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

Vasudeva Nanayakkara,
Attorney at Law,
Advisor to HE the President,
Secretary, Democratic Left Front,
No. 491/1, Vinayalankara Mawatha,
Colombo 10.

PETITIONER

S.C. Application No. 209/07

VS

1. K. N. Choksy, P.C., M.P.,
Former Minister of Finance,
No. 23/3, Sir Ernest de Silva Mawatha,
Colombo 7.

2. Karu Jayasuriya, M.P.,
Former Minister of Power & Energy,
No. 2, Amarasekera Mawatha,
Colombo 5.

3. Ranil Wickremasinghe, M.P.,
Former Prime Minister,
No. 115, 5th Lane,
Colombo 3.

And 28 others

RESPONDENTS

AND NOW BETWEEN

Dr. P. B. Jayasundera
No.761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8TH RESPONDENT PETITIONER

S.C. Application No. 209/07

VS.

The Attorney-General
Attorney General's Department,
Colombo 12.

31ST RESPONDENT-RESPONDENT

BEFORE	:	Hon. J. A. N. de Silva	Chief Justice
		Hon. Dr. S. A. Bandaranayake	Judge of the Supreme Court
		Hon. S. Tilakawardane	Judge of the Supreme Court
		Hon. S. Marsoof, P.C.	Judge of the Supreme Court
		Hon. D. J. De S. Balapatabendi	Judge of the Supreme Court
		Hon. K. Sripavan	Judge of the Supreme Court
		Hon. P. A. Ratnayake, P.C.	Judge of the Supreme Court

COUNSEL : Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th Respondent–Petitioner

M. A. Sumanthiran with Viran Corea for the Petitioner-Respondent

Nihal Sri Amarasekera for 22nd Respondent-Respondent appearing in person

Mohan Pieris, P.C. for the Attorney General with J. Wijetilleke, A.S.G., Sanjaya Rajaratnam D.S.G., and Nerin Pulle, S.S.C. as amicus

ARGUED ON : 24.09.2009

DECIDED ON: 13.10.2009

MARSOOF, J.

I have had the advantage of perusing the draft judgement of His Lordship the Chief Justice, with which I respectfully agree. However, I wish to make a few additional observations.

The 8th Respondent-Petitioner (hereinafter referred to as the Petitioner) has prayed in his amended petition dated 31st July 2009 for the vacation of the order of this Court dated 8th October 2008 by which he was required to file an affidavit containing "a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" (prayer (a)) and additionally for an order relieving the Petitioner of the undertaking contained in paragraph 13 of his affidavit dated 16th October 2008 whereby such a firm statement was made by him (prayer (b)). The Petitioner has also moved for any other and further relief that this Court may consider fit and meet (prayer (c)).

Mr. M.A. Sumanthiran, Senior Counsel for the Petitioner-Respondent, has made extensive submissions as to why in his view this Court should not vacate its order dated 8th October 2008 or permit the Petitioner to withdraw his undertaking given to

Court in his affidavit dated 16th October 2008. In particular, he has submitted that the judgement of this Court dated 21st July 2008 delivered by his Lordship Hon. Sarath N. Silva, C.J., (with Hon. Amaratunga, J. and Hon. Balapatabandi, J. concurring) contained serious findings against the Petitioner, which led to the determination that the Petitioner was primarily responsible for certain violations of fundamental rights by the executive and administrative action of the State. Mr. Sumanthiran pointed out that the Petitioner was directed to pay a sum of Rs. 500,000/- as compensation to the State, and submitted that it is clear from the tenor of the said judgement that the Petitioner was not a fit person to hold public office.

Mr. Sumanthiran also relied on *inter alia* the decision of this Court in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 to submit that the Supreme Court has no statutory jurisdiction to re-hear, reconsider, revise, review, vary or set aside its own orders. He also stressed that accordingly, neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2008 can lawfully be revised or varied by this Court. This submission was independent of the preliminary objection taken by him in regard to the power of the Chief Justice to constitute a Bench comprising five or more judges to hear, in terms of Article 132(3) of the Constitution, the matter arising from the amended petition of the Petitioner dated 31st July 2009, which was disposed of unanimously by this Court earlier in the proceedings.

Mr. Faiz Mustapha, P.C. submitted on behalf of the Petitioner that the only sanction imposed against the Petitioner in the said judgement was the aforesaid order for compensation, and stressed that the said judgement contained no finding that the Petitioner was not a fit person to hold public office. He also emphasized that the main judgement in this case fell short of either removing the Petitioner from the substantive office he then held as the Secretary to the Ministry of Finance or barring him from holding public office in future. He further submitted that the Court, upon delivering the judgement dated 21st July 2008, became *functus*, and could not have lawfully made the order dated 8th October 2008 which required the Petitioner to file the affidavit in question.

In my view, the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution to redress alleged infringements or imminent infringements of fundamental and language rights is unique in that it is an original jurisdiction vested in the apex court of the country without any provision for review through appellate or other proceedings. While our hierarchy of courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the oft used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism, the remedy provided by Article 126 is fraught with the danger of becoming an "unruly horse", and for this reason has to be exercised with great caution. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the *Fernandopulle* case stressed the need for finality, and very clearly laid down that this Court is not competent to reconsider, revise, review, vary or set aside its own judgement or order (in the context of a fundamental rights application) *except*

under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error *(per incuriam).*

Although the Petitioner has adverted to the doctrine of *per incuriam* as a basis for relief in his amended petition dated 31st July 2009, his Senior Counsel Mr. Mustapha submitted that he does not propose to rely on this doctrine, the parameters of which have been succinctly explained by his Lordship Hon. Amarasinghe, J., in the course of his judgement in the *Fernandopulle* case. Accordingly, in the absence of any contention that the judgement of this Court dated 21st July 2008 was pronounced or the order of this Court dated 8th October 2008 was made *per incuriam*, I agree with his Lordship the Chief Justice that the relief prayed for by prayer (a) of the amended petition filed by the Petitioner should be refused.

This does not, however, conclude the matter, as it is submitted that in the peculiar circumstances of this case, this Court should in the exercise of its inherent powers, consider granting relief to the Petitioner as prayed for in prayers (b) and /or (c) of his amended petition. Mr. Faiz Mustapha, P.C., in the course of his submissions, stressed that the former Chief Justice Hon. Sarath N. Silva was actuated by malice towards his client and stressed the element of coercion which he alleged vitiated the affidavit dated 16th October 2008 filed by the Petitioner in these proceedings. He submitted that on 8th October 2008, the Petitioner was directed by this Court contrary to all norms of natural justice, to file the said affidavit giving a "firm" undertaking not to hold public office in future, and that he had a reasonable apprehension that if he failed to comply with the order of Court he would have been held in contempt of court. It is in this context that the question arises as to whether in the peculiar circumstances of this case, the Petitioner may be permitted to withdraw the undertaking contained in the affidavit filed by him.

As his Lordship Sharvananda, A.C.J., observed in *Kumarasinghe v Ratnakumara and Others* [1983] 2 Sri LR 393 at page 395, "an affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath", and there can be no doubt that "facts" would include a state of mind or belief. Indeed, in my view, a person may even choose to give a binding undertaking by way of affidavit, to do or not to do something. The most important characteristic of an affidavit is its voluntary nature, and there can be no doubt that no court will act on an affidavit that has been extracted using duress or coercion. The onus would be on the person asserting duress or coercion to show that the threat of harm was so immediate and proximate that it deprived the affidavit of its voluntary character. It is, however, unnecessary to embark on an inquiry into the degree of immediacy or proximity of the alleged coercion or duress, as in my opinion this matter can be resolved on other grounds which render such an inquiry futile.

As strenuously contended by Mr. Mustapha, P.C., neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2009 debarred the Petitioner from holding public office, and the omission to do so was perhaps due to the Court being mindful of the Petitioner's fundamental right guaranteed by Article 14(1)(g) of the Constitution to engage in any "lawful occupation, profession, trade, business or enterprise" which cannot be taken away except in according with law

following due process. He submitted that the phraseology of Article 14(1)(g) clearly applies to the holding of public office, and that the relevant disciplinary authority who had the power of dismissal with respect to the Petitioner while he held office as the Secretary to the Ministry of Finance was the President of the Republic, who in terms of Article 52 of the Constitution was the appointing authority to Secretaries of Ministries. He also submitted further that since this Court has not made any "final order" after the Petitioner filed his affidavit dated 16th October 2008, the Court may consider permitting the Petitioner to withdraw the said affidavit in its entirety, or at least consider relieving the Petitioner of the undertaking contained in paragraph 13 of the said affidavit not to hold public office, as prayed for in paragraph (b) of the prayer to his amended petition.

I am of the considered opinion that there is merit in the submissions made by Mr. Mustapha, P.C. In particular I find that the judgement of this Court dated 21st July 2008 did not hold that the Petitioner is a person unfit to hold public office and remove him from the post he held or debar him from holding public office in the future. In my opinion, the remedy enshrined in Article 126 of the Constitution is ill-equipped to determine the suitability of persons to hold office, whether of a public or private nature. The procedure applicable to deal with applications relating to violations of fundamental rights and language rights is found in Part IV of the Supreme Court Rules, 1990, formulated under Article 136 of the Constitution, and adopting this procedure, the Court arrives at its findings after examining the affidavits and documents that are filed by the parties with their pleadings. While the said procedure is appropriate to determine the question whether there has been an infringement or imminent infringement of any fundamental right or language right, in my opinion, it is not at all appropriate to determine the suitability of any person to hold or continue to hold public office.

Unless contrary provision is made by legislation or in the letter of appointment, the provisions of the Establishments Code (Vol. II) apply with respect to disciplinary proceedings against public officers, which could result in various punishments being imposed including dismissal from service of an officer who is found to be unfit to hold public office. The said procedure is characterized by a preliminary investigation, a charge sheet, and the testimony of witnesses under oath or affirmation subject to the right of cross-examination, which are all safeguards provided by the law to such public officers. As Wigmore observes at § 1367 of his treatise titled *Evidence* (J. Chadboum rev. 1974), cross-examination "is the greatest legal engine ever invented for the discovery of truth." It is an important safeguard provided by the law to a person who is subjected to any legal process, whether a criminal trial or disciplinary inquiry, which might ultimately result in the deprivation of his life, liberty or means of livelihood. Such safeguards are unavailable to a public officer who is cited as a respondent to a fundamental rights application. The Disciplinary Authority with respect to Secretaries of Ministries appointed by the President under Article 52 of the Constitution is the President himself, and disciplinary proceedings relating to such Secretaries are governed by the Minute on Secretaries 1979, as subsequently amended, which also contains some important safeguards. It is in view of the absence of such safeguards in fundamental rights proceedings that the Supreme Court has developed the practice of forwarding a copy of any judgement containing adverse

findings against a public officer to the relevant disciplinary authority for it to consider appropriate disciplinary action, without making any findings of its own in regard to the suitability of such public officer to hold public office.

For the purpose of considering the application made by the Petitioner in his amended petition, it is important to advert to the process followed by this Court that led to the impugned order of this Court dated 8th October 2008. When this case was mentioned in Court on 8th September 2008, before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. on a motion seeking certain incidental orders to give effect to the judgement of this Court dated 21st July 2008 and which had no bearing to the propriety of the Petitioner holding office, it was submitted by Mr. Sumanthiran that the Petitioner is "yet continuing to hold public office notwithstanding the fact that the finding of this Court is that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution" and was therefore disqualified from holding public office. The Court observed that there is merit in this submission, but very rightly directed that "the matter should be referred to the bench which heard the case for further orders." Accordingly, Court expressly directed that the case be mentioned "on 29th September 2008 *before the same Bench that heard the main case*", namely his Lordship Hon. Sarath N. Silva, C.J., Hon. Amaratunga, J. and Hon. Balapatabandi, J.

However, for reasons that do not appear from the docket, on 29th September 2008 the case did not come up before the aforesaid Bench that heard the main case, but was once again taken up before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. Unfortunately, the Bench before which this case was mentioned on that date, did not decline to hear the matter on the basis that the Bench was not properly constituted. On the contrary, the said Bench noted that despite the finding in the main judgement that the Petitioner has infringed certain fundamental rights, he was "continuing to hold public office", and directed that notice be issued on the Petitioner to be present in Court on the next date (8th October 2008) and "to reveal to Court –

(1) whether he continues to hold any office under the Republic, and if so, the nature of such office and the place at which he is functioning; and

(2) whether he is holding office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka, and if so, the nature of such office."

It is also significant that the Court expressly directed "this matter to be resumed before *the same Bench* on 08.10.2008."

It is therefore manifest that although the order of this Court dated 8th September 2008 clearly contemplated that the question of the propriety of the Petitioner holding public office should be considered by the very same Bench which pronounced the main judgement dated 21st July 2008, the subsequent order of Court dated 29th September 2008 resulted in the case being "resumed" before a differently constituted Bench on 8th October 2008. While in my considered opinion, the proceedings relating

to the Petitioner conducted on 8th October 2008 were null and void due to the improper constitution of the Bench, the said proceedings were also conducted in violation of the salutary *lex curiae* of this Court which was explained by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 87 as follows:

> "……law, practice and tradition require(s) that matters pertaining to a decided case should be referred to the Court composed of the Judges who had heard the case. The practice of the Court in this regard is the law of the Court *lex curiae* - and it must be given effect to in the same way in which a rule of Court must be given effect to."

The rationale and justification for this practice of Court is that it is only the Bench which pronounced a judgement or order that is in the best position to reconsider, revise, review, vary or set aside its judgement, weather on the basis of manifest error (*per incuriam*) or any other ground. Mr. Sumanthiran, who made extensive submissions regarding this salutary practice, nevertheless contended that there is no hard and fast rule that a case should be taken up before the same Bench which pronounced the main judgement for any "incidental order", and that any Bench of this Court could have dealt with the question of propriety of the Petitioner holding public office as it did on 8th October 2008.

While I agree with Mr. Sumanthiran that any Bench of this Court could make "incidental orders" to give effect to its judgements and decisions, insofar as this Court in its judgement pronounced on 21st July 2008 did not make any order having the effect of restraining the Petitioner from continuing to function as Secretary to the Ministry of Finance or in general seek to disqualify him from holding public office in the future, I am of the opinion that what the Court sought to do on 8th October 2008 was to reconsider and vary its judgement pronounced on 21st July 2008. This could only have been done by a Bench consisting of the same judges who heard the main case and pronounced judgement, and this Court was fully conscious of this requirement when it made order on 8th September 2008 that this issue should be dealt with by "*the same Bench that heard the main case*". Of course, as observed by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 86, there could be circumstances in which it is not possible to constitute the same Bench for reviewing an earlier decision, as "for instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason", in which circumstances the review could have been undertaken by a Bench consisting of as many of the judges of the Bench that made the decision sought to be reviewed. However, in the absence of any suggestion that any such circumstances existed on 8th October 2008 when the impugned order was made, it is unfortunate that the Bench of this Court that pronounced the main judgement was not constituted to deal with the question of suitability of the Petitioner to hold public office.

Apart from this, it is necessary to observe that even on 8th October 2008 this Court did not make any determination regarding the propriety of the Petitioner holding public office. After the Petitioner, through his Counsel Mr. Mustapha, intimated to Court

that he had tendered his resignation from the post of Secretary to the Ministry of Finance within four days from the date of pronouncement of the main judgement, and that he did not hold any office in any establishment in which the Government of Sri Lanka had any interest, Court only directed the Petitioner to file an affidavit giving a "firm" undertaking that he will not in the future hold public office.

In my considered opinion, on 8th October 2008 this Court could not have lawfully made a determination that the Petitioner was not fit to hold public office, since it had not afforded the Petitioner a proper opportunity of being heard on his fitness or otherwise to hold public office. Imposing a life-time bar on the Petitioner holding public office would not only have violated his fundamental right guaranteed by Article 14(1)(g) of the Constitution but would also have offended the rule of proportionality. Such a determination could also have impinged on the Petitioner's franchise in so far as it would have prevented him from seeking election to Parliament, the Provincial Council or even a local authority. The direction made by Court on 8th October 2008 spelling out the content of an affidavit to be filed by the Petitioner was an attempt to achieve indirectly what it could not have done directly, and additionally, had the sanction of contempt of court.

I am conscious of, and very much concerned about, the infirmities of the affidavit dated 16th October 2008 that was filed by the Petitioner pursuant to the order of this Court dated 8th October 2008. It is clear that the said affidavit seriously compromised the fundamental right of the Petitioner guaranteed by Article 14(1)(g) of the Constitution, giving rise to the question as to whether a person may lawfully waive a fundamental right guaranteed by the Constitution in this manner. In the United States, the Courts have consistently held that in general certain constitutional rights primarily granted for the benefit of the individual may be waived, but others enacted in the public interest or on grounds of public policy cannot be so waived. The said dichotomy did not find favour in the Supreme Court of India, where in *Basheshar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan & Another* (1959) Vol. 46 AIR (SC) 149, the Court by majority decision held that none of the fundamental rights guaranteed by the Constitution of India could be waived. As Hon. Bhagwati, J., observed at page 160 of the said judgement–

> "… it is the sacred duty of the Supreme Court to safeguard the fundamental rights which have been for the first time enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself ……...But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution, there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution."

This decision has been followed consistently in India and was also cited with approval in *Herath Banda v. Sub Inspector of Police, Wasgiyawatta Police Station, and Others* [1993] 2 Sri LR 324, in which this Court refused an application to withdraw a fundamental rights application on the basis that the grievance has been settled. It is

significant to note that at page 325 of his judgement Hon. Amarasinghe, J., stressed that applications pertaining to fundamental rights are not ordinary private matters, and observed that he is "reluctant to accept any suggestion that the question of withdrawal (of a fundamental rights application) depends on the importance of the right violated." Following the reasoning in the *Basheshar Nath* case, his Lordship doubted that any useful purpose could be served "by attempting to arrange the rights on a hierarchical scale." I hold that none of the fundamental rights guaranteed by the Constitution may be compromised or waived by any person who is otherwise entitled to its protection. Accordingly, insofar as the Petitioner is not competent to compromise or waive his fundamental right guaranteed by Article 14(1)(g) of the Constitution, he is not bound by the undertaking given by him in paragraph 13 of his affidavit dated 16th October 2008.

Mr. Faiz Mustapha P.C. has urged this Bench, which has been specially constituted by his Lordship the Chief Justice, and consists of not only the honourable Judges who pronounced the judgement dated 21st July 2008 but also the honourable Judges who made the order dated 8th October 2008 (other than Hon. Justice Sarath N. Silva, C.J., who has since retired and Hon. Amaratunga, J., who has declined to sit), to consider granting the Petitioner relief, in the exercise of the inherent power of Court, by permitting him to withdraw the affidavit dated 16th October 2008 filed by him. He has further submitted that since no order has been made by this Court with reference to the said affidavit, the Petitioner is entitled to withdraw it. Alternatively, Mr. Mustapha has urged Court to relieve the Petitioner of the undertaking given by him in paragraph 13 of the affidavit not to hold any public office in future.

This Court, no doubt, has the inherent power to make such orders as may be necessary for the ends of justice. The inherent power of Court is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist. In the exercise of this power, the Court may rectify such injustice on the principle *actus neminem gravabit* (an act of the Court shall prejudice no person). This principle, which was described by Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* (1871) 3 PC 465 as "one of the first and highest duties of all Courts……to take care that the act of the Court does no injury to any of the suitors," has been applied by our courts as well as the courts in other jurisdictions such as the United Kingdom and Canada in situations in which there was a need to undo some harm caused by a serious miscarriage of justice. *See, Ittepana v Hemawathie* [1981] 1 Sri LR 476; *Amato v The Queen*, (1982) 69 CCC (2d) 31; *Gunasena v Bandaratillake* [2000] 1 Sri LR 292; *A and others v Home Secretary (No 2)* [2006] 2 AC 221. As Lord Nicholls of Birkenhead observed in *Regina v Loosely* [2001] 4 All ER 897 at 899 -

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law."

It is in this theoretical backdrop that the ultimate relief pressed for by Mr. Mustapha P.C should be viewed. In my considered opinion, even though as already noted, the order of this Court dated 8th October 2008 is devoid of validity, the Petitioner has chosen to abide by it, and it may not be proper to permit him to withdraw the affidavit filed by him pursuant to the said order, or any part thereof. Although for

this reason, I am inclined to hold that the application in prayer (b) to the amended petition of the Petitioner has to be refused, in view of the position that the said affidavit has been filed in proceedings tainted with illegality and in violation of the Petitioner's fundamental rights which this Court is bound to protect, I am of the opinion that it must be treated as a nullity having no force or avail in law.

In my opinion, it is the President of Sri Lanka, who as the Head of the Executive and the appointing and disciplinary authority with respect to Secretaries to Ministries, is vested with the power and responsibility to deal with disciplinary matters relating to such officers, and accordingly, the question of the propriety of the Petitioner holding public office, as Secretary to the Ministry of Finance, has to be considered by him. I therefore hold that in terms of the power vested in him by Article 52 of the Constitution, the President is free to consider appointing the Petitioner as Secretary to the Ministry of Finance notwithstanding the undertaking given by the Petitioner to Court in the aforesaid affidavit that he shall not hold public office in future.

I make no order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT