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

In the Matter of an Appeal for Special Leave to Appeal from the judgement of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution.

SC Appeal No. 66/2020
SC SPL LA No. 196/2019
CA (Writ) Application No. 87/2013

1. Salinda Dissanayake
Hon. Minister of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 325, N.M. Perera Mawatha
Colombo.

1A. Rajitha Senarathna
Hon. Minister of Health, Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi Mawatha, Colombo 10.

1B. Keheliya Rambukwella,
Minister of Health
No. 385, Baddegama Wimalawansa Himi Mawatha, Colombo 10.

2. Secretary
Ayurvedha Teaching Hospital complex
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2A. Secretary
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3. Homeopathy Council
No. 94, Shelton Jayasinghe Mawatha
Welisara, Ragama.

4. Ahinsaka Perera
Secretary
Homeopathy Council
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5. Newton Peiris
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6. Professor K.K.G.S. Ranaweera
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7. Udani Jayamali
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7A. A.M. Manjula Abeysinghe
Chief Accountant
Department of Ayurvedha
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8. Dr.A.J.M.Muththwar
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9. P. Dayarathna
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9A. Mrs. Geethamani C. Karunaratne
Additional Secretary
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10. Homeopathy Interim Control Committee
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11. Hon. Attorney General
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12. Chandana Weerasekera
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13. Mohomed Abubakar Mohomed Muneer,
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Kalubowela.

14. Chandani, Jeewamali Herath
Homeopathy Hospital,
No. 94, Shelton Jayasinghe Mawatha
Welisara, Ragama.

15. Lokeshwara Anusha Madupali
No. 3/B, Pilipothagama Road, Badulla.

16. Geethamani C. Karunarathama
Ministry of Health, Nutrition and Indigenous Medicine,
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Colombo 10.

16A. D.L.U. Peiris
Additional Secretary Admin 1
Ministry of Health

No. 385, Baddegama Wimalawansa
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17. Professor. Hemantha Senanayake
University Grants Commission
No. 20, Ward Place, Colombo 07.

18. D.P. Wimalasena
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Treasury Building, Colombo 01.

19. Senior Professor Gunapala Amarasinghe
Colombo University,
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20. J.M.W. Jayasundera Bandara
Ministry of Health, Nutrition and
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Mawatha, Colombo 10.

21. Chamindika Herath
Ministry of Health, Nutrition and
Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi
Mawatha, Colombo 10.

Respondents-Appellants

1. Dr. Ekanayake Mudiyanselage Supun
Minimekala Ekanayake,
Kalawana, Metikumbura
Polgahawela.

2. Dr. Kulatharage Yoshitha Priya
Chandrabharathi
No. 24, Lakeview Circular Road
Dikhenawatte, Mattegoda.

3. Dr. Mohamed Fazhrula Fayaz Ahamed
No. 259/12/B/2, Pallanchena Watta,
Thimbirigaskatuwa, Negombo.

Intervenient Petitioners

VS.

1. Koralagamage Sydny Sunimal Kularatne
No.1/15 Kandy Road,
Dalugama, Kelaniya.

2. Wickramanayake Pathirannehelage
Dissanayake,
Diwulwewa, Hettipola.

3. Liyana Arachchige Lawrance Perera
No. 548/2, Nelum Mawatha
Jayanthipura, Battaramulla.

Petitioners-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. Yasantha Kodagoda, PC, J.
Counsel	:	Nirmalan Wigneswaran, DSG for the Respondent-Appellants. Sanath Weerasinghe with Jayalath Hissella for the Petitioners-Respondents. Saliya Peiris, PC with Upendra Walgampaya Instructed by Ms. Thushari Jayawardhana for the Intervenient Petitioners.
Written Submissions	:	07.10.2020 and 27.02.2023 by the Respondent-Appellant.
filed on		05.07.2021 and 07.03.2023 by the Petitioner-Respondents. 28.06.2021and 10.03.2023 by the 1st, 2nd and 3rd Intervenient Petitioners.
Argued on	:	09.03.2022 and 20.02.2023
Decided on	:	10.08.2023

Jayantha Jayasuriya, PC, CJ

This Court had granted special leave to appeal to respondents-appellants from the judgement of the Court of Appeal dated 15.05.2019. The three petitioners-respondents had invoked the jurisdiction of the Court of Appeal on 02nd April 2013 seeking *inter alia* a writ of certiorari to quash the decision of 1st, 2nd 4th and 5th to 10th respondents-appellants, to call applications from Sri Lanka Homeopathy degree holders and diploma holders for registration as new Homeopathy practitioners. An advertisement published in print media by the Registrar of the Homeopathy Medical Council was produced marked P8. Furthermore, petitioners-respondents sought a writ of Mandamus directing the respondent-appellants to publish an advertisement cancelling the aforesaid impugned advertisement – P8. Two other reliefs sought by the petitioner-respondents from the Court of Appeal against the aforesaid respondents-appellants were writs of prohibition preventing them from registering new Homeopathic practitioners and usurping powers and authority of the Homeopathic Council. Furthermore, they sought interim orders restraining the respondents-appellants from calling applications for registration as new homeopathic practitioners and doing any act incidental to and connected with calling said applications and / or making decisions and implementing them until the final determination of the application.

In the aforesaid application, the Minister in charge of Indigenous Medicine, the Secretary of the Ministry of Indigenous Medicine and Secretary of the Homeopathic Council were the 1st, 2nd and 4th respondents respectively. While the members of the Homeopathic Interim Control Committee were cited as 5th to the 9th respondents and the Homeopathic Interim Control Committee was cited as the 10th respondent.

Petitioners-respondents are registered practitioners of homeopathy and they invoked the jurisdiction of the Court of Appeal on the basis that the aforementioned respondents-appellants have usurped the powers and authority of the Homeopathic Council, established under the provisions of the Homeopathy Act No 7 of 1970. Petitioners-respondents further claimed that 5th to 9th respondents named before the Court of Appeal are not members of the Homeopathic Council recognised by the Act, but of an Interim Control Committee appointed by the Minister. It was contended that the Minister had no power to appoint such committee and the committee has no power to register Homeopathic medical practitioners. They contended that it is the Homeopathic Medical Council who has the power to register new practitioners as provided under section 16(3) of the Homeopathy Act.

The Court of Appeal by its judgement dated 15.05.2019, allowed the application of the petitioner-respondents and granted reliefs prayed for in the prayer of the petition.

Respondents-appellants sought special leave to appeal from this court and three intervenient petitioners sought to intervene. This court at the hearing of the special leave to appeal application of the respondent–appellants had also considered the submissions of the learned President's Counsel for the three intervenient-petitioners when granting special leave to appeal on six questions of law, including the following question framed by the intervenient-petitioners:

"Did the Court of Appeal err in failing to hear the intervenient-petitioners prior to its judgement dated 15.05.2019?"

Four of the five remaining questions of law relate to the legality of the impugned judgment of the Court of Appeal.

It is pertinent to note that the decisions the petitioners-respondents challenged in the Court of Appeal were made in 2013 and the judgement was delivered in the year 2019. The learned Deputy Solicitor-General at the outset of the hearing of this appeal submitted that the interim committee, whose decision was impugned in the Court of Appeal ceased to function and a council appointed under the provisions of the new Homeopathy Act, which came in to operation in 2016, is performing necessary duties, at present. Furthermore the said council had endorsed the registration of the intervenient-petitioners as homeopathy practitioners. In view of these changes due to intervenient factors, the learned Deputy Solicitor General submitted that the challenge to the Court of Appeal judgment based on the initial questions of law is an academic exercise and therefore he would confine himself to the sole legal question set out below:

"Did the Court of Appeal err in failing to hear the Intervenient Petitioners prior to its judgment dated 15th May 2019, and if so, whether the judgment dated 15th May 2019 could have an adverse impact on the intervenient petitioners and / or any others who are similarly circumstanced?"

Accordingly all parties agreed to pursue this matter based on the above question of law and restrict their respective cases to focus on the said question.

Before I proceed to examine the submissions on this legal issue I would first set out briefly the factual background as revealed by the material presented before this court.

Under the provisions of Homeopathy Act No 7 of 1970, a council called Homeopathic Council is established. During the period of first ten years commencing on the appointed date, the Minister had the power to appoint the members of the council and thereafter they are to be elected by the homeopathic practitioners registered under the Act. Powers of the council includes the power to register homeopathic practitioners. All the members of the council hold office for a term of five years and a member is deemed to have vacated from office on his removal by the Minister.

In the year 2006, a council had been elected and on 20th October 2009, the Minister had removed the members of the said council. Thereafter the Minister had appointed an interim committee and the term of office of the said interim committee came to an end on 30th January 2011. Thereafter, on 28th March 2011, having considered a memorandum submitted by the Minister, the cabinet of ministers had decided that action be taken in consultation with the Attorney-General. Thereafter, acting on the opinion of the Attorney-General, the Minister had appointed several interim committees. One such committee had been appointed with effect from 1st January 2013, and it is this committee that took steps to call for applications to register homeopathic practitioners. On 19th November 2013, petitioners-respondents challenged this decision and invoked the writ jurisdiction of the Court of Appeal. However, the said interim committee had ceased to hold office at the end of 2013 and a fresh interim committee had been appointed thereafter. On 4th December 2015, a gazette was published setting out the names of all registered homeopathic practitioners. In the following year a new Act had come in to force (Homeopathy Act No 10 of 2016) and on 7th November 2016 a council comprising of eleven members had been appointed in accordance with the provisions of the said Act.

The petitioners-respondents on 29th August 2017 had filed an amended petition in the Court of Appeal pleading inter alia that "they are entitled to and / or there are compelling reasons to maintain and continue with the application". Thereafter the impugned judgment of the Court of Appeal was delivered on 15 May 2019. It is also pertinent at this stage to note that the Court of Appeal when granting notices had refused granting interim relief prayed by the petitioners-respondents to restrain the respondents-petitioners calling applications for registration as new homeopathic practitioners and doing any act incidental to and connected with calling said applications and / or making decisions and implementing them.

The learned President's Counsel for the three intervenient petitioners submitted, that they in response to the advertisement P8, submitted applications to register themselves as homeopathic practitioners and obtained registration on or around 07th August 2013. Thereafter, on or around 18th May 2019 the Registrar of the 3rd Respondent-Petitioner Council informed that their registration would be cancelled as per the impugned judgement of the Court of Appeal dated 15th May 2019. He further submitted that the basis or the reason for said decision by the registrar of the council could be attributed to a specific finding of the Court of Appeal in the impugned judgment dated 15th May 2019. The learned judges of the Court of Appeal having granted relief prayed by the petitioner-respondents, further proceeded to hold:

"Learned Senior DSG for the respondents in his written submissions seeks to dismiss the petitioner's application on futility on the basis that five new homeopathy practitioners were registered in response to the advertisement P8 pending determination of this application. That registration of five new members is on the above-mentioned principle of law (is) a nullity".

On behalf of the intervenient-petitioners it was contended that they themselves and others who are similarly circumstanced are truly aggrieved by the impugned judgement, as their registration had been adversely affected without granting a hearing for them. They contend that they were necessary parties for the application and the failure on the part of the petitioners-respondents to name them as respondents is a fatal irregularity.

The registrar of the homeopathic council by the gazette No 1944 dated 05th December 2015, a copy of which is produced before this court by the intervenient-petitioners, had published the names of the registered homeopathic practitioners under the title "list of homeopathy practitioners-general register-2014". The said list contains two hundred and sixty one names including the three intervenient-petitioners. They are listed as 194, 195 and 197. The three petitioners-respondents are listed in the same list as 114,115 and 125. It is also pertinent to observe that the registrar of the homeopathic council had published a similar list of registered practitioners in the gazette no 1350 dated 16 July 2004 under the title "list of homeopathic practitioners – 2003" and the names of the three respondents-petitioners appear under the same sequential numbers. The three petitioners-respondents had produced a copy of this gazette along with their petition when invoking the jurisdiction of the Court of Appeal.

In this context it is pertinent to observe that the petitioners-respondents neither in their original petition dated 02nd April 2013 nor in the amended petition dated 29th August 2017 had prayed for the cancellation of any registration granted pursuant to the impugned advertisement P8. However, they sought interim orders restraining the respondents-petitioners from calling applications for registration as new homeopathy practitioners and registering them under the provisions of the Act as well as directing the Secretary of the homeopathic council to publish an advertisement cancelling the impugned advertisement marked P8, but were not successful as the Court of Appeal did not grant such interim relief.

The learned Deputy Solicitor General while associating himself with the submissions of the learned President's Counsel for the intervenient petitioners submitted, that a motion with a copy of a letter of the Registrar of the homeopathic council confirming the registration of five persons out of twenty persons who submitted applications in response to the impugned advertisement P8, as registered homeopathy practitioners, together with an extract of the gazette dated 04.12.2015 which contains the names of the intervenient petitioners and the date of their registration namely 07th August 2013, was filed in the Court of Appeal on 17th December 2018. Furthermore, it was contended that the written submissions filed on behalf of the respondents-petitioners in the Court of Appeal on 01st March 2019, categorically drew the attention of the court to the fact that five qualified homeopathic practitioners have been selected from among twenty applicants who responded to the impugned advertisement and that their names were published in the gazette dated 04th December 2015. In the aforementioned written submissions it had been contended that the writ application should fail *inter alia* on the ground of futility and due to the failure to sight necessary parties as respondents. However, the learned judge of the Court of Appeal in his judgment dated 15th May 2019 had restricted his consideration to the submission on futility, in deciding to grant the reliefs prayed for in the prayer. Therefore, it is further contended that the learned judge of the court of appeal erred in holding that the registration of five new members a nullity while granting reliefs prayed in the petition as he failed to consider the submission on the failure to sight necessary parties.

Both the learned President's Counsel for the intervenient petitioners as well as the learned Deputy Solicitor General submitted that the finding on the validity of the registration of the intervenient petitioners without affording them an opportunity to present their case violates the core principles on fair adjudication namely *audi alteram partem* a cardinal rule of natural justice. Therefore, they contend that the revised question of law should be answered in the affirmative.

The learned counsel for the petitioners-respondents contests the above positions of the respondents-appellants and intervenient petitioners. He contended that the legal question should be answered in the negative and the cases of respondents-petitioners as well as intervenient petitioners should be dismissed. It is his contention that the respondents-appellants and intervenient petitioners by restricting the scope of the appeal to the sole question of law and thereby abandoning the appeal on the rest of the questions of law have left two main conclusions of the Court of Appeal intact. It is his position that no person should be allowed to be benefitted from an illegal act and the attempt of the intervenient petitioners to derive benefit from illegality should fail. He claims while the two main findings of the Court of Appeal that 'the appointment of the interim committee by the minister is ultravires' and that 'the decisions made by the purported Interim Committee are null and void *ab initio*' remain unchallenged, registration of the intervenient petitioners as homeopathic practitioners has no force in law, even though they were not accorded a hearing in the Court of Appeal. Furthermore, he submits that the intervenient petitioners "cannot possibly claim that they were unaware of the case pending in the court of appeal challenging the legality of the interim committee by the Minister…. and therefore they should have acted with precautions….". Furthermore, he submits that they are not without remedy as they could obtain registration under the provisions of the Homeopathy Act no. 10 of 2016.

As I have enumerated herein before, the scope of this appeal was restricted to a solitary question of law on the basis that arguing the full appeal is only an academic exercise, due to the subsequent changes. Therefore both the learned Deputy Solicitor-General as well as the learned President's Counsel for the intervenient petitioners confined their challenge to the specific finding of the impugned judgment that directly adversely affected the intervenient petitioners. Therefore the sole issue before this court is whether the learned judge of the Court of Appeal erred when he proceeded to hold "that registration of five new members is on the above mentioned principle of law is a nullity" without according a hearing to the said five new members who were registered by the interim committee.

The registration of these five new members had taken place on 07 August 2013 and by that time there was no judicial pronouncement on the legality of the interim committee. Furthermore, the Court of Appeal had declined issuing an interim order to restrain the respondents-petitioners from calling for applications for registration as new homeopathic practitioners and proceeding to register

them or doing any act incidental or connected with calling said applications or making decisions and implementing them.

The Supreme Court in ***Gnanasambanthan v Rear Admiral Perera and others*** [1998] 3 SLR 167 at 172 observed that *"..it is both the law and practice in Sri Lanka to cite necessary parties to applications for Writs of Certiorary and Mandamus".*

In ***Rawaya Publishers and other v Wijedasa Rajapaksha, Chairman Sri lanka Press Council & Others*** [2001] 3 SLR 213 at 216, Justice J.A.N.De Silva, President Court of Appeal (as he then was) citing with approval ***Udit Narayan Singh v Board of Revenue,*** AIR 1963 – SC 786, observed that:

> *"it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board it self is a necessary party, but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties".*

In ***Wijeratne (Commissioner of Motor Traffic) v Ven. Dr Paragoda Wimalawansa Thero et al*** [2011] 2 SLR 258 at 267 the Supreme Court while examining the rules governing the issue of 'necessary parties' to an action observed that;

> *"the second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application".*

The Court further elaborated

> *"A necessary party to an application for a writ of mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the writ of mandamus. All persons who would be affected by the issue of mandamus also shall be made respondents to the application"* (at 268).

In the matter before us, one of the reliefs sought by the petitioners-respondents is a Writ of Mandamus directing the respondents to publish an advertisement cancelling the impugned advertisement calling for applications to register new homeopathic practitioners and the Court of Appeal granted the said relief too. Three intervenient petitioners who gained registration based on the applications submitted in response to the said impugned advertisement are therefore necessary

parties to the said application. They had gained such registration within a period of just over four months of filing the application in the Court of Appeal by the petitioners-respondents. There had been a period of five years between the intervenient petitioners gaining registration and final submissions in the Court of Appeal. Such submissions had been made three years after the publication of the list of practitioners in 2015 that contained *inter alia* the names of the new practitioners who gained registration in 2013. It is also pertinent to observe that the petitioners-respondents filed an amended petition in the Court of Appeal, two years after the publication of the gazette, but opted not to add the practitioners who were registered in 2013 in consequent to the impugned advertisement. Petitioners-respondents failed to provide a valid explanation on their failure to add new practitioners other than the mere assertion that they were unaware of such registration. In my view this assertion is far from truth. It is clear that the publication of the list of practitioners is not unusual. Petitioners-respondents themselves produced the publication in 2004 containing 178 names. Their explanation, the claim of ignorance on the publication of list of practitioners in 2015, at a time they had invoked jurisdiction of a court of law challenging the registration of new practitioners is unacceptable. Filing of the amended petition in 2017 demonstrates that the petitioners-respondents had been vigilant on the changes that had been taking place in relation to matters surrounding the litigation they initiated in 2013. It is also interesting to note that apart from the five persons who had been registered in August 2013, sixty five new persons had been registered in the following year – 2014 and the publication in 2015 contains all persons who have been registered between the time the petitioners-respondents invoked the jurisdiction of the Court of Appeal and December 2015. This increase had taken place within the space of two years in a background there were only one hundred and ninety-two persons who had been registered between the years 1982 and 2011. When all these facts are taken cumulatively, the ignorance pleaded by the petitioners-respondents on the registration of three intervenient-petitioners by 2017, is unacceptable.

Respondent-petitioners having failed to discharge their responsibility to add necessary parties take up the position that the intervenient-petitioners should be denied of any relief by this court as they failed to intervene in the Court of Appeal. It is the contention of the petitioners-respondents that the intervenient-petitioners who gained registration in 2013 performed certain functions associated with the interim committee and therefore they ought to have known about the proceedings pending in the Court of Appeal. However, there is no proof as to the exact nature of interaction the intervenient-

petitioners maintained with the interim committee. Furthermore, there were no interim reliefs granted by the court. Petitioners-respondents further submitted that there is no bar for the intervenient-petitioners to seek registration under the 2016 Act, after satisfying that they possess necessary qualifications and hence they are not without any remedy.

Aforesaid contentions of the petitioners-respondents neither absolve them from the responsibility they shoulder nor valid explanations for their lapse. In my view requiring the intervenient petitioners to recommence the registration process under the 2016 Act, causes nothing but an unnecessary and unwarranted burden on them. In this regard it is pertinent to observe that the qualifications the intervenient-petitioner posses are set out in the petition, affidavit and annexures of the intervention application filed in this court and they are not disputed. Furthermore, it is pertinent to observe that in August 2013 out of twenty applicants, only four had been successful gaining registration. Petitioners-respondents do not claim that the intervenient petitioners do not possess required qualifications. The learned Deputy Solicitor-General submitted that the newly constituted homeopathic council, under the provisions of 2016 Act had already decided to ratify all the registrations previously made.

It is also pertinent to observe that the learned judge of the Court of Appeal has made reference to the findings of the Supreme Court in its judgment in SC FR 891/2009 and had relied on it when he proceeded to observe that the registration of five new members in consequent to impugned P8 advertisement is a nullity. In my view it is necessary to examine the facts and circumstances based on which SC FR 891/2009 had been instituted to decide the relevancy of its judgment to the matters under consideration in the Court of Appeal. In 2006, members to the homeopathic council had been elected for a period of five years. However, in 2009 the Minister had removed them and had appointed an interim committee. The members who were removed by the Minister had invoked the jurisdiction of the Supreme Court in SC FR 891/2009 and had challenged their removal. Meanwhile the term of the interim committee that was appointed in 2009 had come to an end in 2011. Thereafter several interim committees had been appointed until the enactment of the new Homeopathy Act in 2016. The impugned Advertisement P8 had been published on a decision of one such interim committee. The said committee had functioned from 01st January 2013 till end of the year and a new committee had been appointed thereafter. Therefore the scope of the instant writ application is limited to the decisions of the said interim committee appointed on 01st January 2013. The appointment of the members to the 2013 interim committee took place at a time there was no judicial

pronouncement on the initial removal of the members in 2009. Furthermore, the appointment of members to the interim committee in 2013 was not a matter that was impugned in SC FR 891/2009. The said judgment that was pronounced in March 2016 focused on the removal of members in 2009 and the appointment of the interim committee in the same year. The learned Deputy Solicitor-General submitted that the scope of the said judgment does not extend to the subsequent appointments of several interim committees, including the interim committee appointed in 2013 in consequent to a cabinet decision and on the advise of the Attorney-General.

When all these factors are considered in the backdrop of the failure on the part of the petitioners-respondents to add necessary parties to the application – parties who were directly affected from the impugned judgment - the intervenient-petitioners and who are similarly circumstanced - and the fact that they were denied a hearing before the Court of Appeal prior to the impugned judgment was delivered together with the fact that the learned judge of the Court of Appeal failed to consider this issue even though it was specifically raised, I am of the view, that the Court of Appeal erred in failing to hear the Intervenient Petitioners prior to its judgement dated 15th May 2019 and therefore the aforesaid judgement dated 15th May 2019 could not have an adverse impact on the Intervenient Petitioners and /or any others who are similarly circumstanced. Hence, the impugned judgement of the Court of Appeal dated 15th May 2019, is varied accordingly.

We make no order on costs.

Chief Justice

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, PC, J.
I agree.

Judge of the Supreme Court