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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Mr. Nagananda Kodituwakku, Attorney-at-Law.

SC Rule 03/2017
SC/REG/CHA/MISC/08/2016
SC/WRIT/05/2015

Nagananda Kodituwakku
Attorney-at-Law
99, Subadrarama Road,
Nugegoda

Respondent

Before : Priyantha Jayawardena PC, J
P. Padman Surasena, J
S. Thurairaja PC, J

Counsel : The Respondent appeared in Person

Rajiv Goonetilleke, DSG with Hashini Opatha, SC for the Hon. Attorney General

Rohan Sahabandu, PC with Ms. Sachini Senanayake for the Bar Association of Sri Lanka

Decided on : 29th of February, 2024

The respondent was admitted and enrolled by the Supreme Court as an Attorney-at-Law in terms of section 40 of the Judicature Act No. 2 of 1978, as amended. He was issued with the Rule dated 27th February, 2018 in terms of section 42(2) of the Judicature Act No. 2 of 1978 to show cause why he should not be suspended from practice or removed from the office of Attorney-at-Law.

The impugned conduct of the respondent was set out in the Rule as follows;

> *"**WHEREAS** on 14th October 2015, you invoked the jurisdiction of this Court by filing SC. WRIT No. 05/2015 (hereinafter referred to as the 'said Application') wherein you appeared in person as the Petitioner and inter alia, sought the mater be heard before a full bench of this Court by way of a motion filed on the same day.*
>
> ***Whereas** upon a consideration of the matter, the motion for a fuller bench of this Court was refused on the basis that the said Application did not disclose any matters of general and public importance.*
>
> ***Whereas** consequent to the foregoing order of refusal, a further Petition and an affidavit dated 26th November 2015 was filed by you in the said Application.*
>
> ***Whereas** having considered the contents of the further affidavit dated 26th November 2015, especially the averments which appeared ex facie an affront to the dignity of this Court and the entire judiciary of this country. Their Lordships Court made order on 14.03.2016 to the effect whether you exceeded your privileges as an Attorney at Law by making unbecoming, deliberate aspersions on the judges of the Supreme Court that calls for suspension of practice.*
>
> ***AND WHEREAS** Their Lordships of the Supreme Court, having examined the contents of the said Application, more particularly the Petition and the affidavit dated 26th November 2015, have formed the view that the contents said Application, discloses, inter alia, that;*

(a) In paragraph 8 of the said affidavit and the corresponding averments in the said Petition, you have averred inter alia that; ".....by the above ruling. Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above ……"

(b) In paragraph 25 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "the Judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect Judges to attend to the task of administering justice and to leave politics to politicians".

(c) In paragraph 27 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that "..... the Judges are not permitted to be seen to have private agendas such as expectation of special treatment or perks after retirement".

(d) In paragraph 33 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... the people's trust and confidence in the Judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment against the Government, and also appointing of judges according to wishes of the Executive, ..."

(e) In paragraph 34 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the Judiciary with improper appointments made to the Judiciary on his recommendations".

(f) In paragraph 35 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "I state that in this backdrop having lost my trust and confidence in the Judiciary I reported the state of Judiciary of Sri Lanka to the Commonwealth Nations of which Sri Lanka is a member, to ensure that Latimer House Principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly defined criteria and by a public declared process".

(g) In paragraph 36 of the said Affidavit and the corresponding averments of the said Petition, you have averred inter alia that, "..... I state that however, the said desired intention of the Commonwealth of Nations had been ignored and yet to be fulfilled by the Judiciary under the new regime".

(h) In paragraph 39 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that on 10th Nov 2014, having ruled that it was a matter of National and General Importance the Full Bench of all Judges of the Supreme Court, unanimously ruled in favour of the former president, Mahinda Rajapakshe with a determination that there was no impediment whatsoever to his being elected for a further term".

(i) In paragraph 42 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that Your Lordship's impugned decision on my request made for a full Bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully request that this matter be fixed for support before the Full Bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court".

(j) In paragraph 44 of the said Affidavit and the corresponding averments of the said Petition, you have averred that, "I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(iii), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full Bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's Judiciary, whose actions have attracted severe international criticism and compelled the UN System to intervene and call for an independent tribunals, with foreign judges, to hear cases, and respectfully request the Court to deem that I have withdrawn the case".

(k) The overall tenor and the effect of the matters so averred in the said papers are contemptuous, malicious, and derogatory and is a willful, deliberate, calculated and an intentional attempt to ridicule, embarrass, demean and defame this Court, question its integrity and lower its standing and estimation in the eyes of the public.

***AND WHEREAS** the aforesaid examination by Their Lordships of the papers filed by you discloses that you have;*

(a) By reason of filing the aforesaid papers replete with derogatory and defamatory statements and other insinuations and innuendos, you have conducted yourself;

(i) in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-Law of good repute and competency, or

(ii) which would render you unfit to remain an Attorney-at-Law,

(iii) in a manner which is inexcusable and such as to be regarded as deplorable by your fellows in the profession,

and thereby you have committed a breach of Rule 60 of the Supreme Court Rules 1988 (Conduct of and Etiquette of Attorneys-at-Law) made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the said ales), and,

(b) by reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-At-Law and have thus committed a breach of Rule 61 of the said rules.

***AND WHEREAS** this Court is of the view that proceedings against you for suspension or removal from the office of Attorney-at-Law should be taken under Section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court Rules (Part VII) of 1978 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka."*

Thereafter, the respondent sent his response dated 27th February, 2018 to the Registrar of the Supreme Court denying the allegations and charges in the said Rule.

As the respondent denied the charges leveled against him, it was decided to hold an inquiry in respect of the said charge sheet. At the inception of the inquiry, the charges were read out to the respondent, and he pleaded not guilty to the charges. The learned Deputy Solicitor General commenced the inquiry by leading the evidence of the Deputy Registrar of the Supreme Court.

In her evidence, she stated that the file relating to SC.Writ 5/15 was opened on the 14th of October, 2015 consequent to an application filed by the respondent. She produced the Petition and the affidavit dated 13th October, 2015 filed in the said application. She further stated that there was a motion had been filed by the respondent, seeking to constitute a full bench in terms of Article 132 (iii) of the Constitution to hear the application, stating that the matter involved in the said application contains matters of public and general importance.

She further stated that hence, the docket was forwarded to then Chief Justice for a ruling on the said application. Having considered the said motion, then Chief Justice had refused to constitute a full bench under Article 132(iii) of the Constitution and the application was taken up for support in court. On that day, the respondent had appeared in person, and the other respondents were represented by counsel. Having observed the contents of the affidavit filed by the respondent in the said application, court directed the Registrar of the Supreme Court to serve a certified copy of the motion dated 26th of November, 2015 together with the affidavit dated 26th of November, 2015 filed by the petitioner on the President of the Bar Association directing him to appear as amicus to assist court to decide whether the contents under the heading "Need for a full bench considering the national importance of the case" and the averments contained in paragraph 42 of the affidavit obstructs the cause of justice and amounts to an interference in the due administration of justice.

The original petition dated 14th October, 2015 filed by the respondent, the affidavit dated 13th October, 2015, the motion dated 13th October, 2015 were produced by the witness and marked as P1(A), P1(B) and P1(C) respectively. Further, the journal entries dated 15th October, 2015, and 8th December, 2015, the motion dated 26th November, 2015 and the affidavit attached to the said motion were produced and marked as P1(D), P1(E), P1(F) and P1(G) respectively.

It is pertinent to note that, at the inquiry, the respondent admitted filing the aforementioned documents in SC/WRIT No. 05/2015.

The affidavit dated 26th November, 2015 referred to the aforementioned Rule, *inter alia,* stated as follows;

"

1. *I, NAGANANDA KODITUWAKKU of 99, Subadrarama Road, Nugegoda do hereby solemnly and truly declare and affirm as follows:-*

2. *I am the affirmant above-named, Attorney-at-Law (Sri Lanka) & Solicitor in the UK and a citizen of both countries and being a Buddhist and Public Interest Litigation Activist and I state that I*

furnish this Affidavit to support the content of the Motion filed in Court today.
(26 Nov 2015)…

….

5. *I state that the Writ Application filed by me (SC/Writ/05/2015) on 13th Oct 2015, purely in the Public interest, supported by overwhelming evidence of abuse of the people's Legislative, Executive, and Judicial powers by all three organs of the government (Executive President, Parliament and Judiciary) to insert the clause "... being persons whose names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election..." (hereinafter referred to as the 'flawed clause") to the **Article 99A** of the Constitution by deceitful means, as morefully set out below, thereby violating the sovereign rights of the People of Sri Lanka, which includes the power of Franchise enshrined in **Article 3** of the Constitution, which cannot be taken away or denied without a mandate obtained from the people at a referendum and upon a certificate by the Executive President being endorsed on the Bill (**Article 83**) and therefore the aforesaid 'flawed clause' inserted in the Article 99A of the Constitution is ab initio void in terms of Article **82(6)** of the Constitution.*

6. *I state that the request made by me by Motion filed in Court on 13th Oct 2015 in terms of Article 132(3)(iii) of the Constitution, for the hearing of this matter before a Full Bench of the Supreme Court, considering the fraudulent manner, the said 'flawed clause' had been inserted to the Article 99A of the Constitution, which is of a matter of National importance. Your Lordship has **ruled that it was not a matter of Public and General Importance** as follows.*

" I am of the view that the matters involved in this case are not of general and public importance. Hence the request made in terms of Article 132(3)(iii) of the Constitution is refused."

7. *I state that all judges are required to stand by their decisions which shall be, directed to the parties to the litigation and to the general public with reasons for their rulings given, which however has not been adhered to in Your Lordship's ruling, reducing it to mere nullity* ***(ref P30)****.*

8. *I state that by the above ruling, Your Lordship has displayed abuse of discretion vested in the office of the Chief Justice, and Your Lordship's bias towards the Executive, despite credible evidence produced in the case that the impugned 'flawed clause' referred to above has been fraudulently inserted to the Article 99A of the Constitution by then Executive President J R Jayawardene in 1988, by circumventing the procedure established by law and hence ab initio void.*

9. *I state that in 1988, 5 judges of the Supreme Court, despite the patent violation of the Article 3 (powers of government, fundamental rights and franchise) of the Constitution by the said 'flawed clause', had made a patently flawed determination on 18th April 1988* ***(ref P39)*** *that the said 'flawed clause' was NOT inconsistent with the provision of Article 3 and therefore did not require the approval of the People at a referendum, which is mandated by Article 83 of the Constitution, a decision, which had apparently been made under moral duress* ***(P31)****.*

*10. I state that I observed that the said 5 - Judge Bench had denied the opportunity (**Ref P38**) for the citizens to make objections against the said "flawed clause and made the Court's determination as follows (**ref P39**)*

*"We have considered the respective submissions made in regard to this matter, and **our determination is that Clause 3 and Clause 8** (Clause that permitted party Secretaries to appoint rejected candidates as MPs through the National List) of the Bill **are not inconsistent with the Provisions of Article 3**, read with Article 4(a) and 4(e) of the Constitution, and **therefore do not require the approval of the People at a Referendum**".*

*11. I state that the failure of the 5-Judge Bench to adduce reasons for their determination (in clear violation of Article 123 of the Constitution) reduced the said determination (**Ref P30**) a merely nullity and ab initio void.*

*12. I state that the Supreme Court's special determination Record (SC/SD/02/1988) clearly demonstrates that the process followed by the aforesaid 5-Judge bench had been absolutely flawed and in clear violation of the mandatory procedure provided in Chapter **XII** of the Constitution ...*

...

23. I state that the said 'flawed clause', effectively nullifies the principle of 'Representative Democracy' duly recognized in the Preamble to the Constitution of the Republic of Sri Lanka.

24. I state that the Republic of Sri Lanka is a representative democracy (ref preamble to Constitution) and the citizens judicial power is exercised by the judiciary, wholly on trust, demand not only that judicial power be

exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair and must also be seen to be rational and fair and the Court should be able to justify its actions as an exercise of public power which are always likely to called in question.

25. I state that the judges are expected to administer justice according to law, regardless of the consequences for their approval ratings, as the people expect judges to attend to the task of administering justice and to leave politics to politicians.

26. I state that the judges have a different responsibility and are subject to a different form of accountability and the public expectation of judges is that they will not respond to political pressure.

27. I state that the judges are not permitted to be seen to have private agendas such as expectation of special treatment of perks after retirement.

*28. I state that the Court is expected to resolve the matter presented in this case, strictly according to law, adhering to legal methodology, acting as the final interpreter of the Constitution, protector of fundamental rights of the citizens, their sovereign rights and as a guardian to keep necessary checks upon constitutional transgressions by itself or other organs of the State (**Union of India V Raghubir Singh (1989) 2 SCC 754**)....*

...

33. I state that the people's trust and confidence in the judiciary had been seriously undermined by de facto Chief Justice, Mohan Peiris who pleaded with the Prime Minister of the new administration not to remove him, assuring the Prime Minister that he would not give any judgment

against the Government, and also appointing judges according to wishes of the Executive, which the Prime Minister with contempt revealed in the Parliament.

The relevant part of the Hansard dated 30th Jan 2015 is attached hereto marked ***P40***

34. *I state that the de facto Chief Justice, Mohan Peiris completely destroyed the trust and confidence in the judiciary with improper appointments made to the judiciary on his recommendations.*

35. *I state that in this backdrop having lost my trust and confidence in the judiciary, reported the state of Judiciary of Sri Lanka to the Commonwealth of Nations of which Sri Lanka is a member, to ensure the Latimer House principles which state that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, endangering public confidence and dispensing justice' were implemented and judicial appointments were made on the basis of clearly Define criteria and by a publicly declared process.*

(A true copy of the communication seat to Commonwealth Secretariat marked ***P41*** *is attached here too)*

36. *I state that the Commonwealth secretary in London had informed me that Commonwealth Secretariat had sent an observer group to Sri Lanka and believed that the newly elected government would address the issues raised by me in my communication sent to the office of the Commonwealth of Nations. I state that however, the said desired intentions of the Commonwealth of Nations had been ignored and yet to be fulfilled by the judiciary under the new regime.*

*(True copy of the reply received from Commonwealth Secretariat marked **P42** is attached here too)…*

…

39. *I state that on the 10th November 2014, having ruled that it was matter of National and General Importance the Full Bench of all judges of the Supreme Court, unanimously ruled in favor of the former President Mahinda Rajapakse with a determination that there was no impediment whatsoever to him being elected for a further term.*

*(Relevant page of the Determination (SC Ref 01/2014) ratified by all judges marked **P44** is attached hereto)…*

…

42. *I state that Your Lordship's impugned decision on my request made for a full bench has effectively disqualified Your Lordship from hearing this case, and therefore I respectfully requested that this matter be fixed for support before the Full bench of the Supreme Court sans Your Lordship the Chief Justice, Justice Eva Wanasundara who had clearly shown bias towards the Executive and Justice Sarath De Arbrew presently indicted in the High Court.*

43. *I state that I with due respect to Your Lordship, request that the obviously impugned per incuriam ruling given by Your Lordship that the 'matters involved in this case are NOT of general and public importance' be reviewed considering the general and public importance of this case, initiated purely in the public interest by me, which goes to the very root of the representative democracy of the Republic of Sri Lanka, and to a point a Bench of 7 judges of the Supreme Court in terms of Article 132 (3)(III) to hear and determine this case.*

44. I state that in the event the request made herein, purely in the public interest, in terms of Article 133(3)(III), cannot be acceded to, in view of Your Lordship's refusal to direct the hearing before a full bench of the Supreme Court, I respectfully submit that it would further justify the claim made by the people that they have no trust and confidence in Sri Lanka's judiciary, whose actions have attracted severe International criticism and compelled the UN system to intervene and call for independent tribunals, with foreign judges to hear cases and respectfully request the Court to deem that I have withdrawn the case."

The witness stated that according to the journal entry dated 16th of February, 2016 the respondent had submitted to court that he would tender an unqualified apology. Further, he had moved to file an appropriate affidavit withdrawing the motion dated 26th of November, 2015 and the affidavit dated 26th November, 2015. Hence, the respondent was given two weeks to file an apology or withdraw the motion.

Thereafter, the witness stated that, as per minute dated 23rd of February, 2016, the respondent had filed the motion dated 23rd February, 2016, together with the affidavit dated 23rd February, 2016. The said motion dated 23rd of February, 2016 and the affidavit annexed to that motion dated 23rd of February, 2016 were produced and marked as P1(J) and P1(K) respectively.

Moreover, the witness stated that the respondent had agreed unconditionally to withdraw certain averments in the said affidavit and the motion, on the advice of the President of the Bar Association and to tender a fresh affidavit to the court. However, according to the affidavit dated 23rd February, 2016 respondent had only withdrawn the averment 42 of the affidavit dated 26th November, 2015. The witness further stated that, according to the journal entry dated 14th March, 2016, then Chief Justice, had directed Registrar of the Supreme Court to submit the documents filed in the said application to the judges of the Supreme Court together with the proceedings to consider whether the petitioner as an Attorney-at-Law had exceeded his privilege and had made unbecoming and deliberate aspersions on the judges of the Supreme Court. Consequently, the Registrar of the Supreme Court had submitted the said documents to the learned judges of the Supreme Court.

Thereafter, based on the observations made by the learned judges of the Supreme Court, the Rule dated 23rd November, 2016 was issued on the respondent.

After the evidence in chief of the witness was concluded, the respondent was given an opportunity to cross examine the witness, and the respondent cross examined the witness. After the cross examination was concluded by the respondent, court informed the respondent that he is entitled to give evidence and the respondent was requested to commence his case. Thereafter, the respondent started giving evidence. Before his evidence was concluded the respondent informed court that his family, who were residing in the United Kingdom were leaving that night, and moved to adjourn court for the day. Hence, the proceedings were adjourned on sympathetic grounds. Further, the respondent was informed that the inquiry is specially fixed for the 18th of January, 2023 at 10.00 a.m. and also for the 24th and 25th of January, 2023.

When this matter was taken up for inquiry on the 18th of January, 2023 the respondent was absent and unrepresented. The learned President's Counsel appearing for the Bar Association of Sri Lanka, informed court that he met the respondent that morning in the premises of the Supreme Court. Hence, the inquiry was concluded and a date was fixed for correction of proceeding. When the matter was taken up in court for correction of proceedings, the respondent appeared in court and made an application to re-open the inquiry. However, the said application was refused by court and the respondent was allowed to file written submissions.

In his written submissions, the learned Deputy Solicitor General submitted that the respondent deliberately and intentionally prepared the affidavit dated 26th November, 2015 following the refusal to appoint a full bench, is a calculated effort to make derogatory statements and unfounded allegations in respect of the judiciary as a whole and specific judges mentioned by name.

Moreover, it was submitted that this is not the first time that the respondent has been engaging in such behavior unbecoming of an Attorney-at-Law but he had been doing so for a considerable period of time. It was submitted that the respondent had already been found guilty in Rule bearing No. 1/2016 served on the respondent due to having made spurious allegations against a sitting

Judge of the Court of Appeal which culminated in the respondent being suspended from practice as an Attorney-at-Law for a period of 3 years.

The learned President's Counsel appearing for the Bar Association of Sri Lanka submitted that the Rules framed under the Constitution are not exhaustive, specifically Rule 62. Further it was submitted that the Rules presupposes a lawyer's context, shaping the lawyer's role. It includes the provisions of the Constitution, provisions of law, Judicature Act No. 2 of 1978, decisions of the Supreme Court.

He further submitted that mere allegation without any proof, mere statements made in most reckless manner, statements been made that judges are charged with judicial corruption where no semblance of proof is tendered is not the conduct of a lawyer, and he cannot be a lawyer of good repute referred to in section 41 of the Judicature Act. Moreover, a lawyer who has been enrolled as a man of good repute has to maintain that 'good repute' throughout his professional life. He drew the attention of the court to Rule 61 which states that "an Attorney-at-law shall not conduct himself in any manner unworthy of an Attorney-at-law."

It is pertinent to note that, the respondent did not justify his conduct, or the statements made by him in his affidavit dated 26th November, 2015, either by giving evidence or in the written submissions filed by him. The allegations made against the independence and impartiality of judges sitting in the apex court of this country were not supported by any material.

A careful consideration of the allegations referred to in the Rule and the affidavit dated 23rd February, 2016 when taken as a whole, constitute an affront to the judiciary and the judicial system and that the respondent has not withdrawn the same nor made an unqualified apology. Further, the respondent at no stage expressed any remorse or apology for a making such statements in his affidavit of 26th November, 2015; namely paragraphs 8, 25, 27, 33, 34, 35, 36, 39, 42 and 44 referring to abuse of discretion, insinuating that judges engage in politics, that judges have private agendas, that the trust and confidence in the judiciary has been undermined.

Moreover, the evidence and the material produced at the inquiry shows that the conduct of the respondent is not only bad conduct but also amounts to contemptuous behaviour with total disregard of the authority and respect of the Supreme Court. Hence the evidence led at the inquiry proved that the actions taken by the respondent amounts to conduct which is dishonorable and unworthy of an Attorney-at-law.

Taking into consideration that this is the second instance that the respondent was found guilty of professional misconduct, and the nature of the grave misconduct of the respondent referred to in the Rule, the aforementioned Rule is affirmed. We hold that the respondent is guilty of malpractice. Hence the respondent is removed from the office of Attorney-at-Law. Further, the respondent is restrained from filing public interest litigation in his personal capacity as such conduct would nullify the said decision to remove the respondent from the office of Attorney-at-Law.

The Registrar of the Supreme Court is directed to take all necessary steps to implement this Order and to communicate this Order to the relevant institutions.

Priyantha Jayawardena PC, J

Judge of the Supreme Court

P. Padman Surasena, J

Judge of the Supreme Court

S. Thurairaja PC, J

Judge of the Supreme Court