

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

In the matter of an appeal under and in terms Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Centre for Policy Alternatives (Guarantee) Ltd.,
No. 24/2, 28th Lane, off Flower Road,
Colombo 7.
2. Dr. Paikiasothy Saravanamuttu,
No. 03, Ascot Avenue,
Colombo 5.

SC (FR) Application No. 23/2013

PETITIONERS

Vs.

1. D.M. Jayaratne,
Prime Minister,
Prime Minister's Office,
No. 58, Sir Ernest De Silva Mawatha,
Colombo 7.
2. Chamal Rajapakse,
Speaker of Parliament,
Parliament of Sri Lanka,
Sri Jayawardenapura Kotte.
3. Ranil Wickremasinghe,
Leader of the Opposition,
No. 115, 5th lane,
Colombo 3.
4. A.H.M. Azwer,
Member of Parliament,
No. 4, Bhathiya Road,
Dehiwala.
5. D.M. Swaminathan,
Member of Parliament,
No. 125, Rosmead Place,
Colombo 7.
6. Mohan Pieris,
President's Counsel,
No. 3/144, Kensey Road,
Colombo 8.

7. The Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

RESPONDENTS

BEFORE : Hon. Saleem Marsoof, PC. J,
Hon. Chandra Ekanayake J,
Hon. Sathya Hettige, PC. J,
Hon. Eva Wanasundera, PC. J, and
Hon. Rohini Marasinghe J.

COUNSEL : Viran Corea with Ganeshathasan for the Petitioners.
Palitha Fernando, PC., Attorney-General, with Shavindra
Fernando, PC., Addl. SG, Sanjay Rajaratnam, DSG., Dilip
Nawaz, DSG., Nerin Pulle, SSC., and Manohara
Jayasinghe, SC, for the 7th Respondent.

Argued On : 30.10.2013

Decided On : 24.03.2014

SALEEM MARSOOF, PC. J,

This is an application filed in terms of Articles 17 and 126 of the Constitution seeking redress for the alleged violation of Article 12(1) of the Constitution. The 1st Petitioner, is a body corporate incorporated in Sri Lanka, and registered under the Companies Act No. 7 of 2007, and the 2nd Petitioner, who is a citizen of Sri Lanka, is an Executive Director of the 1st Petitioner company. The said Petitioners have stated in their petition that they make this application in their own right and in the public interest with the objective of safeguarding the rights and interests of the general public of Sri Lanka and securing due respect, regard for, and adherence to, the Rule of Law and the Constitution, which is the supreme law of the land.

The 1st to 5th Respondents are members of the Parliamentary Council established by Article 41A(1) of the Constitution as amended by the Eighteenth Amendment to the Constitution. The 6th Respondent is the incumbent Chief Justice of Sri Lanka, who has been described in paragraph 7 of the petition as the person whom the Petitioners, at the time of filing this application, were reliably aware was named by the President of Sri Lanka in his communication to the said Parliamentary Council, to fill the vacancy in the office of Chief Justice. It is common knowledge that after the removal of the 43rd Chief Justice of Sri Lanka purportedly under Article 107(2) and (3) of the Constitution, the 6th Respondent was appointed as the 44th Chief Justice of Sri Lanka purportedly in terms of Article 107(1) of the Constitution, and currently holds office as such. The 7th Respondent is the Attorney General of Sri Lanka.

Mr. Viran Corea, who appeared at the hearing for the Petitioners, stated that he was only appearing to reiterate what has been set out in the Petitioners' motion dated 18th September 2013, namely that "the Petitioners are placed in a position where they do not wish to participate in the further disposal of this matter which pertains inter-alia to vital issues affecting the integrity of the judicial process." Since the Petitioners have invoked the jurisdiction of this Court in their own right and on behalf of the public interest, I consider it appropriate to deal with the only submission made by Mr. Corea after carefully considering the substantive application of the Petitioners without the benefit of his assistance. Of course, this Court will have to first deal with the preliminary objections that have been taken up by the learned Attorney General, who is the 7th Respondent to this application, and consider the application on its merits only if the preliminary objections are overruled.

The Basis of the Petition

For a fuller understanding of the grievances of the Petitioners, it is useful to summarize at the outset, the main averments of the petition filed by them.

The Petitioners have stated in their petition dated 15th January 2013 that (i) the Order Paper of Parliament of 6th November 2012 included a resolution for the appointment of a Parliamentary Select Committee (hereinafter sometimes referred to as "PSC") to look into certain allegations against the 43rd Chief Justice of Sri Lanka, Hon. (Dr.) Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, who shall hereinafter be referred to as "(Dr.) Shirani Bandaranayake"; (ii) that for considering these allegations, the Speaker of the House of Parliament, purported to appoint in terms of Article 107(2) and (3) of the Constitution and Order 78A(2) of the Standing Orders of Parliament, a PSC consisting of certain persons who are not respondents to the present application; (iii) that Order 78A of the Standing Orders of Parliament was challenged in several writ applications filed in the Court of Appeal by several petitioners other than the Petitioners to the present fundamental rights application and the members of the purported PSC were party respondents to those writ applications; (iv) that the Court of Appeal made a reference to the Supreme Court in terms of Article 125 of the Constitution seeking interpretation of Article 107(3) of the Constitution; (v) that in the meantime, the purported PSC found Chief Justice (Dr.) Shirani Bandaranayake guilty of 3 charges by its purported report dated 8th December 2012; (vi) that on 1st January 2013, the Supreme Court in SC Reference 3/2012 determined that "it is mandatory under Article 107(3) of the Constitution for Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof and the standard of proof of any alleged misbehavior or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehavior or incapacity"; and (vi) that the Court of Appeal, by its judgment in CA (Writ) Application No. 411/2012 dated 7th January 2013 issued a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012.

It is in this backdrop that the Petitioners allege in their petition that their fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution has been violated. The petitioners complain (a) that notwithstanding the determination of the Supreme Court and the judgment of the Court of Appeal, the Speaker of Parliament purported to entertain the purported PSC Report including its findings; and (b) that the Members of Parliament purported to debate the

purported PSC Report and that on 11th January 2013, the Members of Parliament purported to vote on the resolution before Parliament. The Petitioners have quoted in full Article 107(3) of the Constitution, and thereafter asserted that in view of the provisions of Article 4(c) of the Constitution, all matters relating to the investigation and proof of the alleged misbehavior referred to in Article 107(3) could only be carried out by a body established by law, since such investigation clearly involves the exercise of judicial or quasi-judicial powers, and since no law has been enacted by Parliament, the PSC could not have carried out the investigations and arrived at any findings as contemplated by Article 107(3). For these reasons, and in view of the determination of the Supreme Court and the Judgment of the Court of Appeal as aforesaid, the Petitioners assert that Parliament could not have proceeded to pass a resolution calling upon the President of the Republic to remove the 43rd Chief Justice Hon. (Dr.) Shirani Bandaranayake. They have also stated that the Order Paper of Parliament of 10th and 11th January 2013 did not contain a resolution calling upon the President to remove the Chief Justice Hon. (Dr.) Bandaranayake, nor did the agenda include an item for taking a vote on the resolution.

By way of relief, the Petitioners have sought (a) leave to proceed with their application, and several declarations from this Court *inter-alia* to the effect that *unless and until the incumbent Chief Justice retires and / or is found guilty by a competent court, tribunal or institution established by law* (b) the 1st – 5th Respondents cannot in their capacity as the Parliamentary Council and / or as members thereof, make observations to the President in terms of Article 41A of the Constitution with regard to the appointment of a Chief Justice, (c) the 6th Respondent cannot accept the office of Chief Justice or exercise the functions thereof, (d) any attempt by the 1st to 5th Respondents to make observations to the President, in terms of Article 41A of the Constitution, with regard to the appointment of a Chief Justice, would be an infringement of Article 12(1) of the Constitution, and (e) any attempt by the 6th Respondent to accept the post of Chief Justice and / or exercise the functions thereof would be an infringement of Article 12(1) of the Constitution. They have also sought certain restraining orders including interim orders against the 1st to 6th Respondents, which would have the effect of preventing the 6th Respondent from accepting the office of Chief Justice if appointed to it in terms of Article 107(1) or performing any functions of that office. No interim relief has so far been granted by this Court to the Petitioners as prayed for by them.

The Realm of Common Knowledge

It is common knowledge, but unfortunately there is no mention in the petition filed by the Petitioners dated 15th January 2013, that when the Court of Appeal by its aforesaid judgment in CA (Writ) Application No. 411/2012 dated 7th January 2013 issued a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012, the Court of Appeal very clearly explained that insofar as Hon. (Dr.) Shirani Bandaranayake, who was the Petitioner to the said writ application, had failed to cite as party respondent to her writ petition, the 117 Members of Parliament who had signed and presented to the 1st Respondent-Respondent the impeachment motion under consideration, “the quashing of the impugned decision [of the PSC] will not affect the members who subscribed to the impeachment motion, *as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner.*” Since the Court of Appeal had deliberately, and for very good reasons, refrained from prohibiting Parliament from proceeding with the impeachment motion before it, the resolution to remove Chief Justice Hon. (Dr.) Shirani Bandaranayake was debated in Parliament, and passed on 11th

January 2013, with 155 Members of Parliament voting for it, and 49 voting against it. This paved the way for an address of Parliament for the removal of the Chief Justice to be presented to the President of Sri Lanka as required by Article 107(2) of the Constitution and Order 78A(9) of the Standing Orders of Parliament, and thereupon, on or about 12th January 2013, the President made order in terms of Article 107(2) of the Constitution removing the Petitioner-Respondent from the office of Chief Justice of Sri Lanka

While this Court will take judicial notice of the aforesaid omitted facts, this Court will also take note of the fact that the vacancy that arose in the office of Chief Justice of Sri Lanka consequent to such removal, was filled by a warrant issued by the President of Sri Lanka under his hand on 15th January 2013 in terms of Article 107(1) of the Constitution appointing the 6th Respondent as the 44th Chief Justice of Sri Lanka.

It is also noteworthy that by the decision of a Five Judge Bench of this Court (Marsoof J., Ekanayake J., Hettige J., Wanasundera J., and Marasinghe J.) in *The Attorney General v Hon. (Dr.) Shirani Bandaranayake and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), the decision of the Court of Appeal in CA (Writ) Application No. 411/2012 dated 7th January 2013 to issue a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012, was set aside. It is also noteworthy that in the course of arriving at its decision, the Five Judge Bench considered the correctness of the determination of a Three Judge Bench of this Court (Amaratunga J., Sripavan J., and Dep J.,) in SC Reference 3/2012 (SC Minutes dated 1.1.2013), and went on to overrule the same.

The Preliminary Objections

Certain preliminary objections were raised by the learned Attorney General on 16th July 2013 when this case came up for support for leave to proceed, and on the direction of this Court, the said preliminary objections were later set out in a motion dated 19th July 2013 in order to give adequate notice of these objections to the Petitioners as well as the other Respondents to this case. In the light of the submissions made by the learned Attorney General at the hearing into these preliminary objections, I shall for convenience formulate these in the following manner:-

- (1) Insofar as the 6th Respondent has been appointed as the Chief Justice of Sri Lanka by a warrant issued by the President in terms of Article 107(1) of the Constitution, can any of the relief prayed for by the Petitioners be granted in these proceedings in view of the immunity of the President contained in Article 35(1) of the Constitution?
- (2) Insofar as the 6th Respondent, having been appointed in terms of Article 107(1) of the Constitution of Sri Lanka, now holds office and exercises the functions of that office, can this Court grant any of the relief prayed for by the Petitioners that would have the effect of removing the said Respondent from office?

Before dealing with these preliminary objections, I would like to mention that the main relief sought by the Petitioners to this application, have been summarized earlier in this judgment under the heading "The Basis of the Petition", and indeed some of the relief prayed for would not be granted by any court of law as it would be futile to do so. For instance, although certain declarations and restraining orders

have been sought against the 1st to 5th Respondents who constituted the Parliamentary Council that was considering the suitability of the appointment of the 6th Respondent to hold office as Chief Justice, the observations of the said Council in regard to the said matter have already been made, and the 6th Respondent has been appointed to the office in question. As such, the only relief that has been prayed for by the Petitioners that could still have any practical import would, apart from prayer (a) of the Petition that relates to the grant of leave to proceed, would be the declarations sought by prayers (e) and (g) and the restraining order sought by prayer (i) to the petition. By these prayers, the Petitioners have prayed that this Court be pleased to make order granting-

- (a) the Petitioners *leave to proceed* with this application;
- (e) a declaration that *any attempt by the 6th Respondent to accept the post / office of Chief Justice, and/or to exercise the functions thereof* (unless and until the incumbent Chief Justice retired and / or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament, calling upon the President to remove the said incumbent Chief Justice), would amount to an infringement of the Fundamental Rights guaranteed to the Petitioners by Article 12(1) of the Constitution and involves imminent infringement of the fundamental rights guaranteed to the Petitioners by Article 12(1).
- (g) a declaration that in the given circumstances, *any act of acceptance by the 6th Respondent of any appointment to act or function as Chief Justice* (unless the incumbent Chief Justice retires and/or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament calling upon the President to remove her from office) involves a violation of the Constitution of the Democratic Socialist Republic of Sri Lanka, which constitutes infringement of the fundamental rights of the Petitioners and other citizen guaranteed under Article 12(1) of the Constitution and involves imminent infringement of the fundamental rights guaranteed to the Petitioners by Article 12(1).
- (i) an order *restraining the 6th Respondent from accepting the post/office of Chief Justice and/or from exercising the functions thereof*, unless and until the incumbent Chief Justice retires and/or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament, calling upon the President to remove the said incumbent Chief Justice. (*Emphasis added*)

I shall now consider the preliminary objections raised by the learned Attorney General, who has after referring to the relevant constitutional provisions, relied on the decision of a Five Judge Bench of this Court ((S.W.B.Wadugodapitiya J., P.R.P. Perera J., Shirani Bandaranayake J., D.P.S.Gunasekera J., and Ameer Ismail J.) in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309, and submitted that the said decision dealt extensively with both points raised by him, and that this Court need not look any further in disposing of this application.

For the reasons already briefly noted, and with which I shall deal with fully in later on in this judgment, Mr. Viran Corea did not make any submissions on the preliminary objections. However, this Court is bound to carefully examine both preliminary objections taken up by the learned Attorney General,

particularly since the Petitioners have sought to invoke the jurisdiction of this Court not only on their own behalf, but purportedly on behalf of the People of Sri Lanka.

(1) The Presidential Immunity

This preliminary objection is based on Article 35(1) of the Constitution, which occurs in Chapter VII of the Constitution of the Democratic Socialist Republic of Sri Lanka, under the heading “The Executive” and the sub-heading “The President of the Republic.” However, although the learned Attorney General has placed reliance only on Article 35(1), for the purpose of carefully examining this provision, I consider it desirable to quote Article 35 in its entirety. This article provides as follows:-

- (1) *While any person holds office as President, no proceedings shall be instituted or continued against him in any Court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.*
- (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.
- (3) *The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any Court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) [relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament].*

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney- General. (*Emphasis added*)

The Presidential Immunity embedded in Article 35(1) of the Constitution has been considered by this Court in several decisions, but one of the most significant was the decision of this Court in *Mallikarachchi v. Shiva Pasupathy. Attorney-General* (1985) 1 SRI LR 74. In this case, a Five Judge Bench of this Court (Sharvananda C.J., Wanasundera J., Colin-Thome J., Ranasinghe J., and Abdul Cader J.) considered, amongst other things, the immunity of the President under Article 35(1) of the Constitution in the context of a challenge in fundamental rights proceedings under Article 17 and 126 of the Constitution, to the validity of certain orders made by the President proscribing the Janatha Vimukthi Peramuna (JVP) under certain Emergency Regulations made in terms of the Public Security Ordinance. Sharvananda C.J., who pronounced the main judgment of this Court, at page 77 of his judgment, sought to explain the rationale of the Presidential Immunity in the following words:-

“Article 35(1) confers on the President during his tenure of office, an absolute immunity in legal proceedings in regard to his official acts or omissions, and also in respect of his acts or omissions in his private capacity. The object of the Article is to protect from harassment the person holding the

high office of the Executive Head of the State in regard to his acts or omissions either in his official or private capacity during his tenure of the office of President.

Such a provision as Article 35(1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in Article 23(1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. *The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.*

It is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions.”(Emphasis added)

Sharvananda CJ., in the course of his exhaustive judgment, explored both the width and the depth of the Presidential Immunity, and explained therein at pages 78 and 79 that the immunity afforded by Article 35 (1) is personal to the President and is limited to the duration of his office. Furthermore, as His Lordship went on to explain at page 79 of his judgment, it is clear from Article 35 (3) of the Constitution that the Presidential Immunity conferred by Article 35(1) will not apply to any proceedings in court in relation to the exercise of any power pertaining to any subject or function assigned to the President, or remaining in his charge under paragraph (2) of Article 44, and that in relation to the exercise of any power, pertaining to any such subject or function, it is competent to institute any such proceeding against the Attorney-General. Addressing this question in great detail, Sharavananda J observed as follows at page 79 of his judgment:-

“Article 44 (1) empowers the President to appoint Ministers of Cabinet and assign subjects and functions to such Ministers. Article 44 (2) gives a discretion to the President to assign to himself any subjects or functions and vests him with the residual power to remain in charge of any subject or function, not assigned to any Minister under the provisions of Article 44 (1). It follows that in respect of actions or omissions of the President which are not referable to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph 2 of Article 44, proceedings cannot be instituted against the Attorney-General.

Thus though the President is personally immune from legal proceedings in a court in respect of anything done or omitted to be done by him in his official or private capacity, his acts or omissions in relation to the category of matters referred to in Article 35 (3) can be questioned in court in proceedings instituted against the Attorney-General. Thus in proceedings in respect of such acts or omissions of the President, the Attorney-General can properly be made the defendant or respondent.

Article 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney-General in respect of the actions or omissions of the President in the exercise of any powers pertaining to subject or functions assigned to the President or remaining in his charge under that

paragraph 2 of Article 44. It is only in respect of those acts or omissions of the President, that it is competent to proceed against the Attorney-General. *The Attorney-General is thus made constitutionally liable to defend such acts or omissions but his liability does not however extend to acts or omissions of the President committed in the exercise of powers not covered by Article 44 (2) of the Constitution, but in the purported exercise of powers vested in him otherwise.*"(Emphasis added)

It is also clear that the Constitution does not bar altogether legal redress with respect to any grievance that arises from any act or omission of the President during his tenure of office, as such a grievance may be redressed according to law after he ceases to hold office, for which purposes article 35(2) expressly provides that the running of prescription would stand suspended during his tenure of office.

In *Edward F William Silva and Others v. Shirani Bandaranayake* (1997) 1 Sri LR 92, when a preliminary objection was taken up by the Attorney General before a Five Judge Bench of this Court (M.D.H Fernando J., A.R.B.Amerasinghe J., Ramanathan J., S.W.B Wadugodapitiya J., and P.R.P Perera J.) against a challenge of the appointment of Hon. (Dr.) Bandaranayake as a Judge of the Supreme Court in fundamental rights proceedings, P.R.P. Perera J., who set out in a separate judgment his own reasons for agreeing with the decision of the other four judges who heard the case, observed at page 99 of his judgment as follows:-

"We are of the view therefore that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of Law, more so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party. . . *It is only the President who could furnish details relating to the said appointment. . . Such a matter cannot be canvassed in any Court.* Accordingly, we are of the view that this application cannot be entertained by this Court and must be dismissed *in limine*."

In *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri L.R. 309, a Five Judge Bench of this Court (S.W.B.Wadugodapitiya J., P.R.B. Perera J., Shirani Bandaranayake J., D.P.S.Gunasekera J., and Ameer Ismail J.) considered the question of Presidential immunity in the context of a fundamental rights application seeking to challenge to the appointment of Hon. Sarath N. Silva as the Chief Justice of Sri Lanka. The Court was, in that case, confronted with an argument that was founded on a decision of this Court that was made eighteen months before by a Three Judge Bench of this Court (G.P.S de Silva CJ., Fernando J., and Gunasekera J) in *Karunathilaka v. Dayananda Dissanayake, Commissioner of Elections et al (1)* (1999) 1 Sri LR 157 in which the challenge that was made in fundamental rights proceedings was to the inaction on the part of the Commissioner of Elections to hold elections with respect to five Provincial Councils the term of office of whose members had come to an end in June 1998.

The facts of *Karunathilaka's* case were quite interesting. The Commissioner of Elections had taken the necessary steps to fix the date of the poll as 28th August 1998, and the issue of postal ballot papers was fixed for 4th August 1998, but by telegram dated 3rd August 1998 the returning officers suspended the postal voting. No reason was given. The very next day, namely on 4th August 1998, the President purported to issue a Proclamation under Section 2 of the Public Security Ordinance and promulgated an Emergency Regulation which had the effect of cancelling the date of the poll that had been previously scheduled for 28th August 1998. Thereafter the Commissioner of Elections took no steps to fix a fresh

date for the poll and as a result, there was a failure to hold elections for the said Provincial Councils. The Petitioners in that case had alleged violations of Articles 12(1) and 14(l)(a) of the Constitution, by reason of the indefinite postponement of the said elections, citing the Commissioner of Elections as the 1st Respondent to the proceedings. M.D.H Fernando J., with G.P.S. de Silva, C.J. and D.P.S. Gunasekera J. concurring, made a very cryptic observation in the course of his judgment at page 176 to 177, which was very much relied upon by learned Counsel for the Petitioners in the *Victor Ivan* case:-

“What is prohibited is the institution (or continuation) of proceedings against the President. *Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law.* It is also relevant that immunity endures only "while any person holds office as President". It is a necessary consequence that immunity ceases immediately thereafter;I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: *Immunity is a shield for the doer, not for the act.* Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. *Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit;* as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct.” (*Emphasis added*).

Having referred to the above observation of Fernando J. in *Karunathilaka's* case, Wadugodapitiya J. who proceeded to examine the contention of the Attorney-General that by virtue of Article 35 of the Constitution, the President enjoyed absolute immunity from suit in any Court of Law, observed as follows at page 24 of his judgment:-

This case confirms the proposition that the President's acts cannot be challenged in a Court of law in proceedings against the President. However, *where some other official performs an executive or administrative act violative of any person's fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings.* (*Emphasis added*)

It is therefore necessary to examine, apart from the 6th Respondent, who is alleged by the Petitioners to be performing the functions of the office of Chief Justice in violation of their fundamental rights, who else has been cited as respondents to this application, and in what capacities, as it is only one or more of those persons, who can be called upon to justify his or her conduct of violating the alleged fundamental rights of the Petitioners, if they in the above quoted words of Fernando J., rely “on an act done by the President”.

As has been already noted, the Court of Appeal in CA (Writ) Application No. 411/2012, by its order dated 7th January 2013 issued a mandate in the nature of *certiorari* purporting quash the report of the Parliamentary Select Committee dated 8th December 2012 and its findings, but that court not only declined the further relief sought by the predecessor to the 6th Respondent to restrain Parliament

proceeding with the impeachment resolution before it, but expressly stated that the decision of that court would not prevent Parliament from taking further steps pursuant to the said resolution. Parliament moved on to debate the resolution, and with the requisite majority, passed the resolution to remove Hon. (Dr.) Bandaranayake from her office as Chief Justice. The President then made order as he lawfully might, for removing her from office in terms of Article 107(2) of the Constitution. It was in these circumstances that steps had to be taken to fill the vacancy in the office of the Chief Justice.

The 1st to 5th Respondents to this application are the members of the Parliamentary Council established by Article 41A(1) of the Constitution, as amended by the Eighteenth Amendment to the Constitution, which presumably made observations as contemplated by the said Article 41A(1) read with Schedule II Part I item 1 thereof, *prior* to the appointment of the 6th Respondent as the Chief Justice of Sri Lanka by the President of Sri Lanka upon his predecessor Chief Justice being removed from office. It is *not alleged by the Petitioners in their petition that they performed any act relying on the President's act of appointing the 6th Respondent as Chief Justice of Sri Lanka in terms of Article 107(1) of the Constitution.* The only other respondent to this application, besides the 1st to 6th Respondents, is the 7th Respondent Attorney-General, but it is clear from the petition that he has been cited respondent as required by Article 126 read with Article 134(1) of the Constitution and not in terms of the proviso to Article 35(3) of the Constitution.

The distinction is important, as noticing the Attorney General as required by Article 134(1) is to provide him an opportunity of being heard, if he wishes to make submissions in appropriate cases, but he is not called upon to defend any party or person. However, where as contemplated by the proviso to Article 35(3), proceedings are instituted against the Attorney-General instead of the President of Sri Lanka, who as noted earlier enjoys immunity from suit under Article 35(1), when the President is alleged to have performed any function *qua* Minister in circumstances outlined in Article 35(3) of the Constitution, he is called upon to defend the action of the President in his capacity as a Minister in terms of Article 44 of the Constitution. This is not such as case, as what is sought to be impugned in these proceedings, is the President's act of appointing the 6th Respondent as the 44th Chief Justice of Sri Lanka in terms of Article 107(1) of the Constitution, with respect to which act, he enjoys absolute immunity, as so well explained by Shavananda CJ in a passage already quoted from his judgment in *Mallikarachchi v. Shiva Pasupathy, Attorney-General* (1985) 1 SRI LR 74 at page 79. As Sharvananda J. went on to explain at page 80 of that judgment,

The Attorney-General cannot be called upon to answer the allegations in the petitioner's application. *He does not represent the President in proceedings which are not covered by the proviso 1 to Article 35 (3), and is not competent or liable to answer the allegations in the petition.* Counsel for the petitioner sought to justify the citation of the Attorney-General as respondent by reference to Rule 65 of the Supreme Court Rules [now replaced by Rule 44 of the Supreme Court Rules, 1990] which provides that in proceedings under Article 126 of the Constitution, the Attorney-General shall be cited as Respondent. This Rule 65 was designed to meet the mandate of Article 134 which states that the Attorney-General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. *That Rule does not visualise the Attorney-General being made a sole party- respondent to answer the allegations in the petition.* Since infringement of fundamental right by executive or administrative action is alleged, the Attorney-General is noticed

only to watch the interests of the State. He is not cited as the person who has committed the alleged infringement. (*Emphasis added*)

For the reasons outlined above, preliminary objection (1) based on the Presidential Immunity from suit has to be upheld.

(2) Removal of the Chief Justice

In view of the decision to uphold preliminary objection (1) taken up by the Attorney General, it is not strictly necessary to deal with the next preliminary objection taken up by him, but as all learned Counsel have made extensive submissions on the point, I shall advert to it, albeit briefly.

As noted by Wanasundera J. in *Visuvalingam and others v. Liyanage and Others No. (1)*, (1983) 1 Sri LR 203 at pages 248 to 249 and Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309 at page 331, the process outlined in Article 107(2) and (3) is the “only method of removal” of a Superior Court Judge found in the Constitution, and is not vested exclusively in Parliament or the President, and requires Parliament and the President, to act in concurrence. In other words, neither the President of Sri Lanka, nor Parliament, can by himself or itself remove the Chief Justice, a Judge of the Supreme Court, the President of the Court of Appeal or a Judge of the Court of Appeal, and the Constitution requires *two organs of State, both elected by the People, to act together* in the important process of impeaching a Superior Court Judge. This Court has no jurisdiction under the Constitution or any other law to remove a Chief Justice, Judge of the Supreme Court, President of the Court of Appeal or a Judge of the Court of Appeal, nor does it have the jurisdiction or power to grant any prayer in the petition which seeks to directly or indirectly have the effect of removing the 6th Respondent from the office which he now holds as the Chief Justice of Sri Lanka.

In these circumstances and for these reasons, I am of the opinion that preliminary objection (2) too has to be upheld.

Conclusions

I accordingly make order that in view of both preliminary objections taken up by the Attorney General being upheld, the application filed by the Petitioners should stand dismissed. In all the circumstances of this case, I do not make any order for costs. However, before parting with this judgment, I wish to add that Mr. Viran Corea has informed Court that as stated in a motion filed by the Petitioners dated 18th September 2013, he is under instruction from the Petitioners not to participate in the further disposal of this application, and did not make any other submission before this Court. In my view, to seek to withdraw from this case at this stage is an abuse of the judicial process, particularly in the context that the Petitioners had initially invoked the jurisdiction of this Court in their own right and in the public interest. This Court has in these circumstances, given anxious consideration to all matters that arise from the pleadings of the Petitioners, as it is in law bound, in arriving at its decision.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,
I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,
I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,
I agree.

JUDGE OF THE SUPREME COURT

Rohini Marasinghe, J,
I agree.

JUDGE OF THE SUPREME COURT