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

In the matter of an Application for Special Leave to Appeal against the Judgment of the Court of Appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

PETITIONER - APPELLANT

S.C. Appeal No. 67/2013
S.C. Spl. L.A. Application No.24/2013
C.A. (Writ) Application No. 411/2012

-VS-

Dr.Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake,
Residence of the Chief Justice of Sri Lanka,
129, Wijerama Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive, Colombo 08.

PETITIONER - RESPONDENT

01. Hon. Chamal Rajapakse,
Speaker of Parliament,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

02. Hon. Anura Priyadarshana Yapa,
Eriyagolla.
Yakwilla.

03. Hon. Nimal Siripala De Silva,
93/20, Elvitigala Mawatha,
Colombo 08.

04. Hon. A.D. Susil Premajayantha,
123/1, Station Road,
Gangodawila,
Nugegoda.

05. Hon. Rajitha Senaratne,
CD 85, Gregory's Road,
Colombo 07.

06. Hon. Wimal Weerawansa,
18, Rodney Place,
Cotta Road,
Colombo 08.

07. Hon. Dilan Perera,
30, Bandaranayake Mawatha,
Badulla.

08. Hon. Neomal Perera,
3/3, Rockwood Place,
Colombo 07.

09. Hon. Lakshman Kiriella,
121/1, Pahalawela Road,
Palawatta,
Battaramulla.

10. Hon. John Amaratunga,
88, Negambo Road,
Kandana.

11. Hon. Rajav Arothiam Sampathan,
2D, Summit Flats,
Keppetipola Road,
Colombo 05.

12. Hon. Vijitha Herath,
44/3, Medawaththa Road,
Mudungoda,
Miriswatta,
Gampaha.

13. Hon. W.B.D. Dassanayake,
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardenepura Kotte.

RESPONDENT -RESPONDENTS

Before	**:**	Hon. S. Marsoof, PC., J, Hon. P.A. Ratnayake, PC., J, Hon. S. Hettige, PC., J, Hon. E. Wanasundera, PC., J and Hon. R. Marasingha, J.
Counsel	**:**	Palitha Fernando, Attorney General with A. Gnanathasan PC, Additional Solicitor General, W.J.G. Fernando DSG, S. Fernando DSG, Sanjay Rajaratnam DSG, Dilip Nawaz DSG, Janak De Silva DSG, Nerin Pulle SSC and Manohara Jayasinghe SC instructed by State Attorney Sujatha Pieris for the Petitioner-Appellant. Petitioner-Respondent and 1st to 10th and 13th Respondent-Respondents absent and unrepresented. M.A. Sumanthiran with Viran Corea and Niren Anketell for the 11th Respondent-Respondent. J.C. Welimuna with Sunil Watagala, Mewan Kiriella Bandara and Senura Abeywardhena for the 12th Respondent-Respondent.
Argued on	**:**	10.6.2013
Written Submissions	**:**	14.6.2013
Decided on	**:**	28.6.2013

SALEEM MARSOOF J.

This order pertains to certain preliminary objections taken up on behalf of the 11th and 12th Respondent-Respondents (hereinafter sometimes referred to as the "11th and 12th Respondents") in regard to the maintainability of this application.

Basic Facts

By way of introduction, it may be useful to set out in outline the basic facts that give rise to the aforesaid objections. The President of Sri Lanka has made order on 12th January, 2013 in terms of Article 107(2) of the Constitution of Sri Lanka removing the Petitioner-Respondent from the post of Chief Justice pursuant to a resolution for her impeachment being passed by Parliament and the President addressing Parliament as contemplated by Article 107 of the Constitution. Prior to this development, the Petitioner-Respondent had filed an application dated 19th December 2012 in the Court of Appeal seeking *inter alia* a writ in the nature of *certiorari* quashing the report of the

Parliamentary Select Committee that found her guilty of certain charges of misbehaviour and a writ of prohibition against the 1st Respondent-Respondent and/or the 2nd to 13th Respondent-Respondents (hereinafter sometimes collectively referred to as the "Respondent- Respondents") from taking any further steps pursuant to the said report. The Court of Appeal by its Judgement dated 7th January 2013, issued a writ of *certiorari* quashing the said findings and also a writ of prohibition on the Speaker and the Parliamentary Select Committee consisting of the 2nd to 12th Respondent-Respondents restraining them from proceeding to implement the motion of impeachment. The Petitioner-Appellant, the incumbent Attorney General of Sri Lanka, who had assisted the Court of Appeal on its invitation as *amicus Curiae*, sought special leave to appeal form this Court against the said decision of the Court of Appeal, and this Court on 30th April 2013 granted special leave to appeal on two substantive questions of law on the basis that they raise question of public or general importance.

For the purposes of this order it is material to note that after the application for special leave to appeal dated 15th February 2013 was lodged in the Registry of this Court, and notice was dispatched on the Petitioner-Respondent as well as the other Respondent-Respondents, by her motion dated 16th March 2013, the Petitioner-Respondent acknowledged receipt of notice and indicated that the said Respondent will not participate in these proceedings for the reasons set out in the said motion. Furthermore, by 30th April 2013 none of the notices issued on the Respondents-Respondents other than the notice dispatched on the 11th Respondent-Respondent (hereinafter sometimes referred to as the "11th Respondent") had been returned undelivered. The envelope in which the notice issued on the said 11th Respondent had been dispatched did not bear any endorsement relating to the return of the notice undelivered. When the application of the Petitioner-Appellant for special leave to appeal was supported before this Court on 30th April 2013, the Petitioner-Respondent as well as the Respondent-Respondents were absent and unrepresented. The Court heard the Petitioner-Appellant and granted special leave to appeal on the following two substantive questions of law on the basis that they raise question of public or general importance:

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

Court also directed that all parties should file their written submissions within four weeks, and issued notice on the Petitioner-Respondent as well as the Respondent-Respondents that the appeal has been fixed for hearing on 29th May 2013. However, by their respective motions dated 21st May 2013 and 22nd May 2013, the 11th and 12th Respondents informed Court that they could not file caveat or appear in Court on 30th April 2013 for the purpose of objecting to the grant of special leave to appeal against the Judgement of the Court of Appeal as they had not been served with any notice pursuant to the filing of the application for special leave to appeal by the Petitioner-Appellant. In the said motions they alleged that the Petitioner-Appellant has failed to

comply with several of the mandatory provisions of Rule 8 of the Supreme Court Rules, 1990, and moved that Court be "pleased to set aside the said order granting special leave to appeal" and cause the notice of the same to be served on the 11th and 12th Respondents to enable them to file caveat and be "heard in opposition to the grant of special leave to appeal".

The aforesaid motions were considered by this Court on 29th May 2013. The Court examined the contents of the aforesaid motions filed by the 11th and 12th Respondents, the affidavit of the 12th Respondent dated 22nd May 2013, all relevant motions filed by all parties and all journal entries contained in the Supreme Court docket, and held that there has been substantial compliance by the Petitioner-Appellant of the Supreme Court Rules, 1990, but in the interests of justice, the 11th and 12th Respondent-Respondents may be permitted "an opportunity to participate in the proceedings for the grant of special leave to appeal." Court, accordingly set aside its own order granting special leave to appeal "only with respect to the 11th and 12th Respondents". The following paragraphs of the order of Court dated 29th May 2013 clarifies the essence of its ruling on the submissions made on behalf of the Petitioner-Appellant as well as the 11th and 12th Respondents on that date:

> "Learned Counsel for 11th and 12th Respondents have agreed to file caveat within one week from today on behalf of these Respondents, and the question of Special Leave to Appeal with respect to these Respondents will be considered before the same Bench on 10.6.2013. The order granting Special Leave to Appeal against the other Respondents as well as against the Petitioner-Respondent will stand.
>
> Support application for Special Leave to Appeal with respect to 11th and 12th Respondents on 10.6.2013 before the same Bench.
>
> As far as the appeal is concerned, since Special Leave to Appeal had already been granted against the Petitioner-Respondent as well as the other Respondents, the date for hearing of the appeal will be determined on 10.6.2013. Registrar is directed to have this matter listed before the same Bench (namely Hon. Marsoof, PC.J, Hon. Ratnayake, PC.J, Hon. Hettige, PC.J, Hon. Wanasundera, PC.J, and Hon. Marasinghe,J) on 10.6.2013 for support".

Accordingly, on 10th June 2013, the Hon. Attorney-General, who was the Petitioner-Appellant made submissions afresh in support of his application for special leave to appeal, and learned Counsel for the 11th and 12th Respondents were heard in opposition to the grant of special leave to appeal. Submissions were made by Learned Counsel for the 11th and 12th Respondents as well as the learned Attorney-General in regard to the following preliminary objections to the application seeking special leave to appeal against the judgment of the Court of Appeal dated 7th January 2013 sought to be impugned:

1) The Petitioner-Appellant has failed to comply with Rule 8 of the Supreme Court Rules;
2) The Petitioner-Appellant cannot represent State interests and make an appeal against the judgment which the State has failed to comply with;

3) The Petitioner-Appellant is not entitled to seek to appeal against a judgment of the Court of Appeal in a case in which he was not a party and was invited by Court to assist court as *amicus curiae*;
4) The application of the Petitioner-Appellant is an abuse of the process of Court and is futile; and
5) The application of the Petitioner-Appellant has not been properly made as he has failed to file an affidavit in support of his petition filed in this case.

1) Failure to comply with Rule 8

Although in the motions dated 21st and 22nd May 2013 respectively filed by the 11th and 12th Respondent-Respondents and the Statement of Objection filed by the 11th Respondent-Respondent dated 7th June 2013, a failure to comply with certain mandatory provisions of Rule 8 of the Supreme Court Rules, 1990 had in general been alleged, in the course of oral submissions learned Counsel who appeared for the said Respondents stressed in particular the alleged non-compliance by the Petitioner-Appellant of Rule 8(3) of the said Supreme Court Rules, which is quoted below in full:

> "(3) The petitioner *shall tender with his application such number of notices* as is required for service on the respondents and himself *together with such number of copies of the documents referred to in sub-rule (1)* of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall *tender the required number of stamped addressed envelopes* for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."(*Emphasis added*)

The gravamen of the submissions of learned Counsel for the 11th and 12th Respondents in regard to the allegation of non-compliance with Rule 8(3) was that the Petitioner-Appellant had not tendered to Court with his application for special leave to appeal, sufficient number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. Rule 8(1) requires the Registrar of the Court to "forthwith give notice, by registered post, of such application to each of the respondents" The said sub-rule also requires that "a copy of the petition, a copy of the judgment against which the application for special leave to appeal is preferred, and copies of affidavits and annexures filed therewith" to be attached to the notice to be issued by the Registrar. Learned Counsel for the said Respondents submitted, relying on a long line of decisions of this Court including those in *A.H.M. Fowzie & Others v. Vehicles Lanka (Pvt) Ltd.* (2008) BLR 127 and *Tissa Attanayake v The Commissioner General of Election and Others* (S.C. (Spl.) L.A. No. 55/2011 C.A. Writ Application No. 155/2011-SC Minutes dated 21.07.2011), that the failure to comply with Rule 8 of the Supreme Court Rules is fatal to the right of a Petitioner to prosecute his application, and accordingly warrants dismissal *in limine.*

In relation to the factual aspects of the case, learned Counsel for the 11th and 12th Respondents have invited attention to certain motions filed on behalf of the Petitioner-Appellant and a minute dated 26th February 2013 that show that initially the notices were dispatched only to the Petitioner-Respondent and the 11th and 12th Respondents, and that notices on the 1st to 10th and 13th Respondents had only been dispatched by the Registry on 22nd March 2013. From these facts, learned Counsel for the 11th and 12th Respondents invited Court to infer that the Petitioner-Appellant had failed to tender to Court along with his application for special leave to appeal, a sufficient number of notices and documents as required by Rule 8(1) of the Supreme Court Rules, and duly stamped addressed envelopes.

However, in this context this Court cannot ignore the minute of the Registrar of this Court addressed to the Listing Judge dated 18th February 2013 and the Listing Judge's direction dated 20th February 2012, which are reproduced below:

> "18/02/13
>
> Hon. Wanasundera PCJ.
>
> AAL for the Petitioner tendered motion dated 15/2/13 with proxy, petition affidavit and documents and motion that this application be filed to be mentioned on
> 02, 03 or 04 April 2013.
> Subt. for Your Ladyship's directions please.
> Registrar, Supreme Court
>
> R/SC
> List for 'support' on 4/4/2013 and notice to others through the Registry.
>
> Ew
> 20/2/13"

The case was accordingly listed for support on 4th April 2013, on which date the case was re-fixed for support on 30th April 2013.

In this connection, the learned Attorney-General has submitted that the question of compliance with Rules of Court is no more a live issue as this Court has, after a perusal of the record in these proceedings, made order on 29th May 2013 that "Court is of the opinion that there is substantial compliance with the rules of Court". He further submitted that the journal entries in this regard bear testimony to the fact that such notices and documents were in fact lodged in the Registry of this Court and that the said notices were in fact sent by the Registrar of the Court to all the Respondents.

Although It is clear from the journal entries that the Petitioner-Appellant has fully complied with Rule 8(3) of the Supreme Court Rules and tendered to Court sufficient number of notices, documents and stamped addressed envelopes for despatch of notice along with his application for special leave to appeal, as already noted, notices were in fact despatched in two instalments, namely, on 26th February 2013 to the Petitioner-Respondent and the 11th and 12th Respondents who were the only parties who participated in the proceedings in the Court of Appeal in this case, and subsequently on 25th March 2013 to the other Respondents. However, none of these

respondents have responded to the notices of this Court to date, and it may be inferred that the notices have been duly served. In all the circumstances, no prejudice what so ever has been caused to any of the parties in this case by reason of any non-compliance with Rule 8.

I also note that special leave to appeal had been granted in this case against the Petitioner-Respondent as well as the Respondent-Respondents on 30th April 2013, and the said order was set aside by the order of this Court dated 29th May 2013, only to the limited extent of enabling the 11th and 12th Respondents to file caveat and to be heard in opposition to the grant of special leave to appeal. As far as these Respondents were concerned, notice was despatched on them as early as on 26th February 2013, and they have been heard fully in opposition to the grant of special leave to appeal. In any event, as this Court was constrained to observe in its recent decision in *Sumith Ediriwickrama, Competent Authority, Pugoda Textiles Lanka Ltd. and Another v. W.A.Richard Ratnasiri and Others,* SC Appeal No. 85/2004 (SC Minutes dated 22.2.2013), this Court is bound to highlight and apply in the special circumstances of a case "the objective of achieving smooth functioning of this Court", and in all the circumstances of this case this preliminary objection has to be overruled.

2) Comply and Complain

Another preliminary objection taken up on behalf of the 11th and 12th Respondents is that since the legislative and executive arms of government have failed to comply with the impugned judgment of the Court of Appeal, the Attorney-General is not entitled to seek to have the judgment of the Appeal Court set aside or varied by way of appeal. It was submitted by learned Counsel for these Respondents that the Attorney-General was invoking the appellate jurisdiction of this Court as an "effective extension" of the executive arm of government, which has failed to honour and give effect to the decision of the Court of Appeal dated 7th January 2013. They submitted that the Petitioner-Appellant should first comply with the decision of the Court of Appeal and then complain.

The learned Attorney-General has submitted that the objection taken up by the said Respondents is completely misconceived, given that the Attorney-General did not represent any of the Respondents in Court of Appeal in this case. Learned Attorney-General pointed out that at no stage in the pleadings or in the submissions on behalf of the said Respondents was it suggested that the Petitioner-Appellant is seeking to represent the interests of Parliament or any of its committees or members, and submitted that he had decided to invoke the jurisdiction of this Court consistent with the dictates of his conscience to have a grave error committed by the Court of Appeal by seeking to extend its writ to Parliament, thereby eroding the sovereignty of the People. This Court has already granted special leave to appeal on the specific question that arises from the submissions made before this Court by the learned Attorney-General and learned Counsel for the 11th and 12th Respondents, namely whether the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament on the basis that the words "any Court of first instance or tribunal or other institution or any other person" in the said constitutional provision extend to the Parliament or a Committee thereof. Hence, in my view, it is not necessary at this stage for the Court to decide these questions, and it would suffice for me to hold that the

mere fact that the legislative and executive arms of government have not taken cognizance of or complied with the judgment of the Court of Appeal, does not deprive the Chief Law Officer of the State from exercising his constitutional rights under Article 128(2) of the Constitution to seek to rectify, what could turn out to be, a grave error of law. In my view, this preliminary objection too has to be overruled.

3) Amicus Curiae who is not a Party not entitled to Appeal

The third preliminary objection taken up by the 11th and 12th Respondents is that the Petitioner-Appellant in this case, in his capacity as the Attorney General, has no standing or legal authority whatsoever in law to invoke the appellate jurisdiction of this Court in terms of Article 128(2) of the Constitution. Learned Counsel for the said Respondents have stressed that the Attorney-General was not a party to CA Writ application 411/2012 in which the impugned judgment dated 7th January 2013 was pronounced, and had only participated in those proceedings on an invitation from the Court of Appeal to assist Court as *amicus curiae.* They submitted that the Court of Appeal was compelled to seek the assistance of the Attorney-General in this manner as fundamental questions of public or general importance arose in the case, and the said Court considered that the Attorney-General's participation as *amicus curiae* will assist the Court in arriving at its finding, particularly in the context that none of the Respondent-Respondents other than the 11th and 12th Respondents had appeared before that Court in response to its notice.

Leaned Counsel for the 11th Respondents invited the attention of this Court to decisions such as *Chandrasena v. De Silva* 63 NLR 143 and *Abeysundere v Abeysundere* (1998) 1 SLR 185 in which eminent Counsel had been invited by Court to assist as *amicus curiae*, and submitted that it would have been unimaginable for such a Counsel to lodge an appeal where the Court did not adopt the views of the *amicus curiae* in its own decision. Learned Counsel for the 12th Respondent submitted that the Attorney General has misrepresented that he is a "party noticed", and argued that the Attorney General cannot be both a party noticed and *amicus* at the same time. He pointed out that the Court of Appeal in *Land Reform Commission v. Grand Central Ltd* [1981] (2) SLR 147, had censured the Attorney-General when he acted contrary to tradition, prudence and propriety. He citing decisions such as *Moten v. Bricklayers, Masons & Plasterers INT'L Union of America*., 543 F.2d 224, 227 (D.C. Cir. 1976), that it would be most improper for an *amicus curiae* to seek to appeal against a decision made by a court with his assistance.

Focusing on the structure and language of Article 128 of the Constitution, learned Counsel for the 11th and 12th Respondents sought to highlight the concept of "aggrieved party" embodied in Article 128(1) of the Constitution, while the learned Attorney-General adopted an altogether different approach and contended that Article 128(2) cannot be restrictively interpreted. In order to appreciate the contentions of learned Counsel, it is necessary to consider the first two sub-articles of Articles 128, which are for convenience reproduced below:

> "(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any mater or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to

the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings.

(2) the Supreme Court *may, in its discretion,* grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court *shall grant leave to appeal* in every mater of proceedings in which it is satisfied that the question to be decided is of public or general importance. (*Emphasis added*)

learned Counsel for the 11th and 12th Respondents submitted that Article 128 of the Constitution must be read as a whole, and stressed that Article 128(2) cannot be read in isolation or independently from Article 128(1) which confined the right to seek leave to appeal from a decision of the Court of Appeal to an "*aggrieved party to such matter or proceedings*". They argued that a person who was not a party to a case or proceeding in the Court of Appeal, such as an *amicus curiae,* is not entitled in law to prefer an appeal against a judgement of the Court of Appeal, as the right to appeal is vested only on an "aggrieved party" under the first two sub-articles of Article 128 of the Constitution. For this proposition, they sought to rely on the decision of this Court in *Mendis v. Dublin De Silva* 1990 2 SLR 249, in which they contended that this Court had held that in terms Article 128 of the Constitution, an appeal lies to the Supreme Court at the instance of an aggrieved party, that is a person "against whom a decision has been pronounced which wrongly deprived him of something or wrongly affected his title to something." They further contended that the Attorney General has no mandate, authority or inherent power to seek to deny parties to a case of the benefit of a judgement that has not been challenged by any of them. They submitted that any other interpretation of Article 128 will open the flood gates for the State to intervene in private litigation through the office of Attorney-General, which is now directly vested under the President of Sri Lanka.

In response to these submissions, the learned Attorney-General submitted that there is no impediment for an appeal to be preferred in terms of Article 128(2) of the Constitution by a person who had assisted Court as *amicus curiae.* Citing the decision of this Court in *Bandaranaike v. Jagathsena* (1984) 2 SLR 397, he submitted that the concept of "aggrieved party" was confined in its application to Article 128(1) of the Constitution, and argued that Article 128(2) was much wider in several respects. He further submitted that in his capacity of the Chief Law Officer of the State, he was entitled to seek leave to appeal from a decision of the Court of Appeal where the appeal involves a matter of public or general importance. He emphasised that under the proviso to Article 128(2) of the Constitution, this Court is bound to grant leave to appeal on all matters in "every mater of proceedings in which it is satisfied that the question to be decided is of public or general importance."

Having carefully examined all these submissions, it is necessary to state at the outset that a person, whether he or she be an eminent counsel or not, who was called upon by Court to assist

as *amicus curiae* in any particular case or matter, cannot *qua amicus curiae* seek to appeal or move for special leave to appeal from any order or judgment that may thereafter be pronounced by Court. The principle is well illustrated by the United States Court of Appeals, District of Colombia Circuit decision of *Moten v. Bricklayers, Masons & Plasterers*, 543 F.2d 224 (D.C.Cir.1976), cited by learned Counsel for the for the 11th Respondent in this case, in which an employers' association appeared at hearings on a proposed settlement of the suit, but never sought to become a party. The Court of Appeals held that in these circumstances, the employers' association stands "in a relationship analogous to that of *amicus curiae* .... As *amicus curiae* may not appeal from a final judgment, the appeal ... must be dismissed for want of jurisdiction."(at page 227).

This Court cannot ignore the multifarious functions and the immense responsibility vested in the Attorney-General by the Constitution and other laws, which were subjected to minute examination by Ranasinghe J. in *Land Reform Commission v. Grand Central Ltd* [1981] (2) SLR 147 (CA). The sentiments expressed by the Court of Appeal in that case were echoed by a Five Judge Bench of the Supreme Court headed by Neville Samarakoon CJ., who noted in the course of his judgment in *Land Reform Commission v. Grand Central Limited* [1981] (1) SLR 250 (SC) at page 261 that-

> "The Attorney-General of this country is the leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It is for that reason that all Courts in this Island request the appearance of the Attorney General as *amicus curiae* when the Court requires assistance, which assistance has in the past been readily given. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes."

The learned Attorney-General has asserted that he is before this Court in his capacity as the Chief Legal Officer of the State seeking to discharge a duty vested in him under Article 128(2) of the Constitution seeking to remedy grave errors committed by the Court of Appeal on matters of extreme public and general importance. He has submitted that the mere circumstance that he had been invited by the Court of Appeal to assist Court in regard to these matters, does not, and cannot take away his exclusive duties as the Chief Legal Officer of the State, which he submits he is seeking to exercise in the highest traditions of his office.

The question for this Court in this context is a simple one. Should the ambit of Article 128(2) of the Constitution be construed restrictively in the light of the concept of "aggrieved party" found in Article 128(1), or should Article 128(2) be interpreted as a provision distinct and independent from Article 128(1) to extend the right to invoke the appellate jurisdiction of this Court to a broader category of persons? Submissions were made by learned Counsel as to whether Article 128(2) is separated from Article 128(1) by a full stop or a semi-colon, and as to whether the Sinhalese version of the Constitution should prevail over the Tamil or English versions where there is any inconsistency. This Court is vested with the exclusive power of interpreting the Constitution, and has not hesitated in extreme cases such as *Weragama v Eksath Lanka Wathu Kamkaru Samithiya and Others,* (1994) I SLR 293, to replace a semi-colon with a full stop to

overcome an "obvious error". What is most important is to give effect to the manifest intention of the law makers in the discharge of their legislative functions, and to me, as far as the question arising in this appeal is concerned, there can be no ambiguity or uncertainly in regard to the ambit of Article 128(2), which can be easily be gathered from its very provisions.

Article 128(1) of the Constitution of Sri Lanka seeks to confer the power to the Court of Appeal to grant leave to appeal e*x mero motu* or at the instance of any aggrieved party to any matter or proceedings before it, from any final order, Judgment, decree or sentence of that Court in any matter civil or criminal, which involves a substantial question of law. It is manifest that Article 128(2) differs from 128(1) in many ways. Firstly, the Supreme Court may grant special leave to appeal in terms of 128(2) even where the Court of Appeal has refused to grant leave to appeal or where regardless of whether the Court of Appeal has allowed or refused leave, the Supreme Court is of the opinion the matter is fit for review by the Supreme Court. Secondly, Article 128(2) contemplates the grant of special leave to appeal even against interlocutory orders of the Court of Appeal, which did not fall within the purview of Article 128(1). Thirdly, not only an "aggrieved party", but any person whomsoever who can satisfy Supreme Court that the matter is fit for review by it, may succeed in obtaining special leave to appeal under Article 128(2) of the Constitution. Fourthly, the Supreme Court has a broad discretion to grant special leave to appeal where it considers the matter fit for review by it, except where as provided in the proviso to Article 128(2), it is satisfied that the matter is of public or general importance, in which event the Supreme Court is bound to grant leave to appeal. In my view, the submission of learned Counsel for the 11th and 12th Respondents that Article 128(2) should be read in the light of Article 128(1) which confines the right to appeal to an "aggrieved party" is bereft of merit.

In *Bandaranaike v. Jagathsena* (1984) 2 SLR 397 the Supreme Court had to deal with a similar situation, and held that it has a wide discretion to entertain appeals even from a person who were not a party to the proceedings before the Court of Appeal. Colin-Thome J (with whom Wanasundera J and Cader J concurred) observed at page 406 of the judgment that-

> Under Article 128 (2), the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Under *Article 128 (2) you do not have to be a party in the original case.* (*Emphasis added*).

The third preliminary objection is therefore overruled.

4) Abuse of Process of Court

The next preliminary objection was that the application of the Petitioner-Appellant for special leave to appeal is an abuse of court. Learned Counsel for 11th Respondent made submissions on the basis that the impeachment resolution to remove the Petitioner-Respondent from the post of Chief Justice was debated in Parliament on 10th and 11th January 2013, and the President has made an order on 12th January 2013, removing her from Office. In these circumstances, he has submitted that both the Parliament and the President of Sri Lanka have failed to comply with the

judgement of the Court of Appeal, and hence any appeal from the decision of the Court of Appeal amounts to an abuse of process of Court.

The response of the learned Attorney-General to these submissions is that the sequence of events connected with the removal from office of the Petitioner-Respondent has resulted in a legal antinomy where the actions of the legislature and the executive appear to be at odds with the ruling of the Court of Appeal. He has submitted that the impugned judgment of the Court of Appeal is bad in law, and that Parliament, which is constitutionally vested with the powers that could ultimately lead to an order of removal from office of a superior court judge, as well as the President who is vested with the power to make such an order, were left with no choice but to exercise their powers under the Constitution notwithstanding an apparent inconsistency with the ruling of the Court of Appeal, which was made without jurisdiction.

In my opinion, the mere fact that the legislative and executive arms of government have not taken cognizance of or complied with the judgment of the Court of Appeal, does not deprive the Chief Law Officer of the State from exercising his constitutional rights under Article 128(2) of the Constitution to seek to rectify, what he considers a grave error of law. Accordingly, I have to overrule the fourth preliminary objection raised to the maintainability of this case.

5) Failure to file Affidavit

On the final preliminary objection raised by the 11th and 12th Respondents, learned Counsel have submitted that since the Attorney General has failed to file an affidavit in support of the allegations of facts set out in his purported application, the said application should be dismissed *in limine.* On the other hand, the learned Attorney-General has submitted that Rule 6 of the Supreme Court Rules, 1990 is pertinent to this matter. This Rule provides as follows:-

> Where any such *application contains allegations of fact which cannot be verified by reference to the judgement or order of the Court of Appeal* in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an *affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal* or the original court or tribunal)..... Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted , if reasonable grounds for such belief be set forth in such affidavit. *(Emphasis added)*

The Attorney General has submitted that the Petition of Appeal does not contain any allegations of fact, and that in consequence of a direction made by this Court on 4th April 2013, the record of the Court of Appeal was called for by this Court and has been received in the Registry. He has further submitted that in those circumstances Rule 6 did not impose any obligation on the Petitioner-Appellant to file any affidavit in support of his petition. He emphasises that his application for special leave to appeal raised several substantive questions of law, and in fact this Court has already granted special leave to appeal on two of them. I am persuaded that for those reasons, the preliminary objection must be overruled.

Conclusions

This Court has already granted special leave to appeal against the Petitioner-Respondent and the Respondent-Respondents on two substantial questions of law involving public and general importance, and was inclined to permit the 11th and 12th Respondent an opportunity of opposing the grant of special leave to appeal in the interest of justice. Court has heard learned Counsel for the aforesaid Respondents and learned Attorney-General on these preliminary objections, and I am of the firm opinion that they should be overruled, and I make order accordingly, overruling the same. I would also grant special leave to appeal against the 11th and 12th Respondent on the same questions which are for convenience set out below:

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

Written submissions of all parties shall be filed within two weeks from today. Registrar is directed to list this appeal to be mentioned on 16th July, 2013 for fixing a date for hearing.

JUDGE OF THE SUPREME COURT

P.A. RATNAYAKE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

S. HETTIGE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

R. MARASINGHE, J.
I agree.

JUDGE OF THE SUPREME COURT