the motion.

The Petitioner received a notice dated 03rd October 2008, requiring him to appear before Court on 08th October 2008 and reveal to Court :

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1. Whether the Petitioner was continuing to hold office under the Republic and if so, the nature of such office and place at which he is functioning ;

2. Whether he is holding office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka and if so, the nature of such office;

The response to the notice was taken up before Hon. Sarath N Silva, Chief Justice and Justices Thilakawardena and Ratnayake, again a Bench different to the previous Benches. This was neither the Bench that heard the main case nor the Bench that made order on 29th September 2008. Justice Amaratunga and Balapatabendi who were associated with the Judgment were not members. Justice Amaratunga who was a member of the Bench which sat on 2nd September 2008 and 29th September 2008 was not a member of the Bench on 08th October 2008. Justice Ratnayake came in for the first time. This is not in keeping with the initial order made on 2nd September 2008 that the matter should be listed before the Bench that heard the main case. The Bench that sat on 8th October 2008 was not the Bench contemplated in either order namely, 2nd September 2008 which required that the case should go before the Court that heard the main case or the order of 29th September 2008 which directed that the matter should be resumed before the same Bench which sat on 29th September 2008.

The court record reveals that on the 8th October Mr. Faiz Musthapha P.C who appeared for the Petitioner informed Court that Dr. Jayasundera has tendered his resignation from office after 4 days of pronouncement of the Judgment and tendered an unreserved apology for having continued functioning after the Judgment. Apparently the Court had not been satisfied by this statement/submission of the President's Counsel and gave time to Dr. Jayasundera to file an appropriate affidavit in which he may consider including the said expression of regret and "a firm statement" that he would

not hold any office in any Government institution either directly or indirectly or purport to exercise in any manner executive or administrative functions.

As the record reveals an affidavit has been filed by the Petitioner on the lines required and suggested by the Court. In the said document the Petitioner has pledged not to assume public office in the future. President's Counsel for the Petitioner pleads that no order had been made on the questioned document and as such the Petitioner desires to withdraw it. A perusal of the record reveals that this to be correct, in that no order had been made on the validity or effect of the document. It appears that so far the filing of the document is concerned it has not extended beyond a clerical exercise and the Court has not adverted to its contents. I presume that the Court advisedly did not make any order with regard to the affidavit as that would have expanded the scope of the Judgment. In that context the question whether the document can now be withdrawn must be considered.

Mr. Sumanthiran contended that since the Court has used the word 'may' file an affidavit, there was an option for the Petitioner to file or not to file the affidavit. In reply to this Mr. Musthapha, P.C., submitted that Dr. Jayasundera simply did not walk into this Court to file an affidavit. He was noticed by Court to appear and answer two questions. He himself and through his Attorney provided the required information but Court not being satisfied requested him to file an affidavit and also gave a date to make a final order. In those circumstances there was no option available to Dr. Jayasundera.

I am disturbed by the fact that the so called affidavit was prepared and filed at the instance of the Supreme Court. Not only the Petitioner was directed to file an affidavit but the Supreme Court also dictated its contents. It seems to me that the order to file an affidavit, the contents of which are at the dictates of Court amounts to an order made in excess of jurisdiction and as such the validity of the document becomes an issue.

Accordingly, having regard to the fact that final Judgment in F.R. case was delivered and it was concluded and the successive Benches that considered this matter did not comprise the original Bench as per initial order,

the fact that no meaningful action has been taken by the Court on the affidavit upon it being filed and also that the contents of the said affidavit appears to have been dictated by Court. I hold that the Petitioner is entitled to complain about the purported affidavit. Accordingly, I hold and declare ,that the Petitioner is not bound by its contents. However, I do not permit the Petitioner to withdraw this document as it is filed of record. The appointing authority is free to consider all the attendant circumstances and take any decision he deems fit. Under Article 52(1) of the Constitution the prerogative of the appointment of a Secretary to a Ministry is with His Excellency the President. The Supreme Court or no other authority can do it.

In the case of Gunasekera vs Samarasekera – S.C.F.R 607/99 and 608/99 decided on 12.1.2000, Justice D.P.S.Gunasekera, with Hon. Sarath.N. Silva, Chief Justice and Justice Priyantha Perera agreeing held that ordering to pay compensation for violation of a fundamental right cannot be equated to a conviction by a court of law.

It is the duty of the Counsel not to mislead Court or attempt to turn the Supreme Court into an instrument of persecution. It must also be borne very firmly in mind that there must be an end to litigation in a cause.

In conclusion I may add that Mr. Sumanthiran also submitted that there had been an affidavit filed by Dr. Jayasundera in which there was an allegation that former Chief Justice had been biased against Dr. Jayasundera. Mr. Sumanthiran demanded that Dr. Jayasundera be charged with contempt of Court.

This was an affidavit filed under a confidential cover. Mr. Musthapha, P.C., mentioned that it has reference to a statement made by former Chief Justice at a ceremony in Embilipitiya where he is purported to have said that the question of salaries of the Judges are being 'blocked' by some high officials in the Finance Ministry and he will deal with them. Some TV stations had given full publicity to this statement. This had happened prior to the delivery of the Judgment in F.R. Application where Dr. Jayasundera was the 8th Respondent. In this affidavit Dr. Jayasundera has stated that he believes that it was a reference to him. Mr. Musthapha submitted that one cannot be held in contempt for a perception.

I agree with submission of the Attorney General on this point that pursuit of such an affidavit will not assist the honour of this Court or upholding of justice in this country. I make no order with regard to costs.

Chief Justice

Jagath Balapabendi J.

I agree.

Judge of the Supreme Court

Judgment by Justice Shirani A. Bandaranayake

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SC (FR) Application
No. 209/2007

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Advisor to His Excellency
The President,
Secretary,The Democratic
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Petitioner

Vs.

1. K.N. Choksy, PC., MP.,
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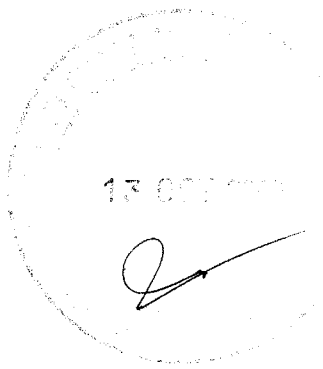
RESPONDENTS



And now between,

Dr. P.B. Jayasundera,
No. 761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8th Respondent-Petitioner

Vs.

Hon. The Attorney-General,
Attorney General's Department,
Colombo 12.

31st Respondent-Respondent

BEFORE : J.A.N. de Silva, CJ.
Dr. Shirani A.Bandaranayake, J.
Shiranee Tilakawardane, J.
S. Marsoof, PC, J.
Jagath Balapatabendi, J.
K. Sripavan, J. &
P.A. Ratnayake, PC,J.

COUNSEL : M.A. Sumanthiran with Viran Corea for the Petitioner

Faiz Musthapha, PC., with Anura Meddegoda and Lakdini Perera for the 8th Respondent-Petitioner

Mohan Pieris,PC AG., with Y.J. Wijayatilake, PC, ASG., Sanjaya Rajaratnam, DSG, and Nerin Pulle, SSC., as amicus.

Nihal Sri Amarasekera for 22nd Respondent
appears in person

ARGUED ON : 24.09.2009

DECIDED ON : 13.10.2009

Dr.Shirani A.Bandaranayake., J

I have had the advantage of reading in draft the judgment of His Lordship the Chief Justice of which I am in agreement. I would however, wish to include the following as reasons for my decision in agreeing with the majority of six to one for granting relief to the 8th respondent-petitioner on 24.09.2009.

The 8th respondent-petitioner had filed an amended petition dated 31.07.2009, praying for relief in order to enable him to comply with the direction of His Excellency the President who had indicated that the 8th respondent-petitioner's services are required in the national interest.

The 8th respondent-petitioner submitted that the order dated 08.10.2008 relates to the inclusion of a firm statement in the affidavit which the 8th respondent-petitioner was required to file in terms of the said order, that he would not hold any public office or exercise any executive or administrative functions in the future. In the circumstances, the 8th respondent-petitioner prayed for relief by vacating the order dated 08.10.2008, making an order relieving the 8th respondent-petitioner of the undertaking contained in paragraph 13 of the affidavit dated 16.10.2008 and/or by granting him such other relief that would seem to be appropriate.

The background to the present application based on the decision in SC (Application) No.209/2007, the subsequent orders made therein and the effect of those had been examined by His Lordship the Chief Justice with which I had agreed and accordingly I do not wish to analyse the said matters in detail. Instead, let me turn to consider briefly a few aspects which are of direct relevance to the matter in issue.

The 8th respondent- petitioner had filed the affidavit dated 16.10.2008 not on the basis of his own free will, but on the directions given by this Court on 08.10.2008. On that day, viz., 08.10.2008, learned President's Counsel for the 8th respondent-petitioner had informed Court that within four (4) days of the main judgment in SC (Application) N0.209/2007 was delivered, the 8th respondent-petitioner had tendered his resignation from the post of Secretary, Ministry of Finance, but had continued to function in that post to discharge official duties since the resignation was not accepted until much later. Learned President's Counsel had further submitted that the 8th respondent-petitioner does not hold any office in any Government Establishment nor in any other Establishment in which Government has any interests. Learned President's Counsel had further submitted that the 8th respondent-petitioner tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. At that stage the Court had made order thus:

> "Hence the 8th respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or

administrative functions. **Further affidavit to be filed as early possible. Mention for a final order on the matter on 20.10.2008**"(emphasis added).

This Court had taken up the issue of the filing of the affidavit by the 8th respondent-petitioner on 20.10.2008. On that day the Court had noted that 8th respondent-petitioner had filed his affidavit on 16.10.2008, but quite interestingly had made no order on the affidavit. The relevant Journal Entry of 20.10.2008 stated that,

> "Counsel for the 8th respondent submits that the 8th respondent has pursuant to the proceedings had in Court on 08.10.2008 filed an affidavit dated 16.10.2008 together with the annexure A-E. Mr.Sumanthiran for the petitioner submits that the annexures are only letters sent by the respective parties and that the 8th respondent has not included a copy of any letter said to have written by him. Subject to that, he submits that the affidavit is insufficient compliance with the undertaking given by the 8th respondent ".

In the said affidavit dated 16.10.2008, the 8th respondent-petitioner had averred that he does not hold any office under the Republic of in any establishment in which the Government of Sri Lanka has an interest purporting to represent the Government of Sri Lanka and that he will not hold office in any Governmental institutions either directly or indirectly or purport to exercise in any manner executive and administrative functions.

It was not disputed at any stage of the previous application or in this application that the 8th respondent-petitioner had been a high ranking Government official, who had been functioning not only as the Secretary, Ministry of Finance and Planning, but also as the Secretary to the Treasury including memberships of the Monetary Board of the Central Bank of Sri Lanka, Finance Commission and Institute of Policy Studies. In simple terms, at the time this Court had directed the petitioner to tender the aforementioned affidavit the 8th respondent-petitioner was holding high ranking employment in the Government of Sri Lanka and was a professional of his chosen area of discipline.

Accordingly, as a citizen of this Democracy, the 8th respondent-petitioner enjoyed what every citizen of this country was entitled to in terms of Article 14(1)g of the Constitution, viz., the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, until the decision of this Court that a firm statement be given that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Article 14 of our Constitution guarantees to our citizens, nine different types of fundamental freedoms, which are exercisable by them throughout this island Republic. These fundamental freedoms are generally known as basic civil rights upon which all the other freedoms in a democratic society would lie. Article 19(1) of the Indian Constitution contains provisions, which corresponds to Article 14 of our Constitution and referring to Article 19(1) of the Indian Constitution, it has been stated in **State of West Bengal V. Subodh Gopal** (AIR (1954) SC 92) tha t,

> "Those great and basic rights are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country".

The rights conferred by Article 14(1) g can be subjected only to restrictions that are stipulated in Article 15 (5) of the Constitution. These restrictions indicate very clearly that in an organized society there cannot be any absolute or unfettered rights with regard to any matter whatever that maybe. Referring to the rationale in such restrictions in the corresponding provisions of the Indian Constitution, Justice Mukherjea, in **Gopalan V. State of Madras** (AIR (1950) SC 27) had stated thus:

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. . . . Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers . . . . What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control . . . . Article 19 of the [Indian] Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality".

The restrictions with regard to the freedom to engage in any lawful occupation, profession, trade, business or enterprise enumerated in Article 14(1) g of the Constitution are stipulated in Article 15(5) of the Constitution and Article 15(5) a clearly states that the exercise and operation of the fundamental right pertaining

to Article 14(1) g shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation, inter *alia*, to **disciplinary control of the person entitled to such fundamental right.**

It is therefore quite obvious that a citizen of this country has a fundamental right to engage in a lawful occupation and such right is guaranteed in terms of Article 14(1) g of the Constitution and also such right, if it is to be restricted in terms of Article 15(5) of the Constitution such restrictions would only be based on the disciplinary procedure in terms of his employment.

A citizen's right to work, so guaranteed in terms of the Constitution, would also be protected by the Courts, again in terms of the Constitution. The basic principle that the Court being the final protector of all citizens was clearly enumerated in **Nagle V Feilden** ([1966] 1 All E.R. 689), where Lord Denning had stated thus:

> " . . . a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the Courts will intervene to protect his rights of property, so they will also intervene to protect his right to work".

It is therefore the paramount duty of Courts to ensure that a citizen's right to work is protected. The right to employment being a fundamental right guaranteed by the Constitution, it would be the duty of the Court to exercise their authority in the interest of the individual citizen and of the general public to safeguard that right. The importance of the fundamental rights safeguarded by the Constitution is clearly stipulated in Article 4 (d) of the Constitution where it is emphasized that,

"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".

A careful consideration of the aforementioned constitutional provisions clearly elaborate the fact that the right to employment is a fundamental right declared and recognized by the Constitution which should not be abridged, restricted or denied in any manner other than to the extent provided by the Constitution itself. Article 118 of the Constitution clearly stipulates that the Supreme Court of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions enumerated in the Constitution exercise the jurisdiction **for the protection of fundamental rights.**

In fact the Supreme Court had been quite mindful of the provisions referred to above and specially to the fact that in the event that there has been evidence to the effect that a Government official who had been named as a respondent in the matter in question had acted in violation of a petitioner's fundamental rights by way of executive and/or administrative action that the said respondent's appointing authority/supervising officer should be notified of such action in order to take relevant steps, if and when necessary.

There is a long line of cases under Articles 11.13(1) and 13(2) of the Constitution that would bear witness to the said practice that even after finding a particular officer responsible for the violation of any one or more of Articles 11, 13(1) and 13(2) of the Constitution, this Court had taken no steps to order such

respondents to cease employment. In the event if they are found guilty, even after ordering to make payment personally as compensation, no directives have been given with regard to the cessation of their employment. The only step that has been taken consistently by the Supreme Court is to direct the Registrar of the Supreme Court to send a copy to the Inspector General of Police for the purpose of taking appropriate steps in terms of the procedure governing the respondent's employment. The purpose for informing the appointing authority the outcome of an action before the Supreme Court, without this Court taking steps to remove citizens from their employment is for the relevant establishment to follow due process of law, if the employee in question is to be deprived of his employment. Since the right guaranteed in terms of Article 14(1) g is not an absolute right, but one which is subject to permissible restrictions, if an employee is accused of any wrongdoing, necessary steps would have to be taken to inquire into such allegations in terms of his contract of employment.

In such circumstances for all the reasons aforementioned it would not be possible for this Court, which possess the jurisdiction for the protection of fundamental rights, to insist for an affidavit from a respondent that ' **he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions'** so as to deprive him from the freedom to engage in any lawful occupation or profession. In fact a question would arise as to whether the aforementioned difficulty was the reason for Court not to have made any order on the affidavit filed by the 8th respondent-petitioner on 20.10.2008 or even on 15.12.2008, when finally the proceedings were terminated. Be that as it may, it must clearly be borne in mind that in terms of the provisions contained in the Constitution protecting the fundamental rights of the citizens and the Supreme Court having the jurisdiction for the protection of fundamental rights, this Court has no jurisdiction to compel and dictate a respondent to file affidavits **with firm statements** affirming/swearing that they would not hold office in

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any governmental institutions. As stated by Francis Bacon (Of Judicature), '**Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws.**'

The 8th respondent-petitioner in his amended petition had stated that he had received a letter dated 25th May 2009 from the Secretary to His Excellency the President directing the 8th respondent-petitioner to resume duties as Secretary, Ministry of Finance and Planning and Secretary to the Treasury. In the said letter the Secretary to His Excellency the President had stated, *inter alia,*

a. that with the successful liberation of the North and East the country needs to embark on a massive development programme and that the country is confronted with several challenges that required to be managed to restore the desired socio economic progress, the impact of the global economy that is confronted with a financial crisis being one such major challenge;

b. that several major infrastructure development activities are in the final stage of implementation and many others are to be launched for which domestic and external funding and other resources need to be mobilized;

c. that the implementation of post-war development programme in the North and East also demand experienced and committed public officers.

The said communication sent by the Secretary to His Excellency the President had further stated thus:

"As we know, His Excellency the President accepted your resignation from the post of Secretary, Ministry

of Finance and Planning and other positions in the Government reluctantly in view of your insistence. Considering the vast knowledge and experience you command while acknowledging your honesty and integrity, His Excellency the President is of the view that it is a waste that your services are not available to the Government particularly in the present context. In this background, His Excellency the President has instructed me to inform you to resume duties as Secretary, Ministry of Finance and Planning and assist the Government in its endeavours" (E).

The appointments of Secretaries to Ministries are made by His Excellency the President of the Republic of Sri Lanka in terms of Article 52(1) of the Constitution. This Court has no power to make such an order or to give directives to that effect when the prerogative of making such appointments have been vested with His Excellency the President of the Republic. This position had been clearly laid down by Amerasinghe,J., (Wijetunga,J., and Bandaranayake, J., agreeing) in **Brigadier Rohan Liyanage V Chandrananda de Silva, Secretary, Ministry of Defence and others** (SC (Application) No.506/99 SCM of 18.07.2000).

The 8th respondent-petitioner in his amended petition dated 31.07.2009 had prayed for the following:

1.vacate the order dated 08.10.2008 in so far as it relates to the inclusion in the Affidavit of a firm statement that the present petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" ;

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2.make an order relieving the present petitioner of the undertaking contained in Paragraph 13 of the said affidavit dated 6.10.2008;

3. grant such other and further relief that this Court may seem fit.

As referred to earlier, either on 08.10.2008, 20.10.2008 or even thereafter no order had been made by this Court either accepting or rejecting the affidavit filed by the 8th respondent-petitioner. With out such valid acceptance and/or a clear order made to that effect, the question of vacating an order or relieving of an undertaking would not arise, since the 8th respondent-petitioner is not bound by its contents. Furthermore, it is also relevant to note at this juncture that the original petition filed by the petitioner in SC (Application) No.209/2007, was heard and decided before a bench consisting of Sarath N.Silva, CJ., Amaratunga, J., and Balapatabendi J. However, the Bench which sat on 08.10.2008 and 20.10.2008 comprised of Sarath N.Silva, CJ., Tilakawardane, J., and Ratnayake J. It is well settled law, as clearly stated by Amerasinghe J., in **Brigadier Rohan Liyanage** (supra) that the Bench of the Court which heard and determined a matter should hear any application touching its earlier decision. Therefore it would not be possible to grant the relief prayed under items 1 and 2 of the amended petition dated 31.07.2009. However, considering the circumstances of this application and the provisions contained in Article 52(1) of the Constitution His Excellency the President, being the appointing authority in terms of Article 52(1) of the Constitution would be free to consider appointing the 8th respondent-petitioner to the Post of Secretary Ministry of Finance and Planning/ Secretary to the Treasury, notwithstanding any undertaking given to Court by the said 8th respondent-petitioner.

Judge of the Supreme Court

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PETITIONER

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		Hon. S. Tilakawardane	Judge of the Supreme Court
		Hon. S. Marsoof, P.C.	Judge of the Supreme Court
		Hon. D. J. De S. Balapatabendi	Judge of the Supreme Court
		Hon. K. Sripavan	Judge of the Supreme Court
		Hon. P. A. Ratnayake, P.C.	Judge of the Supreme Court

COUNSEL : Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th Respondent-Petitioner

M. A. Sumanthiran with Viran Corea for the Petitioner-Respondent

Nihal Sri Amarasekera for 22nd Respondent-Respondent appearing in person

Mohan Pieris, P.C. for the Attorney General with J. Wijetilleke, A.S.G., Sanjaya Rajaratnam D.S.G., and Nerin Pulle, S.S.C. as amicus

ARGUED ON : 24.09.2009

DECIDED ON: 13.10.2009

MARSOOF, J.

I have had the advantage of perusing the draft judgement of His Lordship the Chief Justice, with which I respectfully agree. However, I wish to make a few additional observations.

The 8th Respondent-Petitioner (hereinafter referred to as the Petitioner) has prayed in his amended petition dated 31st July 2009 for the vacation of the order of this Court dated 8th October 2008 by which he was required to file an affidavit containing "a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" (prayer (a)) and additionally for an order relieving the Petitioner of the undertaking contained in paragraph 13 of his affidavit dated 16th October 2008 whereby such a firm statement was made by him (prayer (b)). The Petitioner has also moved for any other and further relief that this Court may consider fit and meet (prayer (c)).

Mr. M.A. Sumanthiran, Senior Counsel for the Petitioner-Respondent, has made extensive submissions as to why in his view this Court should not vacate its order dated 8th October 2008 or permit the Petitioner to withdraw his undertaking given to

Court in his affidavit dated 16th October 2008. In particular, he has submitted that the judgement of this Court dated 21st July 2008 delivered by his Lordship Hon. Sarath N. Silva, C.J., (with Hon. Amaratunga, J. and Hon. Balapatabandi, J. concurring) contained serious findings against the Petitioner, which led to the determination that the Petitioner was primarily responsible for certain violations of fundamental rights by the executive and administrative action of the State. Mr. Sumanthiran pointed out that the Petitioner was directed to pay a sum of Rs. 500,000/- as compensation to the State, and submitted that it is clear from the tenor of the said judgement that the Petitioner was not a fit person to hold public office.

Mr. Sumanthiran also relied on *inter alia* the decision of this Court in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 to submit that the Supreme Court has no statutory jurisdiction to re-hear, reconsider, revise, review, vary or set aside its own orders. He also stressed that accordingly, neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2008 can lawfully be revised or varied by this Court. This submission was independent of the preliminary objection taken by him in regard to the power of the Chief Justice to constitute a Bench comprising five or more judges to hear, in terms of Article 132(3) of the Constitution, the matter arising from the amended petition of the Petitioner dated 31st July 2009, which was disposed of unanimously by this Court earlier in the proceedings.

Mr. Faiz Mustapha, P.C. submitted on behalf of the Petitioner that the only sanction imposed against the Petitioner in the said judgement was the aforesaid order for compensation, and stressed that the said judgement contained no finding that the Petitioner was not a fit person to hold public office. He also emphasized that the main judgement in this case fell short of either removing the Petitioner from the substantive office he then held as the Secretary to the Ministry of Finance or barring him from holding public office in future. He further submitted that the Court, upon delivering the judgement dated 21st July 2008, became *functus*, and could not have lawfully made the order dated 8th October 2008 which required the Petitioner to file the affidavit in question.

In my view, the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution to redress alleged infringements or imminent infringements of fundamental and language rights is unique in that it is an original jurisdiction vested in the apex court of the country without any provision for review through appellate or other proceedings. While our hierarchy of courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the oft used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism, the remedy provided by Article 126 is fraught with the danger of becoming an "unruly horse", and for this reason has to be exercised with great caution. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the *Fernandopulle* case stressed the need for finality, and very clearly laid down that this Court is not competent to reconsider, revise, review, vary or set aside its own judgement or order (in the context of a fundamental rights application) *except*

under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error *(per incuriam).*

Although the Petitioner has adverted to the doctrine of *per incuriam* as a basis for relief in his amended petition dated 31st July 2009, his Senior Counsel Mr. Mustapha submitted that he does not propose to rely on this doctrine, the parameters of which have been succinctly explained by his Lordship Hon. Amarasinghe, J., in the course of his judgement in the *Fernandopulle* case. Accordingly, in the absence of any contention that the judgement of this Court dated 21st July 2008 was pronounced or the order of this Court dated 8th October 2008 was made *per incuriam*, I agree with his Lordship the Chief Justice that the relief prayed for by prayer (a) of the amended petition filed by the Petitioner should be refused.

This does not, however, conclude the matter, as it is submitted that in the peculiar circumstances of this case, this Court should in the exercise of its inherent powers, consider granting relief to the Petitioner as prayed for in prayers (b) and /or (c) of his amended petition. Mr. Faiz Mustapha, P.C., in the course of his submissions, stressed that the former Chief Justice Hon. Sarath N. Silva was actuated by malice towards his client and stressed the element of coercion which he alleged vitiated the affidavit dated 16th October 2008 filed by the Petitioner in these proceedings. He submitted that on 8th October 2008, the Petitioner was directed by this Court contrary to all norms of natural justice, to file the said affidavit giving a "firm" undertaking not to hold public office in future, and that he had a reasonable apprehension that if he failed to comply with the order of Court he would have been held in contempt of court. It is in this context that the question arises as to whether in the peculiar circumstances of this case, the Petitioner may be permitted to withdraw the undertaking contained in the affidavit filed by him.

As his Lordship Sharvananda, A.C.J., observed in *Kumarasinghe v Ratnakumara and Others* [1983] 2 Sri LR 393 at page 395, "an affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath", and there can be no doubt that "facts" would include a state of mind or belief. Indeed, in my view, a person may even choose to give a binding undertaking by way of affidavit, to do or not to do something. The most important characteristic of an affidavit is its voluntary nature, and there can be no doubt that no court will act on an affidavit that has been extracted using duress or coercion. The onus would be on the person asserting duress or coercion to show that the threat of harm was so immediate and proximate that it deprived the affidavit of its voluntary character. It is, however, unnecessary to embark on an inquiry into the degree of immediacy or proximity of the alleged coercion or duress, as in my opinion this matter can be resolved on other grounds which render such an inquiry futile.

As strenuously contended by Mr. Mustapha, P.C., neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2009 debarred the Petitioner from holding public office, and the omission to do so was perhaps due to the Court being mindful of the Petitioner's fundamental right guaranteed by Article 14(1)(g) of the Constitution to engage in any "lawful occupation, profession, trade, business or enterprise" which cannot be taken away except in according with law

following due process. He submitted that the phraseology of Article 14(1)(g) clearly applies to the holding of public office, and that the relevant disciplinary authority who had the power of dismissal with respect to the Petitioner while he held office as the Secretary to the Ministry of Finance was the President of the Republic, who in terms of Article 52 of the Constitution was the appointing authority to Secretaries of Ministries. He also submitted further that since this Court has not made any "final order" after the Petitioner filed his affidavit dated 16th October 2008, the Court may consider permitting the Petitioner to withdraw the said affidavit in its entirety, or at least consider relieving the Petitioner of the undertaking contained in paragraph 13 of the said affidavit not to hold public office, as prayed for in paragraph (b) of the prayer to his amended petition.

I am of the considered opinion that there is merit in the submissions made by Mr. Mustapha, P.C. In particular I find that the judgement of this Court dated 21st July 2008 did not hold that the Petitioner is a person unfit to hold public office and remove him from the post he held or debar him from holding public office in the future. In my opinion, the remedy enshrined in Article 126 of the Constitution is ill-equipped to determine the suitability of persons to hold office, whether of a public or private nature. The procedure applicable to deal with applications relating to violations of fundamental rights and language rights is found in Part IV of the Supreme Court Rules, 1990, formulated under Article 136 of the Constitution, and adopting this procedure, the Court arrives at its findings after examining the affidavits and documents that are filed by the parties with their pleadings. While the said procedure is appropriate to determine the question whether there has been an infringement or imminent infringement of any fundamental right or language right, in my opinion, it is not at all appropriate to determine the suitability of any person to hold or continue to hold public office.

Unless contrary provision is made by legislation or in the letter of appointment, the provisions of the Establishments Code (Vol. II) apply with respect to disciplinary proceedings against public officers, which could result in various punishments being imposed including dismissal from service of an officer who is found to be unfit to hold public office. The said procedure is characterized by a preliminary investigation, a charge sheet, and the testimony of witnesses under oath or affirmation subject to the right of cross-examination, which are all safeguards provided by the law to such public officers. As Wigmore observes at § 1367 of his treatise titled *Evidence* (J. Chadboum rev. 1974), cross-examination "is the greatest legal engine ever invented for the discovery of truth." It is an important safeguard provided by the law to a person who is subjected to any legal process, whether a criminal trial or disciplinary inquiry, which might ultimately result in the deprivation of his life, liberty or means of livelihood. Such safeguards are unavailable to a public officer who is cited as a respondent to a fundamental rights application. The Disciplinary Authority with respect to Secretaries of Ministries appointed by the President under Article 52 of the Constitution is the President himself, and disciplinary proceedings relating to such Secretaries are governed by the Minute on Secretaries 1979, as subsequently amended, which also contains some important safeguards. It is in view of the absence of such safeguards in fundamental rights proceedings that the Supreme Court has developed the practice of forwarding a copy of any judgement containing adverse

findings against a public officer to the relevant disciplinary authority for it to consider appropriate disciplinary action, without making any findings of its own in regard to the suitability of such public officer to hold public office.

For the purpose of considering the application made by the Petitioner in his amended petition, it is important to advert to the process followed by this Court that led to the impugned order of this Court dated 8th October 2008. When this case was mentioned in Court on 8th September 2008, before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. on a motion seeking certain incidental orders to give effect to the judgement of this Court dated 21st July 2008 and which had no bearing to the propriety of the Petitioner holding office, it was submitted by Mr. Sumanthiran that the Petitioner is "yet continuing to hold public office notwithstanding the fact that the finding of this Court is that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution" and was therefore disqualified from holding public office. The Court observed that there is merit in this submission, but very rightly directed that "the matter should be referred to the bench which heard the case for further orders." Accordingly, Court expressly directed that the case be mentioned "on 29th September 2008 *before the same Bench that heard the main case*", namely his Lordship Hon. Sarath N. Silva, C.J., Hon. Amaratunga, J. and Hon. Balapatabandi, J.

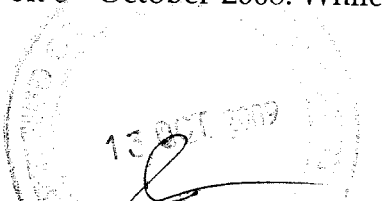
However, for reasons that do not appear from the docket, on 29th September 2008 the case did not come up before the aforesaid Bench that heard the main case, but was once again taken up before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. Unfortunately, the Bench before which this case was mentioned on that date, did not decline to hear the matter on the basis that the Bench was not properly constituted. On the contrary, the said Bench noted that despite the finding in the main judgement that the Petitioner has infringed certain fundamental rights, he was "continuing to hold public office", and directed that notice be issued on the Petitioner to be present in Court on the next date (8th October 2008) and "to reveal to Court -

(1) whether he continues to hold any office under the Republic, and if so, the nature of such office and the place at which he is functioning; and

(2) whether he is holding office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka, and if so, the nature of such office."

It is also significant that the Court expressly directed "this matter to be resumed before *the same Bench* on 08.10.2008."

It is therefore manifest that although the order of this Court dated 8th September 2008 clearly contemplated that the question of the propriety of the Petitioner holding public office should be considered by the very same Bench which pronounced the main judgement dated 21st July 2008, the subsequent order of Court dated 29th September 2008 resulted in the case being "resumed" before a differently constituted Bench on 8th October 2008. While in my considered opinion, the proceedings relating



to the Petitioner conducted on 8th October 2008 were null and void due to the improper constitution of the Bench, the said proceedings were also conducted in violation of the salutary *lex curiae* of this Court which was explained by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 87 as follows:

> ".....law, practice and tradition require(s) that matters pertaining to a decided case should be referred to the Court composed of the Judges who had heard the case. The practice of the Court in this regard is the law of the Court *lex curiae* - and it must be given effect to in the same way in which a rule of Court must be given effect to."

The rationale and justification for this practice of Court is that it is only the Bench which pronounced a judgement or order that is in the best position to reconsider, revise, review, vary or set aside its judgement, weather on the basis of manifest error (*per incuriam*) or any other ground. Mr. Sumanthiran, who made extensive submissions regarding this salutary practice, nevertheless contended that there is no hard and fast rule that a case should be taken up before the same Bench which pronounced the main judgement for any "incidental order", and that any Bench of this Court could have dealt with the question of propriety of the Petitioner holding public office as it did on 8th October 2008.

While I agree with Mr. Sumanthiran that any Bench of this Court could make "incidental orders" to give effect to its judgements and decisions, insofar as this Court in its judgement pronounced on 21st July 2008 did not make any order having the effect of restraining the Petitioner from continuing to function as Secretary to the Ministry of Finance or in general seek to disqualify him from holding public office in the future, I am of the opinion that what the Court sought to do on 8th October 2008 was to reconsider and vary its judgement pronounced on 21st July 2008. This could only have been done by a Bench consisting of the same judges who heard the main case and pronounced judgement, and this Court was fully conscious of this requirement when it made order on 8th September 2008 that this issue should be dealt with by *"the same Bench that heard the main case"*. Of course, as observed by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 86, there could be circumstances in which it is not possible to constitute the same Bench for reviewing an earlier decision, as "for instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason", in which circumstances the review could have been undertaken by a Bench consisting of as many of the judges of the Bench that made the decision sought to be reviewed. However, in the absence of any suggestion that any such circumstances existed on 8th October 2008 when the impugned order was made, it is unfortunate that the Bench of this Court that pronounced the main judgement was not constituted to deal with the question of suitability of the Petitioner to hold public office.

Apart from this, it is necessary to observe that even on 8th October 2008 this Court did not make any determination regarding the propriety of the Petitioner holding public office. After the Petitioner, through his Counsel Mr. Mustapha, intimated to Court

that he had tendered his resignation from the post of Secretary to the Ministry of Finance within four days from the date of pronouncement of the main judgement, and that he did not hold any office in any establishment in which the Government of Sri Lanka had any interest, Court only directed the Petitioner to file an affidavit giving a "firm" undertaking that he will not in the future hold public office.

In my considered opinion, on 8th October 2008 this Court could not have lawfully made a determination that the Petitioner was not fit to hold public office, since it had not afforded the Petitioner a proper opportunity of being heard on his fitness or otherwise to hold public office. Imposing a life-time bar on the Petitioner holding public office would not only have violated his fundamental right guaranteed by Article 14(1)(g) of the Constitution but would also have offended the rule of proportionality. Such a determination could also have impinged on the Petitioner's franchise in so far as it would have prevented him from seeking election to Parliament, the Provincial Council or even a local authority. The direction made by Court on 8th October 2008 spelling out the content of an affidavit to be filed by the Petitioner was an attempt to achieve indirectly what it could not have done directly, and additionally, had the sanction of contempt of court.

I am conscious of, and very much concerned about, the infirmities of the affidavit dated 16th October 2008 that was filed by the Petitioner pursuant to the order of this Court dated 8th October 2008. It is clear that the said affidavit seriously compromised the fundamental right of the Petitioner guaranteed by Article 14(1)(g) of the Constitution, giving rise to the question as to whether a person may lawfully waive a fundamental right guaranteed by the Constitution in this manner. In the United States, the Courts have consistently held that in general certain constitutional rights primarily granted for the benefit of the individual may be waived, but others enacted in the public interest or on grounds of public policy cannot be so waived. The said dichotomy did not find favour in the Supreme Court of India, where in *Basheshar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan & Another* (1959) Vol. 46 AIR (SC) 149, the Court by majority decision held that none of the fundamental rights guaranteed by the Constitution of India could be waived. As Hon. Bhagwati, J., observed at page 160 of the said judgement–

> "... it is the sacred duty of the Supreme Court to safeguard the fundamental rights which have been for the first time enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself .....But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution, there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution."

This decision has been followed consistently in India and was also cited with approval in *Herath Banda v. Sub Inspector of Police, Wasgiyawatta Police Station, and Others* [1993] 2 Sri LR 324, in which this Court refused an application to withdraw a fundamental rights application on the basis that the grievance has been settled. It is

significant to note that at page 325 of his judgement Hon. Amarasinghe, J., stressed that applications pertaining to fundamental rights are not ordinary private matters, and observed that he is "reluctant to accept any suggestion that the question of withdrawal (of a fundamental rights application) depends on the importance of the right violated." Following the reasoning in the *Basheshar Nath* case, his Lordship doubted that any useful purpose could be served "by attempting to arrange the rights on a hierarchical scale." I hold that none of the fundamental rights guaranteed by the Constitution may be compromised or waived by any person who is otherwise entitled to its protection. Accordingly, insofar as the Petitioner is not competent to compromise or waive his fundamental right guaranteed by Article 14(1)(g) of the Constitution, he is not bound by the undertaking given by him in paragraph 13 of his affidavit dated 16th October 2008.

Mr. Faiz Mustapha P.C. has urged this Bench, which has been specially constituted by his Lordship the Chief Justice, and consists of not only the honourable Judges who pronounced the judgement dated 21st July 2008 but also the honourable Judges who made the order dated 8th October 2008 (other than Hon. Justice Sarath N. Silva, C.J., who has since retired and Hon. Amaratunga, J., who has declined to sit), to consider granting the Petitioner relief, in the exercise of the inherent power of Court, by permitting him to withdraw the affidavit dated 16th October 2008 filed by him. He has further submitted that since no order has been made by this Court with reference to the said affidavit, the Petitioner is entitled to withdraw it. Alternatively, Mr. Mustapha has urged Court to relieve the Petitioner of the undertaking given by him in paragraph 13 of the affidavit not to hold any public office in future.

This Court, no doubt, has the inherent power to make such orders as may be necessary for the ends of justice. The inherent power of Court is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist. In the exercise of this power, the Court may rectify such injustice on the principle *actus neminem gravabit* (an act of the Court shall prejudice no person). This principle, which was described by Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* (1871) 3 PC 465 as "one of the first and highest duties of all Courts.....to take care that the act of the Court does no injury to any of the suitors," has been applied by our courts as well as the courts in other jurisdictions such as the United Kingdom and Canada in situations in which there was a need to undo some harm caused by a serious miscarriage of justice. *See, Ittepana v Hemawathie* [1981] 1 Sri LR 476; *Amato v The Queen*, (1982) 69 CCC (2d) 31; *Gunasena v Bandaratillake* [2000] 1 Sri LR 292; *A and others v Home Secretary (No 2)* [2006] 2 AC 221. As Lord Nicholls of Birkenhead observed in *Regina v Loosely* [2001] 4 All ER 897 at 899 -

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law."

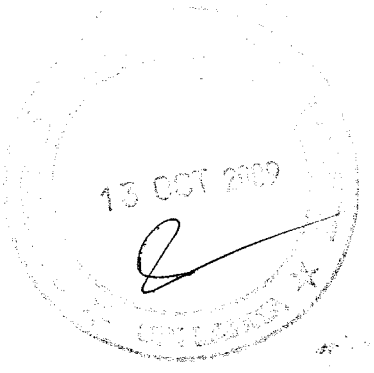
It is in this theoretical backdrop that the ultimate relief pressed for by Mr. Mustapha P.C should be viewed. In my considered opinion, even though as already noted, the order of this Court dated 8th October 2008 is devoid of validity, the Petitioner has chosen to abide by it, and it may not be proper to permit him to withdraw the affidavit filed by him pursuant to the said order, or any part thereof. Although for

this reason, I am inclined to hold that the application in prayer (b) to the amended petition of the Petitioner has to be refused, in view of the position that the said affidavit has been filed in proceedings tainted with illegality and in violation of the Petitioner's fundamental rights which this Court is bound to protect, I am of the opinion that it must be treated as a nullity having no force or avail in law.

In my opinion, it is the President of Sri Lanka, who as the Head of the Executive and the appointing and disciplinary authority with respect to Secretaries to Ministries, is vested with the power and responsibility to deal with disciplinary matters relating to such officers, and accordingly, the question of the propriety of the Petitioner holding public office, as Secretary to the Ministry of Finance, has to be considered by him. I therefore hold that in terms of the power vested in him by Article 52 of the Constitution, the President is free to consider appointing the Petitioner as Secretary to the Ministry of Finance notwithstanding the undertaking given by the Petitioner to Court in the aforesaid affidavit that he shall not hold public office in future.

I make no order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT



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

In the matter of an Application for Relief pertaining to the undertaking in the affidavit filed by the 8th Respondent-Petitioner dated 16th October 2008 pertaining to holding Public Office.

Vasudeva Nanayakkara
Attorney-at-Law
Advisor to H.E.the President
Secretary, Democratic Left Front
No. 49 1/1. Vinayalankara Mawatha
Colombo 10
And others.

Petitioner

SC(FR) Application No. 209/07

Vs.

1 K.N. Choksy, PC., M.P.,
Former Minister of Finance
No. 23/3, Sir Ernest de Silva Mawatha,
Colombo 7.

2. Karu Jayasuriya, M.P.,
Former Minister of Power & Energy,
No. 2, Amarasekera Mawatha,
Colombo 5.

3. Ranil Wickremasinghe, M.P.,
Former Prime Minister,
No. 115, 5th Lane,
Colombo 3.

And 28 Others.

Respondents

AND NOW BETWEEN

SC(FR) Application No. 209/07

Dr. P.B. Jayasundera
No. 761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8th Respondent-Petitioner

Vs.

The Attorney General
Attorney General's Department
Colombo 12.

31st Respondent-Respondent

BEFORE	:	Hon. J.A.N. de Silva	Chief Justice
		Hon. Dr. S.A. Bandaranayake	Judge of the Supreme Court
		Hon. S. Tilakawardane	Judge of the Supreme Court
		Hon. S. Marsoof	Judge of the Supreme Court
		Hon. D.J.De S. Balapatabendi	Judge of the Supreme Court
		Hon. K. Sripavan	Judge of the Supreme Court
		Hon. P.A. Ratnayake,	Judge of the Supreme Court

COUNSEL : M..A.Sumanthiran with Viran Corea for the Petitioner.

: Faiz Musthapha, PC with Anura Meddegoda and Lakmini Perera for the 8th Respondent.

Mohan Pieris, PC. Attorney General with J. Wijayatilake,PC. ASG., Sanjaya Rajaratnam DSG. and Nerin Pulle SSC. for Attorney General as amicus.

Nihal Sri Amarasekera for 22nd Respondent appearing in person.

ARGUED ON : 24.09.2009

DECIDED ON : 13.10.2009

P.A. Ratnayake J.

I have had the advantage of perusing the draft judgment of His Lordship the Chief Justice and I agree with his conclusion that His Excellency the President, being the appointing authority in terms of article 52 of the constitution would be free to consider appointing the 8th respondent petitioner to the post of Secretary to the Ministry of Finance notwithstanding the undertaking given to the court by the said 8th Respondent Petitioner. However, I would like to state my own reasons in arriving at the said conclusion.

The judgment in this case was delivered on 21st July 2008 by a Bench comprising of His Lordship the former Chief Justice Hon. Sarath N Silva, Hon. Amaratunga J. and Hon. Balapatabendi J. The judgment was consequent to an application filed by the Petitioner in the original application (Mr. Vasudeva Nanayakkara) alleging a contravention of fundamental rights by executive and administrative action in the sale of shares of Lanka Marine Services Ltd., a wholly owned company of the Ceylon Petroleum Corporation. In that judgment this Court held that the impugned transaction and the granting of benefits to John Keells Holdings Ltd., has been an arbitrary exercise of executive power primarily on the part of the 8th Respondent-Petitioner who functioned at the relevant time as the Chairman of the Public Enterprises Reform Commission. The judgment also found that ~~that~~ the actions of the 8th Respondent-Petitioner was also biased in favour of John Keells Holdings Ltd. and that he worked in collusion with S. Ratnayake of John Keells Holdings Ltd. to secure illegal advantages to the latter adverse to the public interest. Pursuant to *inter alia* those findings, this Court directed the 8th Respondent-Petitioner to pay a sum of Rs.500,000/- as compensation to the State.

Subsequent to the judgment this case was called again before different benches of this Court pursuant to applications made by parties. The subject

matter of the present application relates to the proceedings before this Court on 8th October 2008 and 20th October 2008.

After the judgment, this case was called on 8th September 2008 before His Lordships the Chief Justice Hon. Sarath N Silva, Hon. Tillakawardane, J. and Hon. Amaratunga,J. on a motion filed by the 19th Respondent (Lanka Marine Services Ltd.). At the hearing the counsel for the Petitioner in the original application (Mr.Vasudeva Nanayakkara) Mr. Sumanthiran submitted to this Court that the 8th Respondent-Petitioner against whom adverse findings were made by Court is yet continuing to hold public office notwithstanding the findings that he has violated the Provisions of the Constitution and the oath taken in terms of Article 53 of the Constitution. Accordingly, this Court made an order to have the application mentioned on 29th September 2008 before the same Bench who heard and decided the main case. The case has not been listed before the same Bench on 29th September 2008 but was called before His Lordships the Chief Justice Hon. Sarath N Silva and Hon. Tillakawardane,J. and Hon. Amaratunga,J. On this day, the Court directed to issue notice on the 8th Respondent Petitioner in this application to appear before Court on 8th October 2008 and again directed the case be heard before the same Bench. The case was called again on 8th October 2008 before a bench of which His Lordships Chief Justice Hon. Sarath N Silva, Hon. Tillakawardane,J. and I were members.

On 08th October 2008 Mr. Faisz Musthapha, P.C. appeared for the 8th Respondent-Petitioner and submitted to Court that the 8th Respondent-Petitioner tendered his resignation from the post of Secretary Ministry of Finance within four days of the judgment. He however submitted that the 8th Respondent-Petitioner continued to function in that post to discharge official duties since the resignation was not accepted until much later. He further submitted that the 8th Respondent-Petitioner resigned from the Chairmanship of Sri Lanka Airlines on 19th September 2008 and that this was accepted on 30th September 2008. He further submitted that the 8th Respondent-Petitioner did

not hold any office in any Government Establishment nor in any Establishment in which the Government has any interest. However, Counsel for the Petitioner in the original application (Mr. Vasudeva Nanayakkara) Mr.Sumanthiran submitted to Court that according to his instructions, the 8th Respondent-Petitioner has interest in companies incorporated in which the Government has an interest and he referred to two such companies. Mr.Musthapha submitted that he only holds a single share in these companies and that he would sever links with these companies as well. He further submitted that the 8th Respondent tenders an unreserved apology to court for having continued functioning after the judgment of this court. Thereafter this Court recorded the following statement in the journal entries of 8th October 2008, which was extensively referred to in these proceedings:

> "Hence the 8th Respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Further Affidavit to be filed as early as possible. Mention for a final order on the matter on 20.10.2008. ..... Accordingly, Registrar to list this matter to be mentioned firstly on 20.10.2008 and later on 15.12.2008."

In the meantime the 8th Respondent-Petitioner filed an affidavit dated 16th October 2008 in which the following statement was contained in paragraph 13:

"I state that I do not hold office under the Republic or in any establishment in which the government of Sri Lanka has an interest, purporting to represent the government of Sri Lanka and I will not hold in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions"

Thereafter, this case was called again on 20th October 2008 before a bench of which His Lordships Chief Justice Hon. Sarath N Silva, Hon. Tillakawardane,J. and I were members. The following statement was also recorded in the journal entries of 20th October 2008, which was also extensively referred to in these proceedings:

> "Counsel for the 8th Respondent submits that the 8th Respondent has pursuant to the proceedings had in Court on 08.10.2008 filed an affidavit dated 16.10.2008 together with the annexure A-E. Mr. Sumanthiran for the Petitioner submits that the annexures are only letters sent by the respective parties and that the 8th Respondent has not included a copy of any letter said to have been written by him. Subject to that, he submits that the affidavit is insufficient compliance with the undertaking given by the 8th Respondent. Mention on 15.12.2008 as previously directed."

It was common ground in the submissions of both Mr.Musthapha P.C. and Mr.Sumanthiran that the words "insufficient compliance" in the journal entry of 20th October 2008 was a typographical error and that the words should instead read as "sufficient compliance".

Thereafter the 8th Respondent-Petitioner filed this instant application before this Court in which he stated that he had been requested by His Excellency the President by letter dated 25th May 2009 to resume duties as Secretary, Ministry of Finance and Planning for the reasons stated in that letter. In the circumstances the 8th Respondent-Petitioner sought the following relief in the amended petition dated 31st July 2009 filed in this instant application;

> "(a) Vacate the Order dated 08.10.08 in so far as the Petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions

(b) Make an order relieving the present petitioner of the undertaking contained in paragraph 13 of the said affidavit dated 16.10.08 tendered by the present Petitioner pursuant to the Order of Your Lordship's Court and produced marked 'D' to this application.

(c) Grant such other and further relief as to Your Lordships' Court shall seem fit and meet."

Mr.Musthapha PC representing the 8th Respondent –Petitioner urged the grant of the above relief on several grounds. Mr. Sumanthiran, who represented the Petitioner in the original Application, strongly opposed the grant of such relief.

As far as the relief prayed for in paragraph (a) in the amended Petition is concerned, a careful reading of the journal entry of 8th October 2008 will reveal that the 8th Respondent –Petitioner was never expressly ordered by this Court not to hold "any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" as described by the 8th Respondent –Petitioner in paragraph (a) of the amended Petition. Indeed all that the journal entry dated 8th October 2008 stated was that the 8th Respondent –Petitioner "may consider" filing an affidavit in which he may make a statement to the effect that he would not hold "any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions". The use of the words "may consider" in the journal entry dated 8th October 2008 makes it unambiguously clear that the making of such statement in the affidavit was optional on the part of the 8th Respondent-Petitioner and that the 8th Respondent-Petitioner was not under compulsion to do so. Therefore, in the absence of an explicit order in the journal entry of 8th October 2008 of the nature described by the 8th Respondent-Petitioner in paragraph (a) in the prayer to the amended petition, the necessity to vacate such an order dated 8th October 2008 does not arise and accordingly it is refused for this reason.

The next issue is the grant of the relief prayed for in paragraph (b) in the amended Petition by making an order relieving the 8th Respondent-Petitioner of the undertaking contained in paragraph 13 of the affidavit dated 16th October 2008 tendered by the 8th Respondent-Petitioner pursuant to the Order of this Court.

In the words of Sir John Donaldson M.R. in *Hussain v Hussain* (1986) 1 ALL ER 961 at 963 an undertaking to a Court is "as solemn, binding an effective as an order of Court in the like terms.....". Consequently a breach of an undertaking to Court amounts to a contempt in the same way as a breach of an order. However a party may apply to Court for a release (as opposed to variation) from an undertaking provided it is supported by evidence showing why that party should be released from an undertaking; vide *Cutler v Wandsworth Stadium Ltd.* (1945) 1 ALL ER 103. However this should only be allowed in exceptional cases usually where there has been a change in circumstances. An unrestricted license permitting parties to withdraw undertakings given to Court could open the floodgates and adversely affect the administration of justice.

Indeed the need to make out a strong case to be released from an undertaking is evident from the facts of *Cutler*'s case (supra). In that case, Cutler filed action against Wandsworth Stadium Ltd. seeking an injunction preventing the Defendants from excluding the Plaintiff from the greyhound racing track. The Defendant gave an undertaking that they would admit the Plaintiff to the Wandsworth Stadium until the trial of the action or until further order. Thereafter, another litigant, Pearson, also filed action against Wandsworth Stadium and obtained an injunction restraining the Defendants from excluding Pearson from their track on dog racing days. However, there was an appeal against that order and the Court of Appeal dissolved the injunction on the basis that it had been granted in terms which were far too wide. Thereafter Wandsworth Stadium Ltd. sought a variation of the undertaking given in *Cutler*'s case. Morton L.J. (with Finlay L.J. agreeing) held that even if the application was treated in substance as an application for release from the undertaking, neither the mere effluxion of time

nor the ground that the Court of Appeal had subsequently taken the view that the injunction was granted in wide terms was enough for the release from such undertaking.

The 8th Respondent–Petitioner was functioning as the Secretary of the Ministry of Finance under His Excellency the President shortly before making the impugned undertaking in the affidavit of 16th October 2008 presumably because his services were needed. Therefore, the mere necessity for the 8th Respondent–Petitioner's services once again for the same post as set out in the letter of His Excellency the President dated 25th May 2009 does not by itself constitute a sufficient basis for the 8th Respondent–Petitioner to withdraw from an undertaking. Therefore I hold that the 8th Respondent–Petitioner is not entitled to the relief prayed for in paragraph (b) in the amended Petition.

There remains another aspect which Mr.Muthapha PC invited this Court to consider. Mr.Muthapha PC drew the attention of this Court to Article 52 of the Constitution that empowers His Excellency the President to appoint a Secretary to a Ministry and therefore he submitted that His Excellency the President being the appointing authority should be free to consider appointing the 8th Respondent-Petitioner as Secretary of the Ministry of Finance if he so desired. There is no doubt that His Excellency the President is empowered by Article 52 of the Constitution to make such an appointment if he so desired in his discretion. However, the issue in such a case would be whether the 8th Respondent-Petitioner would be committing contempt of this Court by breaching the undertaking contained in the affidavit of 16th October 2008 by holding office consequent to such an appointment being made by His Excellency the President.

It has been held that a breach of an undertaking is punishable with contempt if that undertaking is recorded in the written order of the Court; vide *Chatrubhujdas v Natwarlal* (1931) AIR Bom 509; *Gour Gopal Dutt v Smt. Shantidata Mitra* (1976) AIR Cal. 475; *B.Himmat Sinka v M/s Kuldip Industrial Corporation* (1981)

Cr.L.J. (Himachal Pradesh) 1414 and also *Biba Ltd. v Startford Investments Ltd.* (1972) All ER 1041 at 1045.

As noted above, when this case was taken up on 8th October 2008, this Court recorded in the journal entry of that day that a final order on the matter would be made on 20th October 2008. In the meantime the 8th Respondent-Petitioner filed the affidavit dated 16th October 2008. Thereafter, this case was called again on 20th October 2008. However, the matter regarding the affidavit was concluded without this Court making a final order on the matter. In particular the undertaking of the 8th Respondent-Petitioner was not set out in a written order of this Court on 20th October 2008 or any date thereafter. Instead the journal entries of 20th October 2008 suggests that the adequacy of the affidavit has been a matter between Mr.Sumanthiran, who represented the Petitioner in the original Application, and Mr.Musthapha PC who represented the 8th Respondent-Petitioner. An undertaking resulting from an arrangement does not attract punishment by contempt as contemplated in the precedents referred to above.

In the circumstances, I hold that, His Excellency the President, being the appointing authority in terms of article 52 of the Constitution, would be free to consider appointing the 8th Respondent Petitioner to the post of Secretary to the Ministry of Finance notwithstanding the undertaking contained in paragraph 13 of the affidavit dated 16th October 2008 filed in this court by the 8th Respondent Petitioner.

In all the circumstances of this case, I make no order for costs.

P. A. de Silva

Judge of the Supreme Court

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

In the matter of an Application for Relief pertaining to the undertaking in the affidavit filed by the 8th Respondent-Petitioner dated 16th October 2008 pertaining to holding Public Office.

Vasudeva Nanayakkara
Attorney-at-Law
Advisor to H E the President
Secretary, Democratic Left Front
No. 49 1/1, Vinayalankara Mawatha,
Colombo 10 and others.

- Petitioner-

S.C. Appllication (F/R) No. 209/2007

Vs.

1. K.N. Choksy, P.C., M.P.
   Former Minister of Finance,
   No. 23/3, Sir Ernest de Silva Mawatha,
   Colombo 07. and 30 others

- Respondents-

AND NOW BETWEEN

P.B. Jayasundera
No. 761/C, Pannipitiya Road
Pelawatte
Battaramulla

8th Respondent-Petitioner

Vs.

The Attorney General
Attorney-General's Department
Colombo 12.

31st Respondent-Respondent

Before : J.A.N. de Silva, CJ.

Bandaranayake, J.

Shiranee Tilakawardane, J.

S. Marsoof, J.

Balapatabndi, J.

K. Sripavan, J.

P.A. Ratnayake, J.

Counsel : Faiz Mustapha P.C. with Anura Meddegoda and Lakdini Perera for 8th Respondent-Petitioner.

M.A. Sumanthiran with Viran Corea for Petitioner (Vasudeva Nanayakkara)

Mohan Pieris for Attorney General with J. Wijetilleke ASG, Sanjaya Rajaratnam DSG and Nerin Pulle SSC as amicus.

Nihal Amarasekera for 22nd Respondent-Respondent appeared in person.

Argued on : 24.09.09

Decided on : 13.10.09

SRIPAVAN, J.

Whilst I respectfully agree with the conclusion reached by My Lord the Chief Justice, I wish to set down my own reasoning on the issues involved.

The 8th Respondent-Petitioner (hereinafter referred to as the petitioner) by his amended petition dated 31.07.09, sought the following reliefs from this Court:

(a) Vacate the Order dated 08.10.08 in so far as petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions".

(b) Make an order relieving the present petitioner of the undertaking contained in paragraph 13 of the said affidavit dated 16.10.08 tendered by the present petitioner pursuant to the Order of Your Lordship's Court and produced marked "D" to this Application.

(c) Grant such other and further relief as to Your Lordships' Court shall seem fit and meet.

Learned President's Counsel for the petitioner urged that the petitioner made this application to Court in order to comply with the directions of His Excellency the President as contained in the letter dated 25.05.09 marked "E". The last paragraph of the said letter addressed to the petitioner by Mr. Lalith Weeratunga, Secretary to the President, reads thus:

> *"As we know, His Excellency the President accepted your resignation from the post of Secretary, Ministry of Finance and Planning and other positions in the Government reluctantly, in view of your insistence. Considering the vast knowledge and experience you command while acknowledging your honesty and integrity, His Excellency the President is of the view that it is a waste that your services are not available to the Government particularly in the present context. In this background, His Excellency the President has*

instructed me to inform you to resume duties as Secretary, Ministry of Finance and Planning and assist the Government in its endeavours."

It is a common ground that the judgment in S.C. F.R. Application 209/2007 instituted by Vasudeva Nnayakkara against the petitioner and 30 others was delivered on 21.07.08 by a Bench comprising His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Amaratunga, J. and Hon. Balapatabendi, J. The impugned executive action as alleged by Vasudeva Nanayakkara in the said application was primarily, the petitioner who functioned at the material time as Chairman of the Public Enterprise Reform Commission (previously and presently Secretary to the Treasury) caused the sale of shares to Lanka Marine Services Limited (hereinafter referred to as LMSL) a wholely owned Company of the Ceylon Petroleum Corporation which was a profit making, debt free, tax paying Company to John Keells Holdings Limited, (hereinafter referred to as JKH), without prior approval of the Cabinet of Ministers, in a process which was not transparent and was biased in favour of JKH. It was also alleged that the petitioner did not obtain a valuation for LMSL from the Government Valuer and relied only on the valuation secured at his discretion from a private Bank.

The Court having arrived at certain findings against the petitioner, observed as follows:-

"..... P.B. Jayasundera, being the 8th Respondent and the then Chairman of the Public Enterprise Reform Commission, from the very commencement of the process, acted outside the authority of the applicable law, being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He has not only acted contrary to the Law but purported to arrogate himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased in favour of JKH. ..... The impugned transaction and granting of benefits to JKH has been an arbitrary exercise of executive power primarily on the part of the 8th

Respondent, P.B.Jayasundera who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission.

...The findings in the judgment demonstrated that the action of P.B. Jayasundera, 8th Respondent, has not only being arbitrary and ultra vires but also biased in favour of JKH. The allegation of the petitioner that he worked in collusion with S. Ratnayake of JKH to secure illegal advantages to the latter, adverse to the public interest is established. Accordingly, I direct the 8th Respondent to pay a sum of Rs. 500,000/- as compensation to the State. The 18th to 21st Respondents will pay the petitioner a sum of Rs. 2,50,000/- as costs."

The Court thus granted to Vasudeva Nanayakkara the relief sought in prayer (b) of his Petition that there has been an infringement of the Fundamental Right guaranteed by Article 12 (1) of the Constitution by executive or administrative action. The reliefs claimed in paragraphs (g), (h) and (i) of the prayer to the petition were also allowed.

The judgment thus delivered on 21.07.08 expressly and unambiguously declared that the Fundamental Rights guaranteed by Article 12(1) of the Constitution has been violated and imposed compensation in a sum of Rs. 500,000/- on the petitioner. In the absence of clear and unambiguous language to that effect one cannot presume that the judgment debars the Petitioner from functioning as the Secretary to the Ministry of Finance and Planning. The Court becomes **"functus"** once the judgment is delivered. The said decision of the Supreme Court is to be considered as final. The judgment once delivered cannot be reviewed by the same Bench or by any other division of the Court except in the limited circumstances as set out in the case of *Jeyaraj Fernandopulle and others* vs. *De Silva and others* (1996) 1 SLR page 70. (Also vide *Bandula Ravindranata Jayantha & eight others* vs. *Ms. Chandrika Bandaranaike Kumaratunge & others* S.C. Minutes of 3.8.2009). However, any clerical or arithmetical mistake or any accidental slip or omission may be corrected by the **same Bench** (emphasis added) that delivered the final judgment. (Vide *Wilson & others* vs. *Abeyratna Banda* (2004) 1 S.L.R. 255)

It is therefore, a fundamental principle that no Bench is empowered to enlarge the ambit and scope of the judgment or punishment imposed by a previous Bench; nothing is to be implied and no inferences could be drawn from the judgment. One has to look fairly at the language used in the final judgment, or otherwise the door will be opened for unfettered conclusions being reached. An intention to deprive a subject of the lawful occupation or profession cannot be gathered from inconclusive or ambiguous language. Explicit words are necessary in the judgment to achieve that purpose. If any clarification is needed, any party to the application is free to refer the matter to the **same Bench** (emphasis added) that delivered the judgment.

On 08.09.08 when the application came up before His Lordship The Chief Justice Hon. Sarath. N. Silva, Hon. Tilakawardene, J. and Hon. Amaratunga, J. on a motion filed by the 19th Respondent, Counsel for Vasudeva Nanayakkara submitted to Court that the Officer (petitioner in these proceedings) in respect of whose conduct, adverse findings have been made by Court was yet continuing to hold public office notwithstanding the finding that the petitioner had violated provisions of the Constitution and thereby breached the Oath taken in terms of Article 53 of the Constitution. Accordingly, the Court made a specific order to have the application mentioned on 29.09.08 before the **same Bench** (emphasis added) that heard the main case. Unfortunately, on 29.09.08, the application was not listed before the same Bench that heard the main case and delivered its judgment on 21.07.08. The Court on 29.09.08 however, directed the Registrar to issue notice on the petitioner requesting him to appear in Court on 08.10.08 and made order that the case be resumed before the same Bench on 08.10.08.

On 08.10.08, the application came up before His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardene, J. and Hon. Ratnayake, J. . Mr. Faisz Mustapha, President's Counsel appearing for the petitioner submitted that the petitioner tendered an unreserved apology to Court for having continued functioning after the Judgment of the Court. Based on the apology tendered, the Court granted time to the petitioner to file an affidavit in that he **may consider** (emphasis added) including the said expression of regret

and a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. The Court however, directed that the application be mentioned for a final order on 20.10.08.

Having submitted an affidavit dated 16.10.08, the petitioner cannot now be permitted to withdraw the undertaking contained in paragraph 13 of the said affidavit. The said affidavit now forms part of the record and cannot be withdrawn from these proceedings. In other words, the petitioner cannot request to undo an act which he has already performed. If such a course of action is allowed, it may lead to flood gates where parties may seek to withdraw the undertakings after a considerable length of time. If circumstances have changed, parties may file fresh affidavits explaining the supervening events and the changed circumstances, for the consideration of Court. Accordingly, I hold that the petitioner is not permitted to withdraw part of the undertaking contained in his affidavit dated 16.10.08, namely, paragraph 13 thereof.

At the hearing before us, the learned President's Counsel submitted that the petitioner would not be seeking to vacate the order dated 08.10.08 as prayed for in paragraph (a) of his amended petition. Hence, I do not express any opinion on that matter. However, I reiterate that the said order cannot be reviewed or set aside by another Bench except for certain limited circumstances as demonstrated in *Jeyeraj Fernandopulle's* Case.

Advisedly, the Bench comprising His Lordship The Chief Justice Hon. Sarath N. Silva, Hon. Tilakawardene, J. and Hon. Ratnayake, J. did not make any order on 20.10.08 on the affidavit of the petitioner dated 16.10.08. At the hearing before us, learned President's Counsel for the petitioner conceded that no order was made by Court, on the affidavit filed by the petitioner. Had this been done, it would have amounted to enlarging the limits of the final judgment delivered by a different Bench on 21.07.08 and would have given rise to an order made without jurisdiction.

Learned Attorney General brought to the notice of Court that after the delivery of the judgment on 21.07.08, actions have been initiated against the petitioner by the Bribery Commission, Criminal Investigations Department and the Commissioner General of Inland Revenue according to the relevant applicable statutes. The outcome of those investigations are not known to this Court. Considering the totality of the submissions made, the Court while refusing the reliefs sought in paragraphs (a) & (b) of the prayers to the amended petition dated 31.07.09, holds that His Excellency the President being the appointing authority in terms of Article 52 of the Constitution, would be free to consider appointing the Petitioner to the post of Secretary to the Ministry of Finance and Planning, if the President so desires.

Judge of the Supreme Court.

Original correct dissenting Judgment of Justice Shiranee Tilakawardane

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

In the matter of an application for relief pertaining to the undertaking in the affidavit filed by the 8th respondent-petitioner dated 16th October, 2008 pertaining to holding public office.

S.C. (F/R) No. 209/07

Vasudeva Nanayakkara,
Attorney-at-Law,
Advisor to His Excellency the President,
Secretary, The Democratic Left Front,
No. 49 1/1, Vinayalankara Mawatha,
Colombo 10.

Petitioner

P.B. Jayasundera,
No. 761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.
8th Respondent-Petitioner

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.
31st Respondent-Respondent

BEFORE : **J.A.N. DE SILVA. C.J.**
BANDARANAYAKE.J
TILAKAWARDANE.J

MARSOOF.J

BALAPATABENDI.J

SRIPAVAN.J &

RATNAYAKE.J

COUNSEL : M.A. Sumanthiran with Viran Corea for the original petitioner.

Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th respondent-petitioner.

Mohan Peiris, P.C. A.G. with Y.J.W. Wijayatilleke P.C., A.S.G., S. Rajaratnam, D.S.G., and N. Pulle, S.S.C., appears as amicus.

Nihal Sri Amarasekera – 22nd respondent appears in person.

ARGUED ON : 24.9.2009.

DECIDED ON : 13.10.2009

Ms. Tilakawardane, J., dissenting

Pursuant to a Petition filed by the 8th Respondent Petitioner (the "Petitioner") on 7th July 2009, and twice amended by him on 11th July 2009 and 31st July 2009 (the "Petition"), this application was listed before a bench of 7 judges of the Supreme Court. At the conclusion of proceedings, the Court's order, as dictated by the Chief Justice on behalf of the bench, was stated to be;

Relief granted with Tilakawardane, J., dissenting.

This order was apparently subsequently amended in chambers of the Chief Justice with the concurrence of the other judges, to read as follows;

Court, having considered the submissions of Counsel and Mr. Nihal Sri Amerasekera who appeared in person, refuses the reliefs sought in paragraph (a) and (b) of the prayer to the amended Petition dated 31st July 2009. However the Court is inclined to grant other relief under paragraph (c) of the prayer to the amended Petition. Accordingly by a majority decision [Hon. Tilakawardane, J. dissenting], the Court

decides that His Excellency, the President, being the appointing authority in terms of Article 52 of the Constitution would be free to consider appointing the 8th Respondent Petitioner, to the Post of Secretary to the Ministry of Finance notwithstanding the undertaking given to Court by the 8th Respondent Petitioner.

Having subsequently called for and perused this amended order, I take the opportunity to reiterate my complete and full opposition to the granting of any relief whatsoever sought by the Petitioner in his amended Petition and my dissent with my esteemed colleagues in their decision to do so.

The judgment delivered on 21st July 2008 in this case (the "Original Judgment") dealt with, in large part, the complicity of the Petitioner, as Chairman of the Public Enterprise Reform Commission, in an improper scheme to effect the sale of shares of Lanka Marine Services Ltd., (the "LMSL") to John Keells Holdings without, among other things:

1. prior authorization of the Cabinet of Ministers.
2. the appointment and approval of a Cabinet Approved Tender Board (the "CATB") as mandated by a circular published by the Petitioner himself to ensure transparency, fairness and honesty in the procurement process, and instead allowed the Petitioner unfettered discretion as the final authority on all matters.
3. a valuation of LMSL's shares by the Chief Valuer, and instead, one issued by a private bank resulting in such a deep undervaluation of the stock such that the profits of LMSL in 4 years, alone, would be more than double the share price being offered.

In recognition of the above, and other unauthorized action and behaviour, the Court concluded that the Petitioner ,"from the very commencement of the process, acted outside the authority, of the applicable law being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He has not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased." It needs to be mentioned that the extent and magnitude of the findings against the Petitioner as set out in the Original Judgment are so strong that even the most forgiving employer would balk at his re-employment at such a record of moral turpitude.

It is my considered opinion that this application reveals fatal errors of law which would militate against any relief being granted to the Petitioner.

Setting aside the obvious question raised by the facts that the Petition before us was filed a full year after the Court's allegedly "invalid inducement" of the Petitioner's Affidavit – a long time to suffer what the Majority contends is a patently invalid restriction – the Petitioner, amended the Petition on 21st July 2009 *without obtaining* permission from Court to do so. More specifically, the supporting affidavit made in connection with the amendment lacks a signature of a Justice of the Peace/Commissioner, such omission rendering invalid and false the *jurat* contained therein. The amended Petition dated 21st July 2009, thus remained unsupported by a valid Affidavit, and, consequently, the said Affidavit should have been rejected *in limine*.

When this matter was taken up on 3rd August 2009 a fresh set of papers were filed, consisting of a second amended Petition dated 31st July 2009 and a purported Affidavit dated 31st July 2009, *once again* without having obtained permission of Court. On the same day he sought permission to file an Affidavit within 10 days, which was "of a confidential nature".

It was this defective, second amended Petition dated 31st July 2009 that introduced, for the first time, the allegations that the order dated 8th October 2008, which preceded the filing of the impugned affidavit, was:

a) made without affording an opportunity for the Petitioner to be heard and, therefore, was made in breach of the principles of Natural Justice.
b) made without the Attorney General or the Petitioner or any other party being heard in that regard, and that the Petitioner believed that the Court would not entertain any objections thereto.
c) made in such a manner and in with such a tenor that the Petitioner had reasonable grounds to believe that the said order was coercive in nature and that he would not be permitted to object thereto.
d) made *per incuriam* and in violation of the fundamental right guaranteed to the Petitioner under Article 14 (1) (g) of the Constitution.

In response to these allegations, the Petitioner has sought **only** the following prayers from the Court:

a) Vacate the said order dated 8th October 2008 (the "Order"), in so far as it relates to the inclusion in the Affidavit of a firm statement that the present Petitioner "would not hold any office in any Governmental institution, either directly or indirectly, or purport to exercise in any manner executive or administrative functions";
b) To make an order relieving the present Petitioner of the undertaking contained in paragraph 13 of the said Affidavit dated 16th October 2008, tendered by the present Petitioner pursuant to the order of Your Lordships' Court marked "D" to this application;

c) grant such other and further relief as to Your Lordships' Court shall seem fit and meet.

It is the contention of the Majority Decision that the binding nature of the Affidavit the Petitioner seeks to withdraw is undone, in part, by the fact that benches "considering this matter" subsequent to the issuance of the Original Judgment differed in composition to that of the one which issued the Original Judgment. Pronouncing on this very point, Amerasinghe, J., referring to Article 132(2) stated in *Jeyaraj Fernandopulle v. Premachandra de Silva and Others* [1996] 1 Sri.L.R. 70 that "when any division of the Court constituted in terms of the Constitution sits together, it does so "as the Supreme Court" and that "it is one Court though it usually sits in several divisions... each division has co-ordinate jurisdiction." In light of *Fernandopulle's* judgment the Supreme Court's divisions is a product of administrative expediency and nothing more, and in the light of 114(d) presumption under the Evidence Ordinance- which presumes that judicial acts have been regularly performed- the suggestion that a change in composition of a particular bench itself somehow extinguishes jurisdiction, is proved to be patently incorrect. Indeed the remedy sought by the Petitioner is an action of the same nature as those found to be impugned. The prayer to vacate the Order is a re-visitation of a judgment by the Supreme Court, and in this case, by a bench differing in composition than the one which issued the Order. Therefore, we are – in following such an argument – precluded from being able to take such action.

Interestingly, the *Fernandopulle* case finds further relevance to this situation before us, with its detailed reiteration of the general rule that "when the Supreme Court has decided a

matter, the matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter." This is made evident by the *Fernandopulle* judgment's extensive and explicit statements of the need to pay allegiance to this rule when faced with "an application made in the original action or matter or in a fresh action brought to review the judgment or order." Importantly, the *Fernandopulle* judgment pre-empts the expected argument of extraordinary circumstance, stating that "when the decision is that of the 'final' Court, as is every decision of the Supreme Court, due consideration should be given that fact" even though "some people may regard a particular case as being unusual or extraordinary or of special significance for one reason or another." In light of *Fernandopulle's judgment*, I hold that to grant relief of the type that reverses a prior judgment of this Court is untenable and has no basis in Law and therefore no relief can be granted on prayer (a).

As further reason to strip the Affidavit of its binding nature, the Majority Decision has expressed "concern" regarding the nature of the Affidavit as one being filed in compliance with and compelled by the Order. This "concern", however, when viewed in the light of the Constitutional powers afforded the Court to deal with situations like the one before us, proves to be quite misplaced. The Constitution unequivocally empowers the Supreme Court to be the ultimate guardian of rights of the citizenry of Sri Lanka, going so far as to confer the Court sole and exclusive jurisdiction over matters relating to Fundamental Rights. The Hon. J.A.N. De Silva, C.J., in SCFR No. 352/2007 rightly stated that:

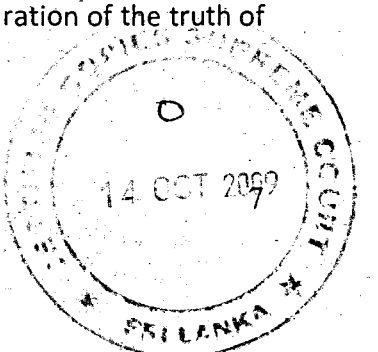
> As is made amply clear by subsection (4) of Article 126, inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and effect action so long as such relief and actions are "just and equitable" - a simple and unqualified two-word threshold clearly meant to give the broad discretion and power required of the Supreme Court to effectively address the infinitely myriad ways in which fundamental rights can be violated. It is important to recognize, then, that the Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the unique nature of these matters for which the Court has been empowered to protect. Put simply, Fundamental Rights applications are qualitatively different from other types of appeals heard before this

Court and warrant greater latitude with respect to their review and redress in order to encompass the equitable jurisdiction exercised in these applications.

> The concept of Fundamental Rights encompasses the inalienable rights of the citizens of the State. Violation of such rights by the State or by the State in connivance with private actors is an attack on the very "being" of the citizens who have reposed their trust in the State to guard and protect them from violations of their Fundamental Rights. Hence, where Fundamental Rights are concerned, the *fruits of judgments affording relief and remedy are especially in need of being accessible by the victims of such violations; it is the duty of the Court as the ultimate guardian of these rights to see to it that this is so.*

It should be quite clear, then, that the decision by this Court to issue an Order requiring the Petitioner to forego any future opportunities to hold public office in response to the *extensive, long-running, abuses of power and corrupt behavior he committed in his capacity as a public officer* was not an instance of the Court being used "as an instrument of persecution", but rather, an instance of the Court upholding its duty to zealously protect the citizenry from a state actor who is known to have extensively violated the trust they have reposed in him. To paint the Petitioner as the victim of an overreaching Court is, frankly, alarming.

In its pith and substance, prayer (b) of the Petition requires that a part of the Affidavit filed by the Petitioner be withdrawn. An Affidavit is a voluntary declaration in writing by a person who swears on oath or solemnly affirms to the truth of the facts therein to which he is able to testify of his own knowledge and observations before a person authorized by law to administer oath or affirmation such as any court, Justice of the Peace or Commissioner of Oaths. An Affidavit by its very nature cannot be withdrawn as it is made in the first person, by the maker of an Affidavit, from personal knowledge of the truth of the facts stated therein or from information obtained from documents he or she has access to and has perused. It is a solemn declaration of the truth of the facts therein, made before a person authorized to administer an oath or affirmation. It is tendered as evidence for the purpose of proving the facts therein to the Court, Tribunal, Authority or person to whom it is tendered, so that it can be relied on and acted upon. Therefore since an Affidavit is a solemn declaration of the truth of



the facts stated therein made by a person from his personal knowledge and is evidence given on oath for the purpose of being relied on and acted upon, it cannot be withdrawn.

As in the case of evidence given orally under oath or affirmation and recorded, an Affidavit cannot be retracted from the record once it is filed in Court. Any retraction on the evidence given by affidavit will entail similar consequences as going back on oral evidence. The consequence of any person who willfully and dishonestly swears or affirms falsely, to facts contained in an Affidavit, would be guilty of making a false statement to Court, which attracts penal consequences.

In other words, once an Affidavit is filed of record, the law of estoppel precludes the maker of the Affidavit, from withdrawing it to prevent any prejudice to any person affected thereby. It is apposite and pertinent to note that an admission of law is permitted to be withdrawn, but not an admission of fact made by a party or his representative in Court. *Vide Uvais v Punyawathie* 1993 2 Sri LR 46.

There may however, in certain circumstances be a situation where an Affidavit may be permitted to be withdrawn if it can be established and proved that it was not made voluntarily but that the maker at the time of making or shortly prior to it was subjected to threat, coercion or duress. At this stage it is opportune to refer to the proceedings contained in the Journal entry of 8th September 2008.

> *...Counsel further submits that the officer in respect of whose conduct adverse findings has been made by Court is yet continuing to hold public office, notwithstanding the fact that the findings of this Court, that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution. Thus he is disqualified from holding public office.*
> *Court is of the view that there is merit in this application and that the matter should be referred to the bench which heard the case for further orders.*

Consequently the case was to be mentioned on 29th September 2008, before the same bench that heard the main case. On 29th September 2008 the Petitioner was represented by Additional Solicitor General. No objections were taken with regard to the constitution of the bench. On this date, the following order is reflected in the Journal entry.

> *"The other matter concerns the conduct of the 8th Respondent.* ***This Court has come to firm findings that the 8th Respondent has acted contrary to law against the public interest, in the conferment of benefits to a private party.*** *(Emphasis is mine). There is a firm finding that he has infringed the Fundamental Rights guaranteed by Article 12 (1) of the Constitution. The motion indicates that notwithstanding these findings which clearly show that he has acted in flagrant violation of the Constitution the 8th Respondent is yet continuing to hold Public office."*
>
> *Additional Solicitor General submits that the Attorney General has revoked the Proxy of the 8th Respondent. In the circumstances the Court directs the Registrar to issue a notice directly on the 8th Respondent to be present in Court on the next date and to reveal to Court; whether he continues to hold office under the republic and if so the nature of such office and the place at which he is functioning whether he is holding in office in any establishment in which the Government of Sri Lanka has any interest purporting to represent the interest of the Government of Sri Lanka and if so the nature of such office. Registrar is to issue Notice on the 8th Respondent to appear in Court on 8th October 2008. This matter to be resumed before the same bench on 8th October 2008.*

In terms of this Order notices were issued to the Petitioner on 3rd October 2008. On 8th October 2008 several reports were tendered to court and submissions made by the Additional Solicitor General that the investigations against the Petitioner had commenced and were pending, by the CID, under the Inspector General of Police, by the Commission to Investigate Allegations of Bribery or Corruption and The Securities and Exchange Commission of Sri Lanka.

The Petitioner was present and represented by President's Counsel Mr. Faiz Mustapha with Mr. Shantha Jayawardane Attorney-at-Law. The Order made pertaining to the Petitioner is quoted from the proceedings of that date.

> *Mr. Faiz Mustapha appears for the 8th Respondent and submits that within four days of the judgment the 8th Respondent tendered his resignation from the post of Secretary Ministry of Finance. He however submits that the 8th Respondent continued to function in that post to discharge official duties since the resignation was not accepted until much later. He further submits that the 8th Respondent resigned from the Chairmanship of Srilankan Airlines on 19.9.2008. This was accepted on 30.9.2008.He further submits that the 8th respondent does not hold any office in any government establishment or in any establishment that the government has any interest. Counsel for the Petitioner submits that according to his instructions the 8th Respondent has an interest in a Company incorporated, in which the Government has interest. He refers to two such companies. Mr. Mustapha submits that he only holds a single share in these companies and that he would severe links with these companies. He further submits that the 8th Respondent tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. Hence the 8th respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and firm statement that he would not hold any office in any government institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Further affidavit to be filed as early as possible. Mention for a final order on the matter on 20.10.2008.*

During the argument in this case, learned President's Counsel appearing for the Petitioner argued that this order was coercive and its tenor did not leave any option but to file an affidavit which he had no desire or intention to make. It is to be noted that prior to any Order of the Court with regard to the filing of the affidavit, through oral submissions made by the same

eminent President's Counsel speaking on behalf of the Petitioner, an unequivocal expression of regret was tendered. He declared that he had voluntarily severed himself from holding any public office or performing public functions. He had himself recognized that the adverse findings and content of the judgment, had grave repercussions, and precluded him as a fit and proper person to hold such office.

This same counsel, in terms of the contemporaneous proceedings recorded on that date, raised no demur to the fact that he should not hold public office, did not seek to argue whether he should or should not hold public office, did not even seek an opportunity to be heard on this subject either on the facts or on the Law. In this context his plea that he was not afforded an opportunity to be heard is untenable and cannot be accepted.

This also concurred with the contentions of the learned counsel Mr. Sumanthiran for the petitioner who submitted that in the light of the finding in the judgment and the infringement of the Constitution, that he had violated the oath of office in terms of Article 53 of the Constitution. He however contested the fact that the Petitioner had relinquished all the offices held by him.

In the light of these conflicting submissions, the Court offered a method of resolving the conflict, namely, by granting the opportunity for the Petitioner to file an affidavit. *Ex facie* the order reads "he may consider..." These words cannot be reasonably interpreted to be coercive or mandatory. The Order was accepted without demur. The Order itself was consistent and in conformity with the clear, undisputed findings that his continuance to hold public office would be inimical to the findings of the judgment and indeed to the ongoing investigations by the 25th, 28th and 30th Respondents, namely the Criminal Investigation Department, the Bribery Commission and the Securities and Exchange Commission.

Consequently an affidavit was filed in Court including the impugned undertaking contained in paragraph 13 of the affidavit which reasonably set out that if he was presently unfit to hold

public office in view of the judgment, then he could possibly not hold such public office in the future. This understanding was simply an affirmation of what had been said by his Counsel in Court. If indeed he was coerced as alleged, why was he not withdrawing the entire affidavit? Was the rest of the affidavit made voluntarily and in recognition that he is not fit to hold public office after the disclosures of the judgment? If he tendered an unreserved apology, spontaneously, without the need to do so, for continuing to hold office how could he rescind from this over all stance taken by him? I hold that there is nothing in the proceedings or orders to indicate coercion. The silence and inaction of the Petitioner for almost a year after the filing of the affidavit also militates against coercion.

The "affidavit of a confidential nature" filed by the Petitioner, though not argued by President's Counsel, contained an allegation of bias. On being questioned the Learned Presidents Counsel for the Petitioner stated that he made no such allegations against all the members of the Court but only against the retired Chief Justice. This document, not tendered to some of the justices, was filed after the amended petition as an "affidavit of confidential nature", something alien to the normal practice of court and the law, and which of course lost its "confidentiality" the moment it was filed, became a matter of public record, and served on the petitioner.

This allegation rests solely on a speech delivered on 26th July 2008 which was (i) made after the delivery of the judgment, (ii) does not refer to the Petitioner by name, and (iii) does not patently reflect bias against the Petitioner. Indeed findings against him were made on documents of public record, affidavits, counter affidavits and admitted facts before the Court, as is patently evinced in the facts adverted to in the judgment. It is to be noted that no reference to alleged bias has been made in any of the correspondence between the Petitioner and the Secretary to the President in the many letters sent by the Petitioner until its belated expression in the 3rd set of documents filed in Court. In terms of the Law, bias must be based on reasonable grounds and proved on material facts and/or documents. In my opinion an oblique reference in a speech delivered with typical candour and perhaps lack of judicious caution, at a function relating to judicial officers and officers of the Court, does not remotely sustain even an

allegation of bias. In my view there is no reasonable ground whatsoever for this serious allegation and, in fact, only merits consideration of charges to be preferred against the Petitioner for contempt of Court.

Under these circumstances I therefore hold that prayer (a) and (b) should be refused, and dismiss the Petition dated 31st July 2009.

During arguments it was suggested that the Order was made *per incuriam* and in violation of the fundamental right guaranteed to the Petitioner under Article 14 (1) (g) of the Constitution. This was not argued at length, clearly because President's Counsel himself realized the futility of such arguments. Relief in terms of Article 17 is only in "respect of infringement or imminent infringement, by executive or administrative action....'.This argument has no basis in Law.

It reasonably follows that since the undertaking given to Court cannot be withdrawn and the application to do so is refused, the Petitioner would be, in my view, standing in contempt of this Court for violating an undertaking he has given to it.

Finally can the Court on its own volition free him from this undertaking merely because the President has expressed a concern to have him back? In considering this I am mindful of the fact that despite affidavits being tendered to Court, apologies being made to Court and the findings of the judgment, the Petitioner has *falsely made contrary representations* to the Secretary to the President in letters (marked "A") dated 25th July 2008 and (marked "F") dated 3rd June 2009. In his letters to the Secretary he contradicts the contents of his own affidavit, the submissions of his own counsel made at the time in Court and which is recorded in contemporaneous proceedings, and, in that sense, appears to be uncertain and confused. Did the Petitioner, in his affidavit, mean what he said or has he fabricated his stance? To say the least his word, in its varied contradictions, appears fickle.

Undoubtedly, the appointing authority is the President, as Article 52 mandates as much. When any incumbent President exercises these powers he or she is also under the same Constitutional mandate to act in accordance with the Doctrine of Public Trust that is reposed through the Sovereignty of the People (Article 4) and under the Law. No single Article of the Constitution can be given greater prominence than or read in isolation from another. It must be read and interpreted in a manner that accords with the pith and substance and, indeed, the spirit of the entire Constitution. It is, after all, the executive power of the People that is exercised by any incumbent President. (Article 4b) Therefore "unfettered discretion cannot exist where the rule of law reigns." Vide *Premachandra v. Major Montague Jayawickrama and another 1994* (2) S.L.R. pg 90 at 103.

Article 28 of the Constitution which deals with the Fundamental Duties states that the **exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations** (emphasis added) and, accordingly, it is the duty of every person of Sri Lanka:

(a) to uphold and defend the Constitution and the law;

(b) to further the national interests and to foster national unity;

(c) to work conscientiously in his chosen occupation;

(d) to preserve and protect public property and to combat misuse and waste of public property;

(e) to respect the rights and freedoms of others;

(f) to protect nature and conserve its riches.

Therefore the power to appoint should be linked to the abovementioned duties. The provision of an Article empowering a person to make an appointment cannot be considered in isolation, disregarding the basic structure and tenet of the Constitution which is embodied in other Articles.

Therefore his or her acts as President, as a noble and gracious leader, must always be guided by the underlying duty to preserve and protect public property and to combat its waste and misuse. In a monarchy the ruler rules under the "pleasure principle", and could act in a dictatorial manner. But under our Democratic Socialist Republic governed by the Constitution, which guarantees democracy to its people, even an Executive President does not have untrammeled power and all acts of governance, especially those that involve public finance, must be in tune with the spirit of the Constitution which mandates good and responsible governance.

Furthermore "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective." *Vide In re The Nineteenth Amendment to the Constitution 2002 (3) 85 at 100.* Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability." See *Abdul Cader Ayoob V The Inspector General of Police and Others* 1997 (1) S.L.R 412 at pg 419. The entire fabric of the Constitution mandates that the rule of law be the ultimate framework of all acts carried out under the Constitution, including the acts of the executive, the legislature and the judiciary. The Judgment of this Court has found the Petitioner a corrupt officer under the law. Even in its widest sense this would be inimical to his appointment to public office. My opposition to the granting of the relief requested by the Petitioner follows squarely from my allegiance to the Rule of Law, the sole foundation upon which the strength of this Court lies and the principle which mandates the we not arbitrarily dismiss prior rulings of this Court – including the one originally issued in this case – merely for issues of political expediency or convenience.

After all, the Rule of Law is the backbone of good governance. The nurturing of these twin institutions leads ultimately to a stable and healthy nation. The stunting of one necessarily

leads to a halt in the growth of the other. The promptings of a kind compassionate heart or sympathetic urgings must necessarily be bridled in dealing with the resources of the State, for it ultimately belongs to the People and must be in the custodianship of honest, disciplined, hardworking and effective public officers.

I accordingly dismiss the amended petition. No Costs.

JUDGE OF THE SUPREME COURT

CERTIFIED
TRUE COPY

DHARMASRI MANATHUNGA
DEPUTY REGISTRAR
SUPREME COURT

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

In the matter of an application for relief pertaining to the undertaking in the affidavit filed by the 8th respondent-petitioner dated 16th October, 2008 pertaining to holding public office.

S.C. (F/R) No. 209/07

Vasudeva Nanayakkara,
Attorney-at-Law,
Advisor to His Excellency the President,
Secretary, The Democratic Left Front,
No. 49 1/1, Vinayalankara Mawatha,
Colombo 10.

Petitioner

P.B. Jayasundera,
No. 761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8th Respondent-Petitioner

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12.

31st Respondent-Respondent

BEFORE : **J.A.N. DE SILVA. C.J.**
BANDARANAYAKE.J

TILAKAWARDANE.J

MARSOOF.J

BALAPATABENDI.J

SRIPAVAN.J &

RATNAYAKE.J

COUNSEL : M.A. Sumanthiran with Viran Corea for the original petitioner.

Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th respondent-petitioner.

Mohan Peiris, P.C. A.G. with Y.J.W. Wijayatilleke P.C., A.S.G., S. Rajaratnam, D.S.G., and N. Pulle, S.S.C., appears as amicus.

Nihal Sri Amarasekera – 22nd respondent appears in person.

ARGUED ON : 24.9.2009.

DECIDED ON : 13.10.2009

Ms. Tilakawardane, J., dissenting

Pursuant to a Petition filed by the 8th Respondent Petitioner (the "Petitioner") on 7th July 2009, and twice amended by him on 11th July 2009 and 31st July 2009 (the "Petition"), this application was listed before a bench of 7 judges of the Supreme Court. At the conclusion of proceedings, the Court's order, as dictated by the Chief Justice on behalf of the bench, was stated to be;

Relief granted with Tilakawardane, J., dissenting.

This order was apparently subsequently amended in chambers of the Chief Justice with the concurrence of the other judges, to read as follows;

Court, having considered the submissions of Counsel and Mr. Nihal Sri Amerasekera who appeared in person, refuses the reliefs sought in paragraph (a) and (b) of the prayer to the amended Petition dated 31st July 2009. However the Court is inclined to grant other relief under paragraph (c) of the prayer to the amended Petition. Accordingly by a majority decision [Hon. Tilakawardane, J. dissenting], the Court decides that His Excellency, the President, being the appointing authority in terms of Article 52 of the Constitution would be free to consider appointing the 8th Respondent Petitioner, to the Post of Secretary to the Ministry of Finance notwithstanding the undertaking given to Court by the 8th Respondent Petitioner.

Having subsequently called for and perused this amended order, I take the opportunity to reiterate my complete and full opposition to the granting of any relief whatsoever sought by the Petitioner in his amended Petition and my dissent with my esteemed colleagues in their decision to do so.

The judgment delivered on 21st July 2008 in this case (the "Original Judgment") dealt with, in large part, the complicity of the Petitioner, as Chairman of the Public Enterprise Reform Commission, in an improper scheme to effect the sale of shares of Lanka Marine Services Ltd., (the "LMSL") to John Keells Holdings without, among other things:

1. prior authorization of the Cabinet of Ministers.
2. the appointment and approval of a Cabinet Approved Tender Board (the "CATB") as mandated by a circular published by the Petitioner himself to ensure transparency, fairness and honesty in the procurement process, and instead allowed the Petitioner unfettered discretion as the final authority on all matters.
3. a valuation of LMSL's shares by the Chief Valuer, and instead, one issued by a private bank resulting in such a deep undervaluation of the stock such that the profits of LMSL in 4 years, alone, would be more than double the share price being offered.

In recognition of the above, and other unauthorized action and behaviour, the Court concluded that the Petitioner ,"from the very commencement of the process, acted outside the authority, of the applicable law being the Public

Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He has not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased." It needs to be mentioned that the extent and magnitude of the findings against the Petitioner as set out in the Original Judgment are so strong that even the most forgiving employer would balk at his re-employment at such a record of moral turpitude.

It is my considered opinion that this application reveals fatal errors of law which would militate against any relief being granted to the Petitioner.

Setting aside the obvious question raised by the facts that the Petition before us was filed a full year after the Court's allegedly "invalid inducement" of the Petitioner's Affidavit – a long time to suffer what the Majority contends is a patently invalid restriction – the Petitioner, amended the Petition on 21st July 2009 *without obtaining* permission from Court to do so. More specifically, the supporting affidavit made in connection with the amendment lacks a signature of a Justice of the Peace/Commissioner, such omission rendering invalid and false the *jurat* contained therein. The amended Petition dated 21st July 2009, thus remained unsupported by a valid Affidavit, and, consequently, the said Affidavit should have been rejected *in limine*.

When this matter was taken up on 3rd August 2009 a fresh set of papers were filed, consisting of a second amended Petition dated 31st July 2009 and a purported Affidavit dated 31st July 2009, *once again* without having obtained permission of Court. On the same day he sought permission to file an Affidavit within 10 days, which was "of a confidential nature".

It was this defective, second amended Petition dated 31st July 2009 that introduced, for the first time, the allegations that the order dated 8th October 2008, which preceded the filing of the impugned affidavit, was:

a) made without affording an opportunity for the Petitioner to be heard and, therefore, was made in breach of the principles of Natural Justice.
b) made without the Attorney General or the Petitioner or any other party being heard in that regard, and that the Petitioner believed that the Court would not entertain any objections thereto.
c) made in such a manner and in with such a tenor that the Petitioner had reasonable grounds to believe that the said order was coercive in nature and that he would not be permitted to object thereto.
d) made *per incuriam* and in violation of the fundamental right guaranteed to the Petitioner under Article 14 (1) (g) of the Constitution.

In response to these allegations, the Petitioner has sought **only** the following prayers from the Court:

a) Vacate the said order dated 8th October 2008 (the "Order"), in so far as it relates to the inclusion in the Affidavit of a firm statement that the present Petitioner "would not hold any office in any Governmental institution, either directly or indirectly, or purport to exercise in any manner executive or administrative functions";
b) To make an order relieving the present Petitioner of the undertaking contained in paragraph 13 of the said Affidavit dated 16th October 2008, tendered by the present Petitioner pursuant to the order of Your Lordships' Court marked "D" to this application;

c) grant such other and further relief as to Your Lordships' Court shall seem fit and meet.

It is the contention of the Majority Decision that the binding nature of the Affidavit the Petitioner seeks to withdraw is undone, in part, by the fact that benches "considering this matter" subsequent to the issuance of the Original Judgment differed in composition to that of the one which issued the Original Judgment. Pronouncing on this very point, Amerasinghe, J., referring to Article 132(2) stated in *Jeyaraj Fernandopulle v. Premachandra de Silva and Others*

[1996] 1 Sri.L.R. 70 that "when any division of the Court constituted in terms of the Constitution sits together, it does so "as the Supreme Court" and that "it is one Court though it usually sits in several divisions... each division has co-ordinate jurisdiction." In light of *Fernandopulle*'s judgment the Supreme Court's divisions is a product of administrative expediency and nothing more, and in the light of 114(d) presumption under the Evidence Ordinance- which presumes that judicial acts have been regularly performed- the suggestion that a change in composition of a particular bench itself somehow extinguishes jurisdiction, is proved to be patently incorrect. Indeed the remedy sought by the Petitioner is an action of the same nature as those found to be impugned. The prayer to vacate the Order is a re-visitation of a judgment by the Supreme Court, and in this case, by a bench differing in composition than the one which issued the Order. Therefore, we are – in following such an argument – precluded from being able to take such action.

Interestingly, the *Fernandopulle* case finds further relevance to this situation before us, with its detailed reiteration of the general rule that "when the Supreme Court has decided a matter, the matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter." This is made evident by the *Fernandopulle* judgment's extensive and explicit statements of the need to pay allegiance to this rule when faced with "an application made in the original action or matter or in a fresh action brought to review the judgment or order." Importantly, the *Fernandopulle* judgment pre-empts the expected argument of extraordinary circumstance, stating that "when the decision is that of the 'final' Court, as is every decision of the Supreme Court, due consideration should be given that fact" even though "some people may regard a particular case as being unusual or extraordinary or of special significance for one reason or another." In light of *Fernandopulle's judgment*, I hold that to grant relief of the type that reverses a prior judgment of

this Court is untenable and has no basis in Law and therefore no relief can be granted on prayer (a).

As further reason to strip the Affidavit of its binding nature, the Majority Decision has expressed "concern" regarding the nature of the Affidavit as one being filed in compliance with and compelled by the Order. This "concern", however, when viewed in the light of the Constitutional powers afforded the Court to deal with situations like the one before us, proves to be quite misplaced. The Constitution unequivocally empowers the Supreme Court to be the ultimate guardian of rights of the citizenry of Sri Lanka, going so far as to confer the Court sole and exclusive jurisdiction over matters relating to Fundamental Rights. The Hon. J.A.N. De Silva, C.J., in SCFR No. 352/2007 rightly stated that:

> As is made amply clear by subsection (4) of Article 126, inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and effect action so long as such relief and actions are "just and equitable" - a simple and unqualified two-word threshold clearly meant to give the broad discretion and power required of the Supreme Court to effectively address the infinitely myriad ways in which fundamental rights can be violated. It is important to recognize, then, that the Supreme Court's broad powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the unique nature of these matters for which the Court has been empowered to protect. Put simply, Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude with respect to their review and redress in order to encompass the equitable jurisdiction exercised in these applications.
>
> The concept of Fundamental Rights encompasses the inalienable rights of the citizens of the State. Violation of such rights by the State or by the State in connivance with private actors is an attack on the very "being" of the citizens who have reposed their trust in the State to guard and protect them from violations of their Fundamental Rights. Hence, where Fundamental Rights are concerned, the *fruits of*

judgments affording relief and remedy are especially in need of being accessible by the victims of such violations; it is the duty of the Court as the ultimate guardian of these rights to see to it that this is so.

It should be quite clear, then, that the decision by this Court to issue an Order requiring the Petitioner to forego any future opportunities to hold public office in response to the *extensive, long-running, abuses of power and corrupt behavior he committed in his capacity as a public officer* was not an instance of the Court being used "as an instrument of persecution", but rather, an instance of the Court upholding its duty to zealously protect the citizenry from a state actor who is known to have extensively violated the trust they have reposed in him. To paint the Petitioner as the victim of an overreaching Court is, frankly, alarming.

In its pith and substance, prayer (b) of the Petition requires that a part of the Affidavit filed by the Petitioner be withdrawn. An Affidavit is a voluntary declaration in writing by a person who swears on oath or solemnly affirms to the truth of the facts therein to which he is able to testify of his own knowledge and observations before a person authorized by law to administer oath or affirmation such as any court, Justice of the Peace or Commissioner of Oaths. An Affidavit by its very nature cannot be withdrawn as it is made in the first person, by the maker of an Affidavit, from personal knowledge of the truth of the facts stated therein or from information obtained from documents he or she has access to and has perused. It is a solemn declaration of the truth of the facts therein, made before a person authorized to administer an oath or affirmation. It is tendered as evidence for the purpose of proving the facts therein to the Court, Tribunal, Authority or person to whom it is tendered, so that it can be relied on and acted upon. Therefore since an Affidavit is a solemn declaration of the truth of the facts stated therein made by a person from his personal knowledge and is evidence given on oath for the purpose of being relied on and acted upon, it cannot be withdrawn.

As in the case of evidence given orally under oath or affirmation and recorded, an Affidavit cannot be retracted from the record once it is filed in Court. Any retraction on the evidence given by affidavit will entail similar consequences as going back on oral evidence. The consequence of any person who willfully and dishonestly swears or affirms falsely, to facts contained in an Affidavit, would be guilty of making a false statement to Court, which attracts penal consequences.

In other words, once an Affidavit is filed of record, the law of estoppel precludes the maker of the Affidavit, from withdrawing it to prevent any prejudice to any person affected thereby. It is apposite and pertinent to note that an admission of law is permitted to be withdrawn, but not an admission of fact made by a party or his representative in Court. *Vide Uvais v Punyawathie* 1993 2 Sri LR 46.

There may however, in certain circumstances be a situation where an Affidavit may be permitted to be withdrawn if it can be established and proved that it was not made voluntarily but that the maker at the time of making or shortly prior to it was subjected to threat, coercion or duress. At this stage it is opportune to refer to the proceedings contained in the Journal entry of 8th September 2008.

> *...Counsel further submits that the officer in respect of whose conduct adverse findings has been made by Court is yet continuing to hold public office, notwithstanding the fact that the findings of this Court, that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution. Thus he is disqualified from holding public office.*

Court is of the view that there is merit in this application and that the matter should be referred to the bench which heard the case for further orders.

Consequently the case was to be mentioned on 29th September 2008, before the same bench that heard the main case. On 29th September 2008 the Petitioner was represented by Additional Solicitor General. No objections were taken with regard to the constitution of the bench. On this date, the following order is reflected in the Journal entry.

"The other matter concerns the conduct of the 8th Respondent. ***This Court has come to firm findings that the 8th Respondent has acted contrary to law against the public interest, in the conferment of benefits to a private party.*** *(Emphasis is mine). There is a firm finding that he has infringed the Fundamental Rights guaranteed by Article 12 (1) of the Constitution. The motion indicates that notwithstanding these findings which clearly show that he has acted in flagrant violation of the Constitution the 8th Respondent is yet continuing to hold Public office."*

Additional Solicitor General submits that the Attorney General has revoked the Proxy of the 8th Respondent. In the circumstances the Court directs the Registrar to issue a notice directly on the 8th Respondent to be present in Court on the next date and to reveal to Court; whether he continues to hold office under the republic and if so the nature of such office and the place at which he is functioning whether he is holding in office in any establishment in which the Government of Sri Lanka has any interest purporting to represent the interest of the Government of Sri Lanka and if so the nature of such office. Registrar is to issue Notice on the 8th Respondent to appear in Court on 8th October 2008.

This matter to be resumed before the same bench on 8th October 2008.

In terms of this Order notices were issued to the Petitioner on 3rd October 2008. On 8th October 2008 several reports were tendered to court and submissions made by the Additional Solicitor General that the investigations against the Petitioner had commenced and were pending, by the CID, under the Inspector General of Police, by the Commission to Investigate Allegations of Bribery or Corruption and The Securities and Exchange Commission of Sri Lanka.

The Petitioner was present and represented by President's Counsel Mr. Faiz Mustapha with Mr. Shantha Jayawardane Attorney-at-Law. The Order made pertaining to the Petitioner is quoted from the proceedings of that date.

> *Mr. Faiz Mustapha appears for the 8th Respondent and submits that within four days of the judgment the 8th Respondent tendered his resignation from the post of Secretary Ministry of Finance. He however submits that the 8th Respondent continued to function in that post to discharge official duties since the resignation was not accepted until much later. He further submits that the 8th Respondent resigned from the Chairmanship of Srilankan Airlines on 19.9.2008. This was accepted on 30.9.2008.He further submits that the 8th respondent does not hold any office in any government establishment or in any establishment that the government has any interest. Counsel for the Petitioner submits that according to his instructions the 8th Respondent has an interest in a Company incorporated, in which the Government has interest. He refers to two such companies. Mr. Mustapha submits that he only holds a single share in these companies and that he would severe links with these companies. He further submits that the 8th Respondent tenders an unreserved apology to Court for having continued functioning after the judgment of this Court.*

Hence the 8th respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and firm statement that he would not hold any office in any government institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Further affidavit to be filed as early as possible. Mention for a final order on the matter on 20.10.2008.

During the argument in this case, learned President's Counsel appearing for the Petitioner argued that this order was coercive and its tenor did not leave any option but to file an affidavit which he had no desire or intention to make. It is to be noted that prior to any Order of the Court with regard to the filing of the affidavit, through oral submissions made by the same eminent President's Counsel speaking on behalf of the Petitioner, an unequivocal expression of regret was tendered. He declared that he had voluntarily severed himself from holding any public office or performing public functions. He had himself recognized that the adverse findings and content of the judgment, had grave repercussions, and precluded him as a fit and proper person to hold such office.

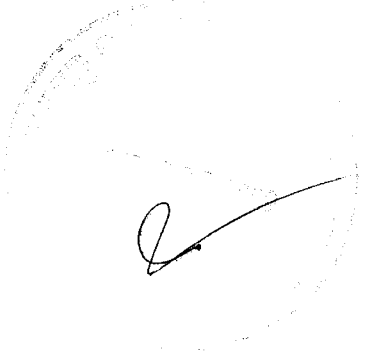
This same counsel, in terms of the contemporaneous proceedings recorded on that date, raised no demur to the fact that he should not hold public office, did not seek to argue whether he should or should not hold public office, did not even seek an opportunity to be heard on this subject either on the facts or on the Law. In this context his plea that he was not afforded an opportunity to be heard is untenable and cannot be accepted.

This also concurred with the contentions of the learned counsel Mr. Sumanthiran for the petitioner who submitted that in the light of the finding in the judgment and the infringement of the Constitution, that he had violated the oath of office

in terms of Article 53 of the Constitution. He however contested the fact that the Petitioner had relinquished all the offices held by him.

In the light of these conflicting submissions, the Court offered a method of resolving the conflict, namely, by granting the opportunity for the Petitioner to file an affidavit. *Ex facie* the order reads "he may consider..." These words cannot be reasonably interpreted to be coercive or mandatory. The Order was accepted without demur. The Order itself was consistent and in conformity with the clear, undisputed findings that his continuance to hold public office would be inimical to the findings of the judgment and indeed to the ongoing investigations by the 25th, 28th and 30th Respondents, namely the Criminal Investigation Department, the Bribery Commission and the Securities and Exchange Commission.

Consequently an affidavit was filed in Court including the impugned undertaking contained in paragraph 13 of the affidavit which reasonably set out that if he was presently unfit to hold public office in view of the judgment, then he could possibly not hold such public office in the future. This understanding was simply an affirmation of what had been said by his Counsel in Court. If indeed he was coerced as alleged, why was he not withdrawing the entire affidavit? Was the rest of the affidavit made voluntarily and in recognition that he is not fit to hold public office after the disclosures of the judgment? If he tendered an unreserved apology, spontaneously, without the need to do so, for continuing to hold office how could he rescind from this over all stance taken by him? I hold that there is nothing in the proceedings or orders to indicate coercion. The silence and inaction of the Petitioner for almost a year after the filing of the affidavit also militates against coercion.



The "affidavit of a confidential nature" filed by the Petitioner, though not argued by President's Counsel, contained an allegation of bias. On being questioned the Learned Presidents Counsel for the Petitioner stated that he made no such allegations against all the members of the Court but only against the retired Chief Justice. This document, not tendered to some of the justices, was filed after the amended petition as an "affidavit of confidential nature", something alien to the normal practice of court and the law, and which of course lost its "confidentiality" the moment it was filed, became a matter of public record, and served on the petitioner.

This allegation rests solely on a speech delivered on 26th July 2008 which was (i) made after the delivery of the judgment, (ii) does not refer to the Petitioner by name, and (iii) does not patently reflect bias against the Petitioner. Indeed findings against him were made on documents of public record, affidavits, counter affidavits and admitted facts before the Court, as is patently evinced in the facts adverted to in the judgment. It is to be noted that no reference to alleged bias has been made in any of the correspondence between the Petitioner and the Secretary to the President in the many letters sent by the Petitioner until its belated expression in the 3rd set of documents filed in Court. In terms of the Law, bias must be based on reasonable grounds and proved on material facts and/or documents. In my opinion an oblique reference in a speech delivered with typical candour and perhaps lack of judicious caution, at a function relating to judicial officers and officers of the Court, does not remotely sustain even an allegation of bias. In my view there is no reasonable ground whatsoever for this serious allegation and, in fact, only merits consideration of charges to be preferred against the Petitioner for contempt of Court.

Under these circumstances I therefore hold that prayer (a) and (b) should be refused, and dismiss the Petition dated 31st July 2009.

During arguments it was suggested that the Order was made *per incuriam* and in violation of the fundamental right guaranteed to the Petitioner under Article 14 (1) (g) of the Constitution. This was not argued at length, clearly because President's Counsel himself realized the futility of such arguments. Relief in terms of Article 17 is only in "respect of infringement or imminent infringement, by executive or administrative action....'.This argument has no basis in Law.

It reasonably follows that since the undertaking given to Court cannot be withdrawn and the application to do so is refused, the Petitioner would be, in my view, standing in contempt of this Court for violating an undertaking he has given to it.

Finally can the Court on its own volition free him from this undertaking merely because the President has expressed a concern to have him back? In considering this I am mindful of the fact that despite affidavits being tendered to Court, apologies being made to Court and the findings of the judgment, the Petitioner has *falsely made contrary representations* to the Secretary to the President in letters (marked "A") dated 25th July 2008 and (marked "F") dated 3rd June 2009. In his letters to the Secretary he contradicts the contents of his own affidavit, the submissions of his own counsel made at the time in Court and which is recorded in contemporaneous proceedings, and, in that sense, appears to be uncertain and confused. Did the Petitioner, in his affidavit, mean what he said or has he fabricated his stance? To say the least his word, in its varied contradictions, appears fickle.

leads to a halt in the growth of the other. The promptings of a kind compassionate heart or sympathetic urgings must necessarily be bridled in dealing with the resources of the State, for it ultimately belongs to the People and must be in the custodianship of honest, disciplined, hardworking and effective public officers.

I accordingly dismiss the amended petition. No Costs.

JUDGE OF THE SUPREME COURT

Two pages removed / excluded by cannibalization of from the original dissenting Judgment of Justice Shiranee Tilakawardane

Undoubtedly, the appointing authority is the President, as Article 52 mandates as much. When any incumbent President exercises these powers he or she is also under the same Constitutional mandate to act in accordance with the Doctrine of Public Trust that is reposed through the Sovereignty of the People (Article 4) and under the Law. No single Article of the Constitution can be given greater prominence than or read in isolation from another. It must be read and interpreted in a manner that accords with the pith and substance and, indeed, the spirit of the entire Constitution. It is, after all, the executive power of the People that is exercised by any incumbent President. (Article 4b) Therefore "unfettered discretion cannot exist where the rule of law reigns." Vide *Premachandra v. Major Montague Jayawickrama and another 1994* (2) S.L.R. pg 90 at 103.

Article 28 of the Constitution which deals with the Fundamental Duties states that the **exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations** (emphasis added) and, accordingly, it is the duty of every person of Sri Lanka:

(a) to uphold and defend the Constitution and the law;

(b) to further the national interests and to foster national unity;

(c) to work conscientiously in his chosen occupation;

(d) to preserve and protect public property and to combat misuse and waste of public property;

(e) to respect the rights and freedoms of others;

(f) to protect nature and conserve its riches.

Therefore the power to appoint should be linked to the abovementioned duties. The provision of an Article empowering a person to make an appointment cannot be considered in isolation, disregarding the basic structure and tenet of the Constitution which is embodied in other Articles.

Therefore his or her acts as President, as a noble and gracious leader, must always be guided by the underlying duty to preserve and protect public property and to combat its waste and misuse. In a monarchy the ruler rules under the "pleasure principle", and could act in a dictatorial manner. But under our Democratic Socialist Republic governed by the Constitution, which guarantees democracy to its people, even an Executive President does not have untrammeled power and all acts of governance, especially those that involve public finance, must be in tune with the spirit of the Constitution which mandates good and responsible governance.

Furthermore "if there is one principle which runs through the entire fabric of the Constitution, it is the principle of Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective." *Vide In re The Nineteenth Amendment to the Constitution 2002 (3) 85 at 100.* Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability." See *Abdul Cader Ayoob V The Inspector General of Police and Others* 1997 (1) S.L.R 412 at pg 419. The entire fabric of the Constitution mandates that the rule of law be the ultimate framework of all acts carried out under the Constitution, including the acts of the executive, the legislature and the judiciary. The Judgment of this Court has found the Petitioner a corrupt officer under the law. Even in its widest sense this would be inimical to his appointment to public office. My opposition to the granting of the relief requested by the Petitioner follows squarely from my allegiance to the Rule of Law, the sole foundation upon which the strength of this Court lies and the principle which mandates the we not arbitrarily dismiss prior rulings of this Court – including the one originally issued in this case – merely for issues of political expediency or convenience.

After all, the Rule of Law is the backbone of good governance. The nurturing of these twin institutions leads ultimately to a stable and healthy nation. The stunting of one necessarily