

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

**SC (FR) Application
No. 209/2007**

Vasudeva Nanayakkara,
Attorney-at-Law,
Advisor to His Excellency
The President,
Secretary, The Democratic
Left Front,
49 1/1, Vinayalankara
Mawatha,
Colombo 10.

Petitioner

Vs.

1. K.N. Choksy, PC., MP.,
Former Minister of
Finance,
No. 23/3, Sir Ernest de
Silva Mawatha,
Colombo 07.
2. Karu Jayasuriya, MP.,
Former Minister of Power
and Energy,
No. 2, Amarasekera
Mawatha,
Colombo 05.
3. Ranil Wickremesinghe,
MP, Former Prime Minister,
No. 115, 5th Lane,
Colombo 03.

and 28 others

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) NO.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) that,

“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

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" ;

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, C.J., Amaratunga, J., and Balapatabendi J. However, the Bench which sat on 08.10.2008 and 20.10.2008 comprised of Sarath N.Silva, C.J., 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