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

In the matter of an application under and in terms of Articles 17 & 126 read with Articles 3, 4, 12, 82(6) and 125 of the Constitution.

Nagananda Kodituwakku
General Secretary,
Vinivida Foundation,
99, Subadrarama Road,
Nugegoda.

Petitioner

S.C.F.R. Application No: 205/2022

Vs.

1. Election Commission
   Elections Secretariat,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

2. Nimal G. Punchihewa
   Chairman, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

3. S.B. Divarathna
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

4. M. M. Mohomed
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

5. K. P. P. Pathirana
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.
6. Mrs. P. S. M. Charles
   Member, Election Commission,
   P.O. Box 02, Sarana Mawatha,
   Rajagiriya.

7. Sagara Kariyawasam
   General Secretary,
   Sri Lanka Podujana Peramuna,
   1316, Nelum Mawatha,
   Battaramulla.

8. Akila Viraj Kariyawasam
   General Secretary,
   United National Party,
   400, Sirikotha,
   Pitakotte, Kotte.

9. Ranil Wickramasinghe,
   Prime Minister,
   58, Sir Earnest De Silva Mawatha,
   Colombo 7.

10. Dhammika Perera
    Member of Parliament,
    Parliament of Sri Lanka,
    Sri Jayawardenapura,
    Kotte.

11. Attorney General
    Attorney General's Department,
    Colombo 11.

Respondents

Before: E.A.G.R. Amarasekara, J.

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Petitioner appears in person.

Ronald Perera P.C. with Eraj De Silva for the 9th Respondent.

Kanishka Balapatabendi DSG with I. Randeni SC for the 11th Respondent.

Supported On: 18.07.2022

Decided On : 19.07.2022

ORDER OF COURT

The Petitioner is seeking to impugn the election of the 9th and 10th Respondents as Members of Parliament from the National Lists of the United National Party and the Sri Lanka Pudujana Peramuna respectively.

The application was filed on 16th June 2022. It was referred to the Listing Judge on 20th June 2022 who made an order on the same day directing to issue notice on the Respondents and to list the application for support on 6th July 2022.

It appears that the Registry of the Supreme Court had thereafter sent the notice to the Hon. Attorney-General, the 11th Respondent, on 22nd June 2022 by hand. On the same day, a journal entry had been made by the Registry that the Attorney-at-Law has not tendered notice up to date in terms of the order dated 20th June 2022.

In fact, the Petitioner had failed to comply with the direction dated 20th June 2022 even by the time the application was taken up for support on 6th July 2022. The journal entry reflects that on that day, the Petitioner had informed Court that he had filed a motion requesting His Lordship Hon. Chief Justice to nominate a Special Bench for this application. The Court having observed that the said motion was not in the brief, directed this matter to be mentioned on 15th July 2022 to ascertain whether His Lordship Hon. Chief Justice has made an order with regard to the request made by the Petitioner to have a Special Bench nominated to hear this matter.

His Lordship Hon. Chief Justice had made order on 12th July 2022 refusing the application of the Petitioner to constitute a Special Bench and recorded his reasons for the refusal. He further directed that this matter be listed for support on urgent basis on 14th July 2022 before any Bench with notice to the Hon. Attorney-General and Other Respondents.

Thus, by 12th July 2022, there were two orders made, one by the Listing Judge on 20th June 2022 and the other by His Lordship Hon. Chief Justice on 12th July 2022, directing that, in addition to the Hon. Attorney-General, notice be served on all the other Respondents. Nonetheless, the Petitioner had failed to comply with these orders.

Notwithstanding the lack of due diligence shown by the Petitioner in failing to tender the required notices, it appears that the Supreme Court Registry had on 12th July 2022 acting pursuant to the order of His Lordship Hon. Chief Justice, prepared notices to be sent to all the Respondents. However, there is no journal entry to indicate that they were in fact dispatched.

The Hon. Attorney-General was the only party represented when the matter was taken up for support on 14th July 2022 as directed by His Lordship Hon. Chief Justice. Court was mindful of the fact that, specially in the circumstances of this case where the Petitioner is seeking interim relief staying the 9th and 10th Respondents from occupying office as duly 'elected' Members of Parliament under Article 99A and sitting and voting in the Parliament and/or in the office of the Cabinet of Ministers, it was incumbent on the Petitioner to serve notice on the 9th and 10th Respondents before seeking interim relief from Court.

In ***Ittepana v. Hemawathie*** **[(1981) 1 Sri.L.R. 476 at 483]** Sharvananda J. (as he was then) quoted with approval the following extract from Black on Judgments:

> *"Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide.* ***It cannot act upon persons who are not legally before it****, upon one who is not a party to the suit ..., upon a defendant who has never been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment entered by such Court is void and a mere nullity."* [Emphasis added]

The fundamental rights jurisdiction of Court includes the power to make interim orders **[*Jayanetti v. Land Reform Commission and Others* [(1984) 2 Sri.L.R. 172 at 180]**. No doubt there may be instances where the Court, in exercising its jurisdiction in terms of Article 126(4) of the Constitution, may have to grant interim relief without hearing the party affected in the first instance in the interest of justice. Nonetheless, this is not such a case as the failure to serve notices on the 9th and 10th Respondents prior to supporting for interim relief occurred due to the lack of diligence shown by the Petitioner.

In these circumstances, on 14th July 2022 Court directed the Registrar to take steps to serve notices on the 1st to 10th Respondents. On that date the Petitioner moved that this matter be taken up on an urgent basis and requested that it be listed for support on 18th July 2022. However, Court pointed out that there must be sufficient time given for notice to be served on the 9th and 10th Respondents and for them to obtain legal representation and offered to list the matter for support on 20th or 21st of July. However, the Petitioner informed that he was due to proceed to UK for the graduation of his daughter and hence those two days were not suitable. He further informed that he was due to return to Sri Lanka only on 20th August 2022. Accordingly, Court fixed this matter for support on 29th August 2022.

However, the Petitioner filed a motion on the very next day, 15th July 2022, claiming that the visa interview scheduled for 14th July 2022 was cancelled due to the imposition of curfew by the Government and therefore the Petitioner's visit to UK has become uncertain. He moved that this matter be fixed for support of interim relief on 18th July 2022 and informed Court that he had taken steps to serve notices on the 9th, 10th and 11th Respondents by courier service. The Listing Judge had directed that this motion be supported on 18th July 2022.

On that day, only the 9th and 11th Respondents were represented. The learned President's Counsel for the 9th Respondent informed Court that his client had not been served with notice but had become aware of the proceedings and obtained a copy of the petition from the Attorney-General's department.

In view of the facts pleaded by the Petitioner in his motion dated 15th July 2022, Court made inquiries from the Petitioner about his proposed travel to UK and its subsequent cancellation as alleged by him as the Court was concerned about the veracity of the position outlined to Court by the Petitioner about his proposed travel to the UK. The Petitioner informed that he became aware of the cancellation of the visa interview only on 15th July 2022 after appearing in this case on 14th July 2022, and on his own volition produced his telephone to Court and drew attention to two notices received regarding the visa interview. These two notices were subsequently filed by motion by the Petitioner as directed by Court.

We observed that there was one e-mail informing of the closure of the Visa Application Centre on 14th July 2022. However, that email had been received by the Petitioner on 13th July 2022 at 6.22 p.m. Thus, it became clear that contrary to his intimation to Court, the Petitioner was aware by the time he appeared before Court on 14th July 2022 that his visa interview scheduled for 14th July was cancelled [Vide documents marked EM1 and EM2 annexed to the motion dated 18th July 2022]. His statement to Court on 14th July of his impending travel to the UK on 20th July 2022 appears to have been an attempt to obtain an early date to support this matter by misrepresenting facts. We wish to place on record that such conduct is unbecoming of any counsel and a breach of his professional obligations to Court.

Nonetheless, we permitted the Petitioner to support his application against the 9th Respondent but made it clear that we are not inclined to make any order against the 10th Respondent who was not represented before Court.

Both the learned DSG and the learned President's Counsel for the 9th Respondent raised a preliminary objection that the application of the Petitioner is time barred.

In terms of Article 126(2) of the Constitution, a fundamental rights application must be filed within one month of the infringement of the fundamental right.

In ***Gamaethige v. Siriwardena and Others*** **[(1988) 1 Sri.L.R. 384 at 402]** Fernando J. held:

> *"Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist (Siriwardena v. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*

According to the petition, the election of the 9th Respondent as a Member of Parliament was published in the gazette on 18th June 2021. This application was filed on 16th June 2022 nearly one year after the 9th Respondent was declared elected as a Member of Parliament. Hence the application of the Petitioner is out of time and is liable to be dismissed in limine.

However, the Petitioner contended that the violation is of a continuing nature. In response, the learned President Counsel for the 9th Respondent pointed out that there is no averment in the petition that the alleged infringement is a continuing violation. Moreover, the learned DSG submitted that the question of a continuing violation does not arise as the Petitioner had previously challenged the election of the 9th Respondent as a Member of Parliament in S.C. (F/R) Application No. 200/2021.

The Petitioner has, at paragraph 9 of the petition, disclosed that he had challenged the election of the 9th Respondent as a Member of Parliament in S.C. (F/R) Application No. 200/2021. However, he claims, at paragraphs 11 and 21 of the petition, **that the said application was never allowed to be supported**.

We examined the case record of S.C. (F/R) Application No. 200/2021 and found that on 14th October 2021, the application was dismissed as the Petitioner was absent and unrepresented. Hence it is clear that the Petitioner had suppressed and misrepresented to Court the fact that S.C. (F/R) Application No. 200/2021 had been dismissed. It is incumbent on a Petitioner in a fundamental rights application to show *uberrima fides* and disclose to all material facts to Court. Failure to do so makes the application liable to be dismissed in limine.

In ***Jayasinghe v. The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others*** **[(2002) 1 Sri.L.R. 277 at 286]** Yapa J. held:

> *"Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations."*

The Petitioner responded that he had disclosed to Court by X5 appended to the pleadings that S.C. (F/R) Application No. 200/2021 had been dismissed. X5 is a motion filed in that case. However, the mere attachment of that motion to this application is insufficient given the fact that the Petitioner had specifically pleaded at paragraphs 11 and 21 of the petition, that the said application was never allowed to be supported. The dexterity of the Petitioner, where he makes a misstatement of a material fact in the body of the petition but the true state of facts is camouflaged in an appending document to the petition, does not provide an avenue for him to claim that all material facts have been disclosed to Court. Accordingly, the application of the Petitioner is liable to be dismissed for the Petitioner had suppressed from Court the material fact that S.C. (F/R) Application No. 200/2021 had been dismissed.

The crux of the case of the Petitioner against the 9th Respondent is Article 99A of the Constitution. He submitted that in terms of Article 99A, it was incumbent on the Secretary of the United National Party to nominate a person to fill the one seat obtained by the party on the National List at the General Elections 2020 within one week of the intimation made by the Election Commission by X2 dated 7th August 2020. This was not done. It was the contention of the Petitioner that due to such failure of the United National Party, the appointment of the 9th Respondent as a Member of Parliament under Article 99A of the Constitution is ab initio void and has no force in law.

The relevant part of Article 99A of the Constitution reads:

> *"Where a recognized political party or independent group is entitled to a seat under the apportionment referred to above, the Election Commission shall by a notice, require the secretary of such recognized political party or group leader of such independent group to nominate within one week of such notice, persons qualified to be elected as Members of Parliament (being persons whose names are included in the list submitted to the Election Commission under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election) to fill such seats and shall declare elected as Members of Parliament, the persons so nominated."*

The Petitioner conceded that the 9th Respondent is qualified in terms of this provision as his name appeared in the nomination paper of the United National Party for the Colombo District. The challenge to his election was limited to the failure to comply with the one-week time limit.

At the outset we observe that neither Article 99A nor any other provision of the Constitution sets out the consequences on the failure of a recognized political party or independent group to nominate a qualified person for National List seats obtained by such party or group within one week of the intimation by the Election Commission.

Samarakoon C.J. in ***Visuvalingam and Others v. Liyanage and Others (No. 1)*** **[(1983) 1 Sri.L.R. 203 at 214-215]** held:

> *"For the purpose of deciding whether a provision in a constitution is mandatory one must have regard also to the aims, scope and object of the provision. The mere use of the word "shall" does not necessarily make the provision mandatory. Subba Rao,J. in the case of State of U.P. vs. Babu Ram stated the position thus-"When a statute used the word 'shall', prima facie , it is mandatory , but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."*

In terms of Article 3 of the Constitution, franchise forms part of the Sovereignty of the People. The National Seat that the United National Party obtained is a direct result of the exercise of the franchise by the people. Court must opt for an interpretation that protects and advances franchise and the Sovereignty of the People rather than one which stultifies it.

It has been held that franchise is part of the fundamental rights of a citizen. In the ***Twentieth Amendment to the Constitution Bill (2017)*** **[Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, page 126 at 136]** Court held:

> *"Right to vote is recognised as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14(1) of the Constitution but also attracts Article 3 of the Constitution."*

In terms of Article 4(d) of the Constitution, Court is bound to respect, secure and advance such fundamental rights and it should not be abridged, restricted or denied, save in the manner and to the extent specified in the Constitution. If the Court were to accept the submission of the Petitioner and hold that the appointment of the 9th Respondent is bad in law due to failure to comply with the one-week time frame, it will amount to the abridgment of the fundamental rights of the voters who voted for the United National Party for no fault of theirs and a violation of the Sovereignty of the people who voted for the United National Party.

Moreover, if the Court is to accept the submission of the Petitioner, it would amount to Court adding words to Article 99A of the Constitution which is not permissible **[*Stassen Exports Limited v. Brooke Bond (Ceylon) Limited and Another* (1990) 2 Sri.L.R. 63 at 75, 116-117; *Walgamage v. The Attorney-General* (2000) 3 Sri.L.R. 1 at 8-9].**

Furthermore, Article 69 of the Constitution establishes the power of Parliament to act notwithstanding any vacancy in its membership. This militates against accepting the submission of the Petitioner as it is clear that even where there is a failure on the part of a recognized political party or independent group to nominate a person or persons to the seats obtained on the National List within one week as required by Article 99A of the Constitution, the Parliament has the power to act.

We hold that the time limit of one-week in Article 99A is directory and not mandatory.

For all the foregoing reasons, we see no basis to grant leave to proceed and dismiss the application.

E.A.G.R. Amarasekara

Judge of the Supreme Court

A.L. Shiran Gooneratne

Judge of the Supreme Court

Janak De Silva

Judge of the Supreme Court