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

In the matter of an application under and in terms of Article 17 and 126 (2) of the Constitution of the Republic of Sri Lanka.

Ms. Kayleigh Frazer,
972/4, Kekunagahawatta Road,
Akuregoda,
Battaramulla.

Petitioner

SC/FR/399/2022

Vs

1. Priyantha Jayawardena,
   Judge in the Supreme Court,
   Colombo 12.

2. Controller General of Immigration,
   Department of Immigration and Emigration,
   Suhurupaya,
   Sri Subhuthipura,
   Battaramulla.

3. Attorney General,
   Attorney General's Office,
   Colombo 12

Respondents

Before: Murdu N.B. Fernando, PC J.,
S. Thurairaja, PC J. and
Achala Wengappuli, J.

Counsel: Nagananda Kodituwakku for the Petitioner
Kanishka de Silva Balapatabendi, DSG for the 2nd and 3rd Respondents.

Argued on: 27-01-2023 and 07-03-2023

Decided on: 11-05-2023

Murdu N.B. Fernando, PC J.

The Petitioner a British national, filed this fundamental rights application dated 27th December, 2022 and moved this Court for leave to proceed *inter-alia* and specifically prayed to quash the decision made by the 2nd Respondent, the Controller General of Immigration on 10th August 2022 (X 4), to cancel the visa issued to the Petitioner and advising the Petitioner to leave this country on or before 15th August, 2022 and further moved for interim relief preventing the Petitioner being deported from Sri Lanka, until the hearing of this application.

The Petitioner also moved for relief against the 1st Respondent a Judge of this Court, for a declaration that the 1st Respondent has violated the fundamental rights of the Petitioner enshrined in Articles 10, 11, 12 and 13 of the Constitution. The Petitioner further pleaded for compensation to be paid to the Petitioner in a sum Rs. 10 million by the 1st and the 2nd Respondents in their personal capacity.

When this matter was taken up for support before us, the Deputy Solicitor General appearing for the 2nd and 3rd Respondents moved that this application be dismissed *in limine* as it is misconceived and cannot be maintained before this Court, for the following reasons;

- the application does not fall within the ambit of executive or administrative action;
- the petitioner has suppressed material facts and misrepresented facts to court;
- there is no proper affidavit before court; and
- application is vexatious and designed to embarrass court.

We heard the submissions of the learned Deputy Solicitor General and of the learned counsel for the Petitioner in response. We now proceed to consider the said preliminary objections raised before us.

To look at this matter in its correct perspective, it is best to begin by alluding to certain litigation (detailed below) that transpired in the submissions made before Court wherein the Petitioner has invoked the jurisdiction of this Court previously, against the 2nd Respondent regarding the core issue, i.e., the cancellation of the visa issued to the Petitioner (X 4) by the Controller General of Immigration, the 2nd Respondent.

The said litigation is as follows: -

CA/WRIT/299/2022 - *Case (1)*

- By this writ application filed before the Court of Appeal, the Petitioner challenged the decision of the 2nd Respondent regarding the cancellation of the visa granted to the Petitioner dated 25-02-2022 valid till 08-03-2023.
- The Court of Appeal refused to issue notice and the application was dismissed on 16-08-2022.

SC/SPL/LA/ 218/2022 - *Case (2)*

- The Petitioner filed a special leave to appeal application against the aforesaid Court of Appeal Order.
- This application was dismissed by this Court for non-compliance of the Supreme Court Rules on 02-09-2022.

SC/SPL/LA/ 246/2022 - *Case (3)*

- The Petitioner filed a fresh special leave to appeal application dated 08-09-2022 against the very same Court of Appeal Order.
- This matter was taken up before this Court on 08-12-2022 and *re-fixed for 07-06-2023* for support for granting of special leave to appeal and is presently pending before this Court.

SC/FR/ 299/2022 - *Case (4)*

- The Petitioner filed a fundamental rights application dated 05-09-2022 against the 2nd Respondent Controller General of Immigration *et al* for violation of the fundamental rights guaranteed under Article 12(1), 13(1) and 13(2) of the Constitution. The Petitioner also sought an interim order not to arrest, detain or deport the Petitioner until the fundamental rights application was concluded.
- This Court was not inclined to grant leave to proceed and on 14-09-2022 the application was dismissed, subject to costs fixed at Rs. 100,000/=

SC/FR/399/2022 - *Case (5)*

- The Petitioner filed the instant fundamental rights application wherein the relief sought is specifically against the 1st and 2nd Respondents as referred to earlier. No relief is sought against the 3rd Respondent, the Hon. Attorney General.

From the foregoing it is clearly seen that the core issue i.e., the matter pertaining to cancellation of the medical visa granted to the Petitioner is still pending before this Court and is now scheduled for granting of special leave on 07-06-2023.

It is pertinent to observe that in the instant fundamental rights application, though the Petitioner is seeking to quash the decision made by the Controller General of Immigration X 4, no violation of a fundamental right is alleged against the 2nd Respondent.

Hence, by this instant fundamental rights application, the Petitioner is seeking from this Court, a declaration that the Petitioner's fundamental rights enshrined in Article 10, 11 ,12 and 13 of the Constitution have been violated specifically by the 1st Respondent, a Judge of this Court.

The case presented by the Petitioner is that the alleged infringement or the violation took place when the 1st Respondent on *08-12-2022* made order *in SC/SPLA/246/2022* (the 3rd case referred to above) to re-fix the said special leave application for a further date. The said order was annexed to the petition marked as ''X 17".

It reads as follows: -

"*Before: Priyantha Jayawardena PC, J.*

Kumudini Wickramasinghe, J.

A.L Shiran Gooneratne, J."

"*Mr. Nagananda Kodituwakku informs Court that the Petitioner does not want him to support this application before Justice Priyantha Jayawardena, PC as His Lordship has delivered a Judgement in this matter on a previous occasion.*

However, Mr. Kodituwakku does not produce any written document from the Petitioner.

He submits that he has received a text message from the Petitioner through her boyfriend's telephone, i.e., 0771897562.

As there is no written instructions from the Petitioner, the Court does not accept the alleged text message.

In view of the submissions made by Mr. Kodituwakku, the Petitioner is directed to appear in Court in person on the next date.

If the Petitioner does not appear in Court in person, an appropriate order will be made in this matter.

Since, SC.CHC.APPEAL NO 11/2006 is in progress this application cannot be taken up for support today.

In view of the above, application is re-fixed for support.

Of consent, support this application on 07.06.2023.

Registrar is directed not to entertain any motions in respect of this application.

This application should not be called tomorrow or any other dates prior to 07.06.2023."

Thus, it is apparent that the pivotal matter in this fundamental rights application revolves around the afore said direction made by this Court in *SC/SPL/LA 246/2022* on *08-12-2022*.

At the outset, it is observed that the said direction is an 'Order of Court' made by a bench of three judges of this Court and not by a single judge, i.e., the 1st Respondent sitting alone or in chambers. Hence, the rationale of the petitioner bringing only the 1st Respondent as a party to the instant application is a threshold matter that begs an answer. No explanation or reason whatsoever, had been given by the Petitioner in the petition or subsequently tendered to Court

by way of a motion or even relied upon by the learned counsel in the submissions made on behalf of the Petitioner.

Thus, the Petitioner in my view has failed to pass the threshold or give one good reason for singling out one judge of a bench of three to allege wrongful conduct and has failed to justify or rational the grounds for invocation of the jurisdiction of this Court, only against a single judge.

Having referred to the '*Order of Court' **X 17***, let me now advert to the objections raised by the learned Deputy Solicitor General for the State.

Firstly,

The maintainability of this case since the instant application does not come within the ambit of *'executive or administrative action'.* It was strenuously argued by the State that the impugned Order **(X 17)**, is a **'judicial act'** correctly made by a division of this Court.

It would be opportune at this juncture to refer to the submissions of the learned counsel for the Petitioner, i.e., the aforesaid **X 17** Order, is an *'executive or administrative act' and* it does falls within the scope of Article 126 of the Constitution and not a 'judicial act' as contended by the State. The counsel repeatedly emphasized that it '*tantamount to pure abuse of office for improper purposes by the 1st Respondent'*, and the direction to the Registrar of the Court is *'immoral'* and *'not expected from a judge in the Supreme Court'*. (vide. paragraphs 20 and 22 of the petition) This Court however observes that the reference in paragraph 22 of the petition to an *order dated 28-11-2022* appears to be an obvious error since the record does not bear out such a date. Nevertheless, the allegation of the Petitioner against the 1st Respondent does not appear to be diminished by such error.

In order to buttress its argument, the learned Deputy Solicitor General relied upon the judgement of **Canonsa Investments Limited v. Earnest Perera and others [1991] 2 Sri LR 214** whereas, the learned counsel for the Petitioner relied upon the judgements of **Maharaja v. Trinidad and Tobago (No 2) [1979] A.C. 385 (PC) ; Peter Leo Fernando v. AG [1985] 2 Sri LR 341, Joseph Perera v. AG and two others [1992] 1 Sri LR 191 and Weerawansa v. AG and others [2000] 1 Sri LR 387** to present a case that the actions of the 1st Respondent falls within the ambit of Article 126 of the Constitution.

The question of what constitutes an 'executive or administrative action' in the context of Article 17 and 126 of the Constitution have been exhaustively dealt by this Court in a string of cases from the time the fundamental rights applications entered the judicial arena and especially so in respect of orders made by Magistrates, regarding remand orders and issue of search warrants, i.e., personal liberty matters. In this judgement, I do not wish to repeat or restate the voluminous views and expressions of this Court made in reference to 'executive or administrative action', suffice is to refer to the oft-quoted case **Cannosa Investments Ltd. v. Earnest Perera** (supra), wherein H.A.G. de Silva, J., having analyzed a long line of judgements observed as follows;

> "[....] On a consideration of the above cases, it would appear to be well established that where an action complained of is in consequence of the

wrongful exercise of a judicial discretion, even on false material furnished to a judge maliciously, such action will *not attract the provisions of Article 126 of the Constitution*" (page 219).

In the aforesaid Canonsa case the issuance of a search warrant for the purposes of entering a premises was the matter in issue and no mala fides or impropriety whatsoever was imputed to the Magistrate and this Court categorically held, *even in an instance of wrongful excise of judicial discretion*, resorting to the provisions of Article 126 of the Constitution for infringement or imminent infringement of a fundamental right declared and recognized by chapter III of the Constitution will not arise.

In the matter before us, the impugned X 17 Order has been made by a 'bench of three judges' of the Supreme Court in pursuance of the judicial process. Furthermore, it is observed that such direction to re-schedule the matter was made by the Court, upon the application of the Petitioner, as the Petitioner was not willing to present its case before the particular bench. In our view the impugned Order X17 is a 'judicial act' performed by a bench of this Court. It is not in the nature of 'executive or administrative action'. It is an act done in the exercise of judicial discretion and will not attract the provisions of Article 17 and 126 of the Constitution. Thus, we see merit in the submissions made by the State, that the impugned Order X 17 does not constitute an 'executive or administrative action' within the meaning of Article 126 of our Constitution and it will not give rise to an infringement of a fundamental right of the Petitioner enshrined and guaranteed by our Constitution, as alleged to by the Petitioner before us.

The learned counsel for the Petitioner on the other hand quoted and relied upon the judgements of Maharaja v. Trinidad and Tobago; Peter Leo Fernando ; Joseph Perera and Weerawansa referred to earlier, wherein the order of the Magistrate was the matter impugned to present and establish a case of a violation of a fundamental right in relation to personal liberty and to claim compensation. However, the learned Counsel failed to draw a parallel with the instant case and more so, failed to place any material before Court to justify a specific *'abuse of office for improper purposes'* by the 1st Respondent as alleged to in the petition filed before this Court. Neither did the learned Counsel prove '*immoral conduct'* as alleged or establish '*wrongful exercise of judicial discretion'* of the 1st Respondent acting in the capacity of the presiding judge of a bench of three judges of the Supreme Court.

The cases relied upon by the counsel for the Petitioner are distinct and distinguishable from the instant application before this Court and we see no reason to term the Order X 17, as an 'executive or administrative act' as contented by the Petitioner.

Coming back to the Order 'X17' made by this Court on 08-12-2022, there is no ambiguity or doubt that it was a direction by Court to re-schedule a special leave to appeal matter upon the application of the counsel for the Petitioner on the ground that the Petitioner does not wish the matter to be supported before the presiding judge i.e., the 1st Respondent, who had delivered Order regarding the core issue in an earlier occasion. However, the Petitioner was not present before Court and there was no written document or instructions to such effect from the

Petitioner to the Counsel *per se* before Court and it appears, for the said reason and the said reason only the special leave to application had to be re-scheduled.

In any event, it is not necessary to examine the merits of this case at this stage. We are only considering the preliminary objection raised by the counsel for the State, that the Order X17 is a 'judicial act' and does not come within the realms of an 'executive or administrative action' to invoke the jurisdiction of this Court in terms of Article 126 of the Constitution coupled with the further submission that the *course of action initiated by the Petitioner is vexatious and is designed to embarrass this Court,* i.e., the Supreme Court.

In terms of Article 118 of the Constitution, the Supreme Court is the highest and the final Superior Court of record in the Republic and subject to the provisions of the Constitution exercise the matters referred to therein and especially, the exclusive jurisdiction for the protection of fundamental rights.

Hence, the submission of the State, that the matter in issue is vexatious litigation and filed to embarrass this Court must be considered in the said light. This is especially so since the allegation of the Petitioner is that the Order X17, '*tantamount to pure abuse of office for improper purposes by the 1st Respondent'*, and the direction in X17 to the Registrar of the Court is *'immoral'* and '*not expected from a judge in the Supreme Court'*. This Court has already held that the impugned Order X 17 is a 'judicial act' performed by a bench of three judges in its judicial discretion and does not amount to 'executive or administrative action'. As emphasized earlier, the Supreme Court is the highest and final Superior Court in Sri Lanka and the Order X17 is made by a bench of three judges of the Supreme Court in the administration of justice.

However, only the 1st Respondent has been made a party to the instant application. No justifiable reason is given in singling out the 1st Respondent except to plead that in making the X17 Order the 1st Respondent completely ignored the request of the counsel for the Petitioner to refer the matter to the Hon. Chief Justice, to appoint an impartial bench to hear the case of the Petitioner *'a young foreign girl forced to live in hiding*', as specifically stated in the petition and that the 1st Respondent, i.e., a judge of this Court, patently abused public office as a judge of the Supreme Court to deny Petitioner's legitimate right to justice and alleged deliberate acts of violation of the Petitioner's fundamental rights which the Petitioner claims is guaranteed under Article 10, 11, 12 and 13 of the Constitution. Furthermore, the Petitioner also prayed for compensation in a sum of Rs 10 million, to be paid to the Petitioner by the 1st Respondent in his personal capacity. Thus, the submission of the State, that this application is vexatious and has been designed to embarrass the Supreme Court has merit, given the fact that the Order X17 is a 'judicial act' done within jurisdiction, in its discretion, in the judicial process of administering justice.

I would pause for a moment to reflect on the observations made by Lord Denning MR in the Court of Appeal in England, in the celebrated case, Sirrors v. Moore [1974] 3 A11 ER 776 at page 785;

> "Every judge of the courts of this land -from the highest to the lowest- should be protected to the same degree, and liable to the same degree if the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgement' it applies to every judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable [..] Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Under the old common law, as we are aware, the immunity regarding judges of the superior courts was absolute and universal. However, regarding judges of the inferior courts (a synonym for the minor judiciary) the immunity was only while the said judges acted within jurisdiction. Nevertheless, in the aforesaid English case it was held that in England, this dichotomy has now been abolished and under the changed judicial system, all judges are immune and protected from liability to damages when the judge is acting judicially. Hence, Lord Denning MR, after a careful examination of the liability of a judge who acts within and outside of its jurisdiction uttered the famous words 'nothing will make a judge whatever his rank liable, except when it be shown that he was not acting judicially knowing that he had no jurisdiction to do it'.

The afore quoted observations of Lord Denning, MR has been echoed and re-echoed by our courts in the Peter Leo Fernando case and Weerawansa's case referred to earlier.

In the Sirrors case, the English case referred to above, a judge of the crown court dismissed an appeal against a recommendation for deportation and after giving judgment ordered the appellant to be arrested and detained which the judge had no jurisdiction to do. The detainee was later released by habeas corpus. The action brought by the detainee against the judge of the crown court and the police officers who executed the arrest order was dismissed. The court concluded that although the judge had no jurisdiction to detain the said Sirros in custody, since the judge was acting judicially in good faith, albeit mistakenly, no action will lie against him and he was entitled to immunity.

In my view, the above observations of Lord Denning MR are equally applicable to the matter before us. I have no hesitation in repeating the words "nothing will make a judge liable except it be shown that he was not acting judicially knowing that he had no jurisdiction to do it". The reason for such immunity is not because the judge has any privilege to make mistakes or to do wrong but because he should be able to do his duty with complete independence and free from fear. Thus, when a judge is hauled-up before court for every trivial order made, the freedom

of suit is given by the law to the judge not so much for the judge's own sake but for the sake of the public and for the advancement of justice.

In the said light, I see merit in the submissions made by the State that the petition is vexatious and brought to embarrass the court.

In the matter before us for determination, not only the 1st Respondent has been singled out and made a party to the instant case, but is also sued for compensation in a sum of Rs One million to be paid in his personal capacity. The above factor in my view, sheds more light to the objection raised by the State, that the instant petition is vexatious and designed to embarrass this court, *albeit* the Supreme Court- the apex court of the land- the highest and the final court of record in Sri Lanka.

The *next objection* raised by the counsel for the State pertaining to the maintainability of this application is that *there is no proper affidavit before court as required by the Supreme Court Rules.*

The learned DSG contended that the hand written note (marked X26) purported to be a letter of authority must be considered upon the background of the Petitioner living in hiding to avoid execution of a 'removal order' and that the Petitioner by this application is attempting to perpetuate an illegality. It was further submitted that illegality and equity do not go hand in hand. In response, the counsel for the Petitioner relied on Rule 44(2) of the Supreme Court Rules and submitted that the Petitioner was living *incommunicado* and thus cannot appear in person before court or even sign a proxy authorizing a counsel to appear and plead a case before a court of law.

The Petitioner before court is Ms. Kayleigh Frazer a foreign national. The affidavit filed before court supporting the petition is not of Ms. Kayleigh Frazer.

The *affidavit* filed of record, which refers to many matters of a very personal nature, ranging during a period of 3 years, from December 2019 to December 2022 has been deposed to by one Nagananda Kodituwakku of No.99, Subadrarama Road, Nugegoda. Its observed that he has affirmed to the facts stated in the affidavit, on behalf of the Petitioner, supposedly 'from his personal knowledge and from documents made available' to the said Nagananda Kodituwakku. Similarly, the *petition* dated 27-12-2022 filed before court has also been signed by the very same Nagananda Kodituwakku, as the Attorney-at-Law for the Petitioner. Admittedly, there is no *proxy* filed of record by the Petitioner Ms. Frazer. The proxy tendered to court has also been signed by Nagananda Kodituwakku. Whilst the Petitioner has not subscribed to the affidavit, the petition, and the proxy, all three documents have been deposed to and executed by Nagananda Kodituwakku. Incidentally, the learned counsel who is representing the Petitioner before this Court is also Nagananda Kodituwakku, Attorney-at-Law.

We have carefully considered the above facts, in relation to the provisions of Rule 44 of the Supreme Court Rules and specifically the provisions relating to Rule 44(2) and 44(3) of the Supreme Court Rules pertaining to applications under Article 126 of the Constitution and its applicability pertaining to persons who are unable to sign a proxy. We are also mindful of the case law regarding the aforesaid Supreme Court Rule 44.

Further, we have considered the plethora of judgements of this Court pertaining to the validity of an affidavit filed of record and especially the significance of the below mentioned dicta of Sharvananda J., (as he then was) in Kobbekaduwa v. Jayawardena and others [1983] 1 Sri L R 416:

> ''The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes *prima facie* evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmation Ordinance (Cap17) furnishes the sanction against a false affidavit. In an affidavit person can depose only to facts which he is able of his own knowledge and observation to testify." (emphasis added)

An affidavit of a Petitioner deposed to by his own knowledge and observations, amounts to *prima facie* evidence and is an important document upon which much reliance is placed in a fundamental rights application. It supports the petition and assist the court in its pursuit in ascertaining the truth. As observed by Mark Fernando, J. in Sooriya Enterprises (International) Limited v. Michael White & Company Limited [2002] 3 Sri L R 371 "the fundamental obligation of a witness or deponent is to tell the truth (section 10), and the purpose of the oath or affirmation is to reinforce that obligation''.

Hence, when an affidavit to support a petition is tendered by a person, who is not the Petitioner and a person who cannot vouch to the veracity of facts and depose to the matters and circumstances from his own personal knowledge and observations, court will take cognizance of such fact in arriving at its decision. Thus, on this view of the matter, we see substance in the objection raised by the State that there is no proper affidavit before court in terms of the Supreme Court Rules.

The *final objection* raised by the State regarding the instant application is that the *Petitioner has suppressed facts and misrepresented material facts to court*.

In order to justify the above preliminary objection, the learned DSG drew our attention to the following material which the counsel alleged, the Petitioner suppressed from court and grossly misrepresented to court, *viz* that the Petitioner was granted a medical visa to travel to Sri Lanka; the Petitioner's visa was cancelled as the visa conditions were violated; and the cancellation took place consequent to holding of an inquiry in terms of the Immigration and Emigration Act No 20 of 1948 as amended.

Further, it was asserted in addition to challenging the said decision (X4) to cancel the visa by way of a writ application (1st ,2nd and 3rd case referred to earlier) and the instant fundamental rights application (5th case referred to earlier), the Petitioner filed another fundamental rights application bearing number *SC/FR/299/2022* against the 2nd Respondent and others (4th case referred to earlier) which fact the Petitioner has completely suppressed from this Court. A copy of the said petition and the Order of this Court was filed of record by the counsel for the State. Upon perusal of the said order, it is patently and manifestly clear that the said fundamental rights application filed by the very same Petitioner, has been dismissed by this Court *in limine*, on 14-09-2022, with costs fixed at Rs 100,000/=. However, the Petitioner has

failed to disclose or refer to such fact in the instant application, i.e., the 5th case referred to above, filed on 27th December 2022.

We consider the failure to refer to the said case SC/FR/299/2022, in the instant application SC/FR/399/2022 as a relevant and a material factor, that should be foremost in our minds, when deciding on this important objection of misrepresentation and suppression of material facts.

Furthermore, the Petitioner has categorically pleaded in the petition and deposed to in the supporting affidavit that the Petitioner has not invoked the fundamental rights jurisdiction of this Court previously against the 1st Respondent, but has failed to assert that the Petitioner had in fact invoked the fundamental rights jurisdiction in respect of the core issue earlier and also moved for interim relief against the decision of the 2nd Respondent contained in **X4.** Thus, in the said context the statement pertaining to invocation of jurisdiction in the petition and the supporting affidavit too, is palpably wrong and erroneous.

The learned DSG contended that the failure to refer to the previous fundamental rights application filed by the Petitioner *i.e.,* SC/FR/299/2022 in the instant case was a serious suppression of fact and relied on the case of **Jayasinghe v. The National Institute of Fisheries and Nautical Engineering and others reported in [2002] 1 Sri L R 277** to substantiate its contention.

The learned counsel for the Petitioner did not respond to this allegation of suppression of material pertaining to SC/FR/299/2022 in his submissions before us. However, he was gracious enough to accept that the Petitioner was in Sri Lanka not on a resident visa as pleaded in the petition but on a medical visa which is clearly depicted in the visa document X5 filed together with the petition. Hence, we do not wish to examine the objection pertaining to suppression regarding the category of visa any further.

Nevertheless, in our view the suppression pertaining to the fundamental rights application SC/FR/299/2022 filed in September 2022 is grave and serious. Time and time again our courts have held that a litigant should come to court with clean hands and without any blemishes. A litigant should be honest to court and disclose all relevant material to court for the court to come to a finding after weighing and analyzing all material and evidence before court. Moreover, a Petitioner owes a bounden duty to court to be forthright. This is more so, in applications filed under Article 17 and 126 of the Constitution where the exclusive jurisdiction is with the Supreme Court and findings are made on affidavit evidence placed before court.

In **Jayasinghe's case** referred to above, the Supreme Court has emphatically held that "failure to disclose a fact that a Petitioner very well knew is a serious suppression of a material fact which indicate that the Petitioner has manifestly failed to carry out an imperative legal duty and obligation to court".

Similarly, in the case of **Blanka Diamonds (Pvt) Ltd. v. Wilfred Van Els and two others [1997]1 Sri L R 360** a judgement of the Court of Appeal, it was held "that the conduct of the Petitioner in withholding material facts from court shows a lack of *uberrima fides* on the part of the Petitioner and that when a litigant makes an application to court seeking relief he enters into

a contractual obligation to disclose all material facts correctly and frankly to court and that a party who misleads court and misrepresent facts to court or utters false hoods in court will not be able to obtain relief from the court".

Hence, a Petitioner has an imperative legal duty and obligation to court and comes to a contractual agreement with court to disclose all material facts correctly and accurately to court. This in my view, is a sacred duty, that should be preserved and protected at all costs. In fact, in "The Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules", under the heading 'Relationship with Court' it is stated as follows:

> *"51. An Attorney-at-Law shall not mislead or deceive or permit his client to mislead or deceive in any way the Court or Tribunal before which he appears."*

Thus, an Attorney-at-Law has a bounden duty not to permit his client to mislead or deceive court, in any manner whatsoever, either by suppression, misleading or misrepresenting facts to court to gain an advantage, which in my view is detrimental to the interests of justice.

In the aforesaid circumstances, we see merit in the submissions of the State regarding the afore said objection, that the Petitioner has suppressed material facts and misrepresented facts to this court.

Having considered the totality of the preliminary objections raised before us, and examined and assessed the material placed before court and the submissions of the learned counsel, we are convinced that there is much merit in the preliminary objections raised on behalf of the State*, namely,*

- the application does not fall within the ambit of executive or administrative action;
- this application is vexatious and designed to embarrass the court;
- there is no proper affidavit before court; and
- the Petitioner has suppressed material facts and misrepresented facts to court.

Hence, we uphold all four preliminary objections raised on behalf of the 2nd and 3rd Respondents and reject this application *in limine* and dismiss the instant case with costs fixed at Rs.500,000/= to be paid by the Petitioner forthwith.

Prior to parting with this Order, I wish to refer to another factor that shocked the conscious of court. Consequent to the conclusion of the hearing of this matter before us, the Attorney-at- Law and counsel for the Petitioner by a communique addressed to the Hon. Chief Justice dated 08-03-2023, together with many annextures has brought certain matters to the attention of the Hon. Chief Justice for necessary action. This communique was passed to us for information. However, in arriving at the aforesaid finding on the suppression of material facts, i.e., the objection lastly dealt by us, we have not examined or considered the matters stated in the communique forwarded as we did not wish to cloud or prejudice our minds by extraneous factors.

Nevertheless, in the interest of justice we wish to place on record the following factors elicited from the documents annexed to the said communique;

(i) the assertion made by the Attorney- at Law for the Petitioner in a motion dated 23-01-2023 filed in the instant case, that the Petitioner in a hand written communication dated 22-01-2023 has confirmed that SC/FR/299/2022 had not been initiated on her instructions and the affidavit annexed thereto is a forged document with the signature of the Petitioner interpolated by fraudulent means; and

(ii) the Petitioner has never seen the affidavit dated 04-10-2022 tendered to court in SC/SPL/LA/246/2022 wherein it is categorically stated: -

> "4. At the same time another lawyer […] advised me that I was entitled to initiate fundamental rights violation petition in the Supreme Court […] and he agreed to represent me.
>
> 5. I state that the said fundamental rights violation petition (SC/FR/299/2022) was taken up on 14th September 2022 and it was dismissed […]"

Having said that, we wish to re-iterate that in coming to the finding regarding the preliminary objections raised by the State, in respect of the maintainability of this application, we have not been swerved by the aforesaid assertions referred to in the communique forwarded to His Lordship the Chief Justice.

We have considered the preliminary objections raised by the State, referred to in this Order within the four corners and the parameters of the law and for reasons more fully adumbrated in this Order, we uphold all four preliminary objections and dismiss this application with costs fixed at Rs. 500,000/=

Judge of the Supreme Court

S Thurairaja, PC J.

I agree

Judge of the Supreme Court

Achala Wengappuli, J.

I agree

Judge of the Supreme Court